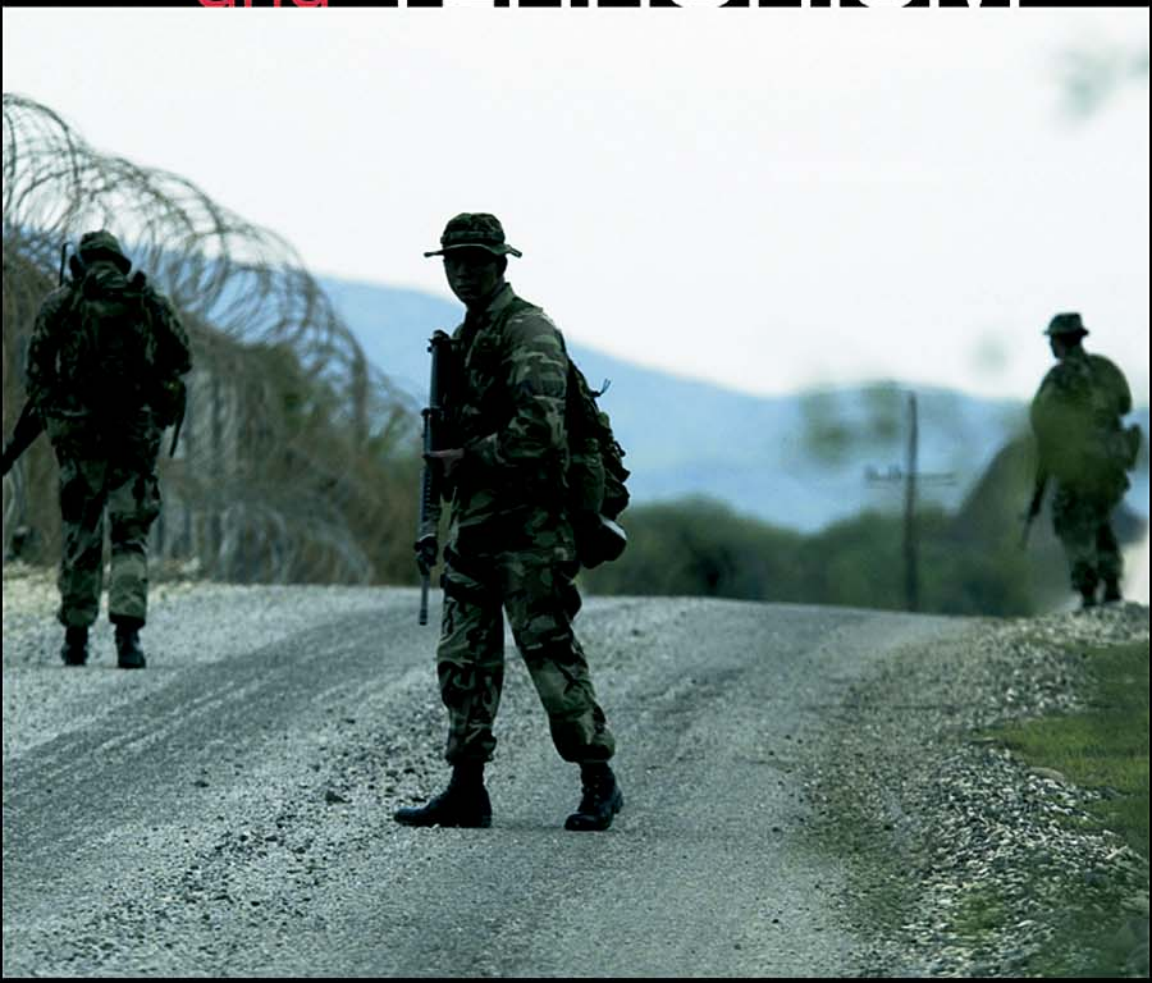
WAR, TORTURE and TERRORISM



Rethinking the rules of international security

Edited by Anthony F. Lang, Jr.
and Amanda Russell Beattie

War, Torture and Terrorism

This book explores the role of various kinds of rules in the international security order. Four central themes – practice, legitimacy, regulation, and responsibility – reflect different dimensions of a rule-governed political order. The volume does not provide a new set of rules for governing an increasingly chaotic international system. Instead, it provides reflections upon the way in which rules can and cannot deal with practices of violence. While many assume that "obeying the rules" will bring more peaceful outcomes, the chapters in this volume demonstrate that this may occur in some cases, but more often than not the very nature of a rule-governed order will create tensions and stresses that require a constant attention to underlying political dynamics.

This wide-ranging volume will be of great interest to students of International Law, International Security and International Relations Theory.

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Preface

This volume originated in a workshop held at the University of St Andrews in June 2006. That workshop, entitled Rethinking the Rules: Force and Security, brought together a group of specialists in international relations, international law, and public policy to explore the changing nature of the rules governing international security. The workshop was structured around four presentations that prompted wide-ranging discussions of rules, force, order, and international affairs. This workshop followed from one held in 2005 on the more general nature of rules and international affairs, which resulted in a series of articles published in a special edition of the journal *International Relations*.[1]

The contributors to this book include the four original presenters at the 2006 workshop—Caroline Kennedy-Pipe, Janne Haaland-Matlary, Michael Smith, and Larry May. Their presentations have been revised on the basis of comments and discussions at the workshop. Because of the enthusiasm of the participants, this volume includes a number of additional chapters. While some originated as comments on the original four presentations, they should not be read as such. Instead, the volume has evolved into chapters that circle around a series of themes that arose during the discussions.

These four central themes—practice, legitimacy, regulation, and responsibility—reflect different dimensions of a rule-governed political order. The volume does not provide a single new set of rules for governing an increasingly chaotic international system. Instead, it provides reflections upon the way in which rules can and cannot deal with practices of violence. While many assume that "obeying the rules" will bring more peaceful outcomes, the chapters in this volume demonstrate that this may occur in some cases, but more often than not the very nature of a rule-governed order will create tensions and stresses that require a constant attention to underlying political dynamics.

One note of caution is warranted. In a book devoted to international rules, one might be surprised to see that there are not international lawyers represented among the contributors. The workshop included four international lawyers as participants, whose insights were fundamental in shaping the course of the discussions. Two were initially planned to be contributors to this volume, but because of other commitments, they were unable to do so. More importantly, in organizing the workshop and this volume, we were attentive to international legal rules, but we also did not

want an overly legal approach to dominate either the discussions held at St Andrews or the themes addressed in this book.

We wish to acknowledge the support provided by three institutions for the workshop: The Binks Trust and its administrator, Sir Gerald Elliot; the Ministry of Defence, Office of Policy Planning; and the School of International Relations at the University of St Andrews. All three institutions provided the resources necessary to bring together individuals from North America and Europe. We also wish to thank the participants in the workshop who did not contribute to this volume, but whose contributions during the workshop were extremely helpful: Group Captain Bill Boothby, Ministry of Defence; Professor Chris Brown, London School of Economics; Ms Allison Burrows, Ministry of Defence; Professor Anthony Carty, University of Aberdeen; Professor Bruno Coppieters, Vriege University, Brussels; Dr Toni Erskine, University of Wales, Aberystwyth; Dr Lee Feinstein, Council on Foreign Relations, US; Professor Karin Fierke, University of St Andrews; Dr Tarcisio Gazzini, University of Glasgow; Professor Pierre Hassner, Sciences Po, Paris; Professor Jan Klabbers, University of Helsinki; Professor Friedrich Kratochwil, European University Institute; Professor Joseph Lampel, City University, London; Dr James Lindsay, Council on Foreign Relations, US; Professor Albert Pierce, National Defense University, US; Ms Kate Schick, University of St Andrews; Dr Gabriella Slomp, University of St Andrews; and Professor Christopher Smith, University of St Andrews. The editors would also like to acknowledge the publication team at Routledge, particularly the editor Andrew Humphreys.

Lang wishes to acknowledge first and foremost the work of his co-editor, Amanda Beattie. Her attention to detail in both organizing the workshop and shepherding most of these pieces through to their final form made this book possible. He would also like to thank the then Head of School of International Relations, William Walker and the current Head of School, Alison Watson, for both their support and enthusiasm for this project and the Centre for Global Constitutionalism that is the next phase of the Rethinking the Rules project. Finally, he would like to thank his wife, Nicki Wilkins, and children who have heard more than they want to know about rules.

Beattie wishes to thank Anthony Lang, Jr. for the opportunity to participate in the Rethinking the Rules Project at the 2006 workshop, as both an administrator and participant, and for the invitation to remain involved in the development of this manuscript. She would also like to acknowledge Florence Beattie and Ann Russell whose attitudes toward rules, customs, and conventions have influenced her interpretation of "the rules" throughout this experience.

Note

1 Anthony F. Lang, Jr., ed., "Rethinking the Rules" *International Relations* 20, 3 (September 2006): 274–351.

Abbreviations

ABM	Anti-Ballistic Missile Treaty
CFE	Treaty on Conventional Armed Forces in Europe
CTBT	Comprehensive Nuclear Test-Ban Treaty
CW	Conventional weapons
DARPA	Defense Advanced Research Projects Agency
DOD	Department of Defense
ECHR	European Commission on Human Rights
FMCT	Fissile Material Cutoff Treaty
GWOT	Global War on Terror
HEU	Highly enriched uranium
IAEA	International Atomic Energy Agency
ICC	International Criminal Court
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IL	International Law
INF	Intermediate Nuclear Forces
IR	International Relations
ISAF	International Stabilisation and Assistance Force
LOAC	Law of Armed Conflict
NLW	Non-lethal weapons
NNWS	Non-nuclear weapon state
NPT	Nuclear Non-Proliferation Treaty
NSS	National Security Strategy
NWS	Nuclear weapon state
OEF	Operation Enduring Freedom
PRT	Provisional Reconstruction Team
R2P	Responsibility to Protect
RMA	Revolution in Military Affairs
RUC	Royal Ulster Constabulary
SDLP	Social Democratic and Labour Party
START	Strategic Arms Reduction Treaty
TRC	Truth and reconciliation commission
UDA	Ulster Defence Association
UN	United Nations
UNC	United Nations Charter
UNSC	United Nations Security Council
UNSCOM	United Nations Special Commission
USC	Ulster Special Constabulary
USNSS	United States National Security Strategy
USW	Unrestricted submarine warfare
UVF	Ulster Volunteer Force
WMD	Weapons of mass destruction

Introduction

Rules and international security: dilemmas of a new world order[1]

Anthony F. Lang, Jr.

Introduction

The "war on terror" has become a central international security concern in the early twenty-first century. Driven by the United States, its reach stretches from the organization of military doctrine to intelligence gathering practices to collective security structures. New strategies and tactics justified by reference to the events of September 11, 2001 are being used to claim that the legal and political structures that had been central to the international order—the long-standing rules of the system—needed radical revision.

The Bush administration stated quite clearly in its 2002 National Security Strategy Statement that it believed the rules of the international security system needed changing in response to the dangers of terrorism:

> For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of pre-emption on the existence of an imminent threat—most often the visible mobilization of armies, navies and air forces preparing to attack. We must adopt the concept of imminent threat to the capabilities and objectives of today's adversaries. … The United States will not use force in all cases to pre-empt emerging threats, nor should nations use pre-emption as a pretext for aggression. Yet in an age where enemies of civilization openly and actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather.[2]

In these innocuous sounding phrases, the United States advocated a direct challenge to long-standing rules governing the use of military force. To suggest that adopting "the concept of imminent threat to the capabilities and objectives of today's adversaries" is only a minor change in accepted justifications of the use of force elides a radical shift from pre-emption to prevention.[3]

Building upon these assumptions about new threats and new rules, the Bush administration launched a war against Iraq in March 2003, claiming that it was seeking to protect the United States from terrorists who might obtain weapons of

mass destruction.[4] At the same time, the US and UK argued that they were seeking to uphold the resolutions of the United Nations Security Council. Iraq under Saddam Hussein had been violating resolutions passed by the Security Council since the early 1990s, particularly those concerning its attempts to obtain weapons of mass destruction. The two primary allies argued that unless the international community undertook military action to force Iraqi compliance with those resolutions, the United Nations would be fundamentally weakened. As George Bush stated in his speech to the UN General Assembly on September 12, 2002:

> The conduct of the Iraqi regime is a threat to the authority of the UN, and a threat to peace. Iraq has answered a decade of UN demands with a decade of defiance. All the world now faces a test, and the UN a difficult and defining moment. Are Security Council resolutions to be honoured and enforced, or cast aside without consequence? Will the United Nations serve the purpose of its founding, or will it be irrelevant?[5]

Coupled with the wars in Afghanistan and Iraq, the United States has been engaged in interrogation techniques and detention policies that stand in contrast to the standard legal conventions that had governed such practices since the end of World War II. By creating detention facilities at Guantanamo Bay in Cuba, the United States argued it could hold suspected terrorists indefinitely and without recourse to appeals procedures that have long been central to legal doctrines. Interrogation techniques at this institution and in a wide variety of locations have been justified as necessary to the prosecution of the "war on terror" by American lawyers, who have made such arguments in relation to United States' law and even international law.[6] Not only has the United States employed such tactics; as evidenced by the policy of rendition (when suspects are sent to other countries where the expectation is that information will be obtained by any means possible) a number of countries have stretched the boundaries of interrogation tactics in order to combat terrorism.

These brief examples arising from the "war on terror" suggest that the rules of the international security order are in a state of flux. Both powerful states and radical opposition groups challenge the rules governing the initiation of conflict and the conduct of military action. As profound changes to the international security order gather speed, international lawyers and civil servants insist upon a return to the traditional rules that grew out of a political context that no longer applies.[7] And diverse voices from religious and political movements demand the complete destruction of the international legal system in favor of a new order grounded on their own moral principles—and advocate violent action to bring about such change.

In all of these cases, however, those advocating such positions insist that they are either acting in accordance with the rules or simply proposing new rules in response to a changed political order. Instead of a lack of rules, we might say that there is a surfeit of rules, rules appearing at random and without any sense of how they fit into the current order. As political agents ignore old rules or propose new ones, philosophers, lawyers, and political analysts insist upon the centrality of

rules to security and argue that agents will comply with rules if they see them to be in their interests—yet offer no new ideas about what to do if rules are violated or simply collapse.

This book is a response to these developments. It, and the project of which it is a part, insists upon a rethinking of the rules governing international security. The contributors to this volume have chosen four substantive security issues to explore—interrogation procedures that many have labeled as torture; unilateral versus collective security responses to terrorists and rogue regimes; rules governing weapons technologies; and international war crimes. In each case, the contributors explore how the new international security order has forced changes in the standard rules and offered suggestions for what those changes mean not only to the specific area under consideration but to the general idea that such practices can be rule governed. That is, contributors to this volume provide insights not only into the specific international security practices but to the broader question that motivates this book: What role should rules have in the current international security order?

This introduction explores this larger question by exploring the general question of rules and international order. Specifically, I examine four topics that relate to rules and international security: the constitutive nature of rules, legitimacy, adaptability, and enforcement. In exploring these issues, I turn to the four substantive topics explored in the volume. The conclusion is not a new set of rules; rather, I suggest that we need to confront the dilemma of an international order that resists rules but also requires them. In response to this dilemma, I propose the idea of a realist constitutional order as a frame within which rules can be understood.

Rules and international security

The concept of security as a way to think about international affairs is relatively recent.[8] In the nineteenth century, interstate practice was conceptualized in terms of war and peace, not national and international security. With the rise of a wider public engagement in questions of war and peace, justifications of military policies moved away from waging war to creating security. Following World War I, the idea of collective security instantiated this idea in the public consciousness. For instance, in the United States, the term national security came to prominence with the passage of the National Security Act of 1947 which largely created the intelligence agencies, the National Security Council, and renamed the Department of War the Department of Defense.[9]

National security is one of the primary concerns of the sovereign state, especially in the realist described world of anarchy and scarcity. Security—or the absence of threats—is the primary goal of states, both internally and externally. The primary threat in the national security model is a military attack on the sovereign state, one designed to take resources, topple the government or annex territory. Security can also mean absence of fear of attack, a much broader and ill-defined threat, but one that justifies a wider array of policies found under the rubric of national security.

International security was introduced in the post-Cold War context to orient analysts and policy-makers to the wider human community rather than individual nation states.[10] This has led to the inclusion of threats such as environmental degradation, global economic collapse, and the spread of infectious diseases as threats against which the human community needs to be secured. At the same time, a concern with war and violence remains part of the international security agenda, leading to a focus on institutions such as the United Nations where the threat of war to all peoples can be countered.

A further development has been the rise of critical security studies.[11] These approaches arise out of not only a more global orientation but also a critique of the very concept of a threat. They (re)introduce politics into the discourse of security by demonstrating "the political dimension of defining threats."[12] Introducing politics has meant a wide range of things, including an emphasis on the role of identity in constructing threats,[13] a focus on the links between power and knowledge,[14] and deconstruction of various modes of positivist social science.

As these theoretical developments suggest, security is an essentially contested concept. As noted above, one definition of security is the absence of all threats. While it may not be at first evident, security is closely related to knowledge—to be secure against threats, one must be able to know what those threats are, both potential and actual. 'security … is in its very elementary nature about certainty. … The certainty that lies behind any notion of security is grounded in knowledge—knowledge about the environment we are living in."[15] One could develop this idea further to argue that to secure something is to ensure that it remains stable, fixed and certain. Security resists change whether violent or non-violent. Certainty has become even more important in recent years, as security requires knowledge of adversaries' intentions and potential power, closely linking security with intelligence gathering.

If security concerns knowledge of the world around us, and seeking to ensure that it remains stable and fixed, then rules can contribute to security. Rules provide stability and certainty by guiding behavior. If an agent is following the rules, his or her actions will follow a pattern of sorts. Rules do not, of course, provide complete certainty. Moreover, rules need to be interpreted, a process that creates uncertainty.[16]

There exist a wide range of rules governing international security. One could argue that there are, in fact, two types of rules: formal (or legal) and informal.[17] Both types of rules play an important role in the structures of international security. Informal rules derive from traditions of statecraft, such as allies should work together and not betray each other in order to balance against an adversary. Formal rules derive from nineteenth century positivist international law and have coalesced around the UN Charter in the current international security order. Both types of rules play an important role in the international security order, by providing guidelines and patterned behavior.[18]

It is important to stress that even within formal rules, there exist a wide variety of rules not all of which state the same thing. Thus, while rules can provide some guidelines, they also leave open space for interpretive strategies, some of which create great uncertainty. The combination of both informal and formal rules, and

the wide range of rules in both spheres, creates a complex international security regime. For some, the variety of rules means that they have no force, since actors (especially powerful ones) can pick and choose whatever rules they want at whatever moments they need. Rules become no more than a patina covering over the pursuit of self-interest.[19]

But, even within this diversity, rules provide a means of thinking about international security that other concepts do not. One could say that rules not only regulate the behavior of actors, they constitute their agency and the structures within which they engage each other. The rules that have constructed the international security regime, then, are not simply regulative rules about what can and cannot be done (although they are that as well). They are constitutive rules that define the very nature of international politics. As a result, they are one of the primary languages through which international affairs takes place. State and even non-state actors employ the language of rules to explain what they are doing. The language of rules makes international security possible.

Understanding how rules both regulate and constitute international security leads to a greater appreciation of what rules can and cannot do. Some theorists, such as Peter Katzenstein and other constructivist authors in International Relations (IR), argue that the regulative and constitutive functions of rules should be kept separate.[20] When rules are constitutive, they construct the world by providing names and concepts that structure basic social interactions. The classic example of a constitutive rule in international relations is sovereignty; there is no single rule that says sovereigns can or cannot do this or that, but the definition of what a sovereign state is creates certain conditions that allow for certain types of behaviors. When rules are more regulative they dictate certain kinds of behaviors as permissible, such as the rule that states cannot go to war unless they are acting in self-defense.

Constitutive rules can be seen throughout most spheres of life. Such rules do not need any authority figure to enforce them but become part of the very nature of our interactions. Regulative rules, on the other hand, need an authority figure to enforce them. This is especially true if we think of such rules as not necessarily (although occasionally) corresponding with the needs and wants of individual agents at all times. The function of a regulative rule is to guide behavior in a social context so that individuals can moderate their own desires in accordance with the needs of the community as a whole. Regulative rules are closer to laws.

If, then, our focus is on regulative rules only or if the functions of regulative and constitutive rules are kept separate, then international rules may not have much force. This has long been the critique of rules and laws from those who see the international realm as anarchic; without a sovereign, there can be no real regulative rules or laws. But, clearly, the regulative and constitutive functions of rules overlap with each other. Nicholas Onuf argues that a rule is simultaneously regulative and constitutive, suggesting that our attempts to distinguish them results more from the perspective of the analyst than from the reality of how rules function in daily life.[21] Onuf locates the importance of rules in social life and international affairs, exploring their role in situations of anarchy, or

when there is a lack of a clearly defined ruler.[22] Although there is no hierarchy, or formal system of rule, Onuf does not accept that the international system, or social reality more broadly, should be characterized as anarchic. Instead, he introduces the term "heteronomy" (borrowed from Kant). Heteronomy is the condition of being under a rule and is the opposite of autonomy, or the ability to act freely.

The concept of heteronomy, as Onuf employs it, describes a condition in which individuals believe they are autonomous but where they are, in fact, constrained to some extent by the rules that constitute their reality.[23] Drawing on the speech act theory of John Searle, Onuf describes a situation in which an agent promises to act in a certain way, a promise that is transformed into a duty, a process that then binds that agent in a way that he may not recognize as regulative. The agent feels autonomous in that he has made the promise, but the promise now binds him in an important way. For the purposes of this book, what Onuf demonstrates is that rules play a central role in constructing the international system around us. They do not need a sovereign authority, but they still bind and constrain agents through the heteronomy function. By constructing the world around us, rules are central to the ways in which international relations operate.

Other theorists of IR and International Law (IL) draw upon the idea of rules to establish the structure of the international system.[24] Constructivist IR theorists occasionally draw on the idea of rules, but more often turn to the cognate idea of a norm to theorize the constructed nature of international relations.[25] While some authors conflate the two terms, the difference between them is important. Norms, as socially shared commonplaces that structure our reality, do not have the same command function as rules. While this may be a matter of nuance, the idea of a rule comes closer to what we see as important in structuring social interactions where individuals do not necessarily share the same interests—a description of just about every social and political situation that exists. As a result, rules are more central to political organization and order than norms.

Rules are also similar to laws, although, again, the differences between them are important. Many IL theorists begin with the point that laws are essentially rules, but with something added to them. H.L.A. Hart is perhaps the most well-known advocate of this position. Hart argued that law is a form of rule, but only if there are two types of rules, what he calls the primary and secondary:

> Rules of the first type impose duties; rules of the second type confer powers, public or private. Rules of the first type concern actions involving physical movement or changes; rules of the second type provide for operations which lead not merely to physical movement or change, but to the creation or variation of duties or obligations.[26]

When a political system includes both primary and secondary rules it is a legal system. The combination can be seen in the way that a legislature works; a legislature passes pieces of legislation that determine actions (primary rules) while the constitution elaborates how the legislature makes those laws (secondary rules).

The advantage of Hart's theory of law is that it avoids the need for a sovereign authority that decides the law; by making the determination of law dependent upon the secondary rules, he gives space for a wider range of different political systems, including (potentially) an international legal system.[27]

While there are certainly similarities between law and rules, to focus purely on law would miss some important regulative and constitutive phenomena at the global level, phenomena that a number of theorists have recently explored. Anne-Marie Slaughter argues that the international system is governed by a series of regulatory structures that result from intergovernmental cooperation. Rather than creating formal institutions, regimes or new international laws, these interactions remain in the realm of regulations.[28] David Malone in a recent study of how the UN Security Council has dealt with Iraq for the past 15 years argues that the Council has increasingly taken on what he calls a "legal-regulative" role in its operations. While he uses the term legal here, his focus is more on regulatory structures, particularly in the sanctions regime that operated from 1991 through 2003.[29] In a recent work that focuses more explicitly on the themes of this book, David Kennedy has examined how lawyers, military officers, and humanitarian activists have been cooperating more and more to develop the regulations and rules that govern the conduct of military force. Their cooperative efforts have produced the rules that govern the conduct of forces in the field in a wide variety of situations, stretching from peacekeeping operations to the war against Iraq.[30]

In the international security realm, which at times appears to be the most anarchic and least rule governed, rules play a central role in organizing the system. What this volume explores, however, is how the rules seem to have suddenly undergone a radical revision. Some, often international legal scholars, have interpreted these changes as a radical destruction of the rules.[31] Contributors to this volume agree that rules are undergoing radical change, but do not agree that a rule-governed order is collapsing. Instead, they examine the ways in which the rules are evolving in the realms of violence and force, suggesting ways to interpret these changes and offering proposals and arguments for how such changes can contribute to a more just and peaceful world order.

The first topic explored in this volume, torture, demonstrates some of the points made here. If we think primarily of regulative rules, the primary rule concerning torture is the UN Convention against Torture and Other Inhuman and Degrading Acts, which specifically states that torture can never be employed, a point made in the strongest terms possible in Section 2 of Article 2:

> No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political stability or any other public emergency may be invoked as a justification for torture.

Sanford Levinson points out that this language is particularly forceful for a legal rule in that it shuts out the possibility that any circumstance could ever justify it.[32]

But while this strong condemnation exists in this clause, the definition of torture in the same convention is so opened ended that it does not really specify what counts as torture and what does not:

> any act by which severe pain or suffering, whether physical or mental is intentionally inflicted upon a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain of suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

This definition, which relies on the infliction of severe pain as the primary criteria, albeit qualified by the purposes of punishment, attaining information or intimidating others, does not give much clarity to what counts as torture. Moreover, the last sentence, in which the infliction of pain can be justified on the basis of "lawful sanction," leaves space for potential abuse.

And it is this opening in terms of a definition that has been exploited in the "war on terror." The most important moment in the American shift in what constitutes torture can be found in a memo written by Assistant Attorney General Jay Bybee to then Counsel to the President Alberto Gonzalez.[33] The memo, written on August 1, 2002, explored what interrogations techniques were allowable according to US law. Bybee argues that the

> Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death … We conclude that the statute, taken as a whole, makes plain that it prohibits only extreme acts.[34]

Bybee goes on to examine what it means to be "extreme"—even turning to the dictionary to clarify its meaning—and examines the US ratification of the UN Convention, Israeli court decisions, and European Human Rights court cases to determine what can be allowed. While not explaining specific practices, Bybee concludes that very coercive forms of interrogation can be employed.

The point I want to emphasize here is that while we assume the "rules" will prohibit torture, what the rules actually do is create a world in which torture is possible. When the Convention defines torture less by what it is and more by the reasons for which it might be used, interpreters like Assistant Attorney General Bybee can construct a world in which torture becomes a normalized practice rather than an abhorrent outlier. What we imagine the rules can do for us—restrain violence and make the world more peaceful—is not what the rules actually do. They construct a world in which torture can become a normal practice, a form of "interrogation"

rather than something that involves the abuse of human bodies in order to advance particular state interests.

Three contributors to this volume emphasize this point. As Nicholas Onuf explains, torture is a rule-governed practice, although it is hard to imagine it as such. Thus rules derive from the functions that torture serves and how those functions differ depending on the social and political context in which they operate. Jill Harries provides a concrete example of how social and political context might shape the purpose of torture in her exploration of the Roman legal system. She explores the different functions that Ancient Romans developed for torture in the context of their legal codes. And Caroline Kennedy-Pipe argues that the practice of torture became rule governed in a sense as it was practiced in the attempts by the United Kingdom to control sectarian violence in Northern Ireland, particularly through the introduction of the Diplock Courts during the 1970s and various forms of interrogation.

These essays, in other words, reveal that the rules governing torture arise from specific social and political contexts. Rather than hope that rules can eliminate torture, a better question is what social and political context supports the practice of torture in the current "war on terror." One might argue that instead of a radical revision undertaken by American policy-makers, the rules structuring torture actually arise from the far more deeply grounded assumptions in international relations about defending the nation state at all costs. For torture appears most often in the current international order as a means to protect the state, with the classic philosophical justification for torture being the "ticking bomb" scenario in which security officers must torture an informant to find out where a bomb has been placed.[35] In other words, perhaps it is the constitutive rules of self-defense on the part of the nation state that make torture possible.

Understanding that rules both constitute and regulate behaviors such as torture should clarify what rules can and cannot do. They cannot eliminate a practice that is so deeply inscribed into the political practices of the sovereign state and its demand for 'self-defense." This is not to excuse American actions in the "war on terror" but only to demonstrate that for those who object to these behaviors, a turn to the "rules" will not resolve the problem. Rather, what is needed is a rethinking of the broader institutional and political frameworks within which such practices take place, which I gesture towards in the conclusion to this chapter in the idea of a realist constitutional order.

Legitimacy

Rules in the political sphere only work if they are legitimate. But what is legitimacy? According to the Oxford English Dictionary, legitimacy means either being in accordance with a law or a status conferred by some authority.[36] This dual meaning does not capture a third dimension of the concept, one that has become more important in an age of democratic governance: being in accordance with the desires of the populace. Max Weber linked debates about legitimacy to discussions of politics in his famous tripartite conception of what constitutes a legitimate political

order: charisma, tradition, or bureaucracy.[37] Weber's account, while important, is limited in that it focuses on the consent dimension of legitimacy more than on the principled dimension. Jean-Marc Coicaud provides a more sustained account of legitimacy, one that builds upon but also diverges from Weber (and Marx). Coicaud reduces legitimacy to its core meaning of the right to govern.[38] This right derives from two primary sources: wide consent and correspondence with a set of norms. Both criteria relate to Weber's sociological account, but Coicaud expands the idea of norms to include moral principles. Admittedly, those principles must be shared in a society, but they cannot be reduced solely to a matter of agreement. This added dimension of legitimacy, what I could call its moral element, is a central part of Coicaud's understanding of legitimacy and it is one that I think is elemental in understanding how legitimacy functions at the global level.

Coicaud also examines whether or not law is the foundation of legitimacy, which he claims it is not. He does not go as far as Carl Schmitt,[39] however, in completely divorcing law and legitimacy, instead arguing that

> the law really is a condition of legitimacy. Nonetheless, it shares this status with individual consent and society's fundamental norms. Not being an independent type of legitimacy, [the law] has to be justified. In order for legality to intervene in the legitimation process—that is to say, in order for conformity to the law to be indicative of a *de jure* government—the laws must be in accord with the values in which the governed recognize themselves.[40]

For Coicaud, then, legitimacy comes in part from conformity to the law but only if law is in accordance with the basic values or norms that constitute a society and can be expressed in some form of consent procedure.

Legitimacy has been a central concern of theorists of international law and ethics.[41] One particularly compelling argument concerning legitimacy comes from Ian Clark, who draws upon the idea of constitutional legitimacy as an alternative framing device. His account locates legitimacy in the construction of international society by states seeking to create order. Clark explores the notion of constitutional legitimacy, which he argues differs from moral and legal norms. For Clark, constitutional legitimacy at the level of international society "refers to the mutual political expectations on which international society is from time to time founded, and which are not fixed in legal rules."[42] This concept of constitutionality, while related to consensus, is distinct from it. Rather than reflecting an agreement among individual agents, a constitutionally legitimate order is one that reflects a just distribution of power and influence within a system.

Legitimacy is not centrally about rules, but Clark's suggestion about the importance of constitutional legitimacy points toward a greater role for the rule of law in conceptualizing the relationship between rules and legitimacy. The understanding of rules that permeates this volume assumes some form of legitimacy. Because rules are simultaneously constitutive and regulative, following a rule contributes to its legitimacy. That is, when rules both constitute reality and regulate behavior, they attain an almost automatic legitimacy. When rules become illegitimate their joint

constitutive and regulative functions break down; that is, they may retain a regulative dimension but their constitutive nature disappears. I would argue, then, that a lack of legitimacy does not mean rules disappear, but it does mean they shift to a situation in which they are purely coercive rather than regulative and constitutive.

The shift from rules being simultaneously constitutive and regulative to one in which rules have lost their constitutive dimension seems to describe the current international security order. American policies have challenged the long-standing assumptions governing some of the themes explored in the second section of this volume, particularly those relating to the Security Council and the use of military force. But, at the same time, the international security order has not become one in which the United States can coerce all the other agents. This makes the situation particularly dangerous, for not only do rules no longer constitute the system they are even failing to regulate through pure coercion. As a result, various agents—from states to non-state military groups—are acting in ways that do not conform to any set of established rules.

In her contribution to this volume, Janne Haaland Matlary explores the role of the Security Council in framing the legitimacy of military intervention. She recognizes that while the Security Council has traditionally been the body that determines the legitimacy of the use of force in the post-World War II era, its role has been subtly undermined in various ways. Matlary's account points to the fact that it is also a changing normative structure in the international system—one in which the prominence of human rights has become more widespread than respect for sovereignty—that has contributed to the undermining of the role of the Security Council. Without Security Council authorization, however, will decisions to use military force become more common? This remains an open question, although David Chandler has argued that the weakening of international legal structures in the face of greater demands for ethical responses to world affairs portends greater conflict.[43]

Ariel Colonomos explores the same dynamic in his chapter on pre-emption. Colonomos demonstrates, however, that it is not simply American policies that have changed the rules governing pre-emptive military force. He suggests that the existing rules, including international law and the just war tradition, leave open space for pre-emption and even preventive war. Structured as they are around the primary principle of self-defense, such traditions of thought allow a reinterpretation of rules to allow for aggressive military actions.

But will more and clearer rules answer this dilemma? The international community has sought to reinvigorate the standard rules of the international security order in their response to debate over the Kosovo intervention in 1999. In December 2001, the International Commission on Intervention and State Sovereignty, supported by the Canadian Government, issued *The Responsibility to Protect,* a report that sought to shift the discourse of international humanitarian action and international security more broadly away from debates on the right to intervene toward a discourse surrounding the "responsibility" of various actors to provide for human security.[44] It arose, at least in part, from the frustration of many that while a serious humanitarian disaster was developing in Kosovo, the United Nations Security Council would not authorize military action, which led to NATO

undertaking an air war to coerce the Yugoslav leadership to halt its actions against the Albanian/Muslim community. The document, however, was overshadowed by the American post-9/11 actions, although it has seen a return in international security debates, particularly those emanating from the United Nations.[45]

The report is an attempt to reinterpret the rules to conform to new international security challenges. It begins with the principle of non-intervention, and then construes its task as being the definition of those circumstances when that "rule" can be overridden; in other words, the creation of a rule for breaking the rules.[46] Its section on authority emphasizes that the Security Council must remain the only source of legitimate authority in the international system. Challenging or evading the Security Council will "undermine the principle of a world order based on international law and universal norms."[47] This insistence on the Security Council as the only legitimate authority in the international system does not confront the fact that arose from the legal debate about the Iraq War; because it is a structure controlled by the most powerful, its rules will reflect the interests of the powerful and can be reshaped in their interest in moments of crisis.

The Responsibility to Protect continues to inform the creation of a rule-governed security system, although it has been coupled with alternative approaches. These alternatives, however, still rely very much on a rule-governed international security order. In the Report of the Secretary-General's High-level Panel on Threats, Challenges and Change, the concept of collective security is resurrected as a central principle of the international security order.[48] Its subtitle, "our shared responsibility" again suggests a possible move away from a rule-governed international security order. But, when considering the dangers of preventive military action, the report falls back upon the UN Charter, stating boldly: "We do not favor the rewriting or reinterpretation of Article 51 [states cannot use military force without Security Council authorization]."[49] Not only does this report insist that this Charter provision should be kept sacrosanct, it resists even "interpreting" it in new ways—an odd understanding of a legal rule, to say the least. Without interpretation, rules mean nothing and cannot really function.[50]

The authors of the *Responsibility to Protect* and the various United Nations reports that followed it have sought to reinstall legitimacy in the Security Council. The larger issue raised by their attempt to place legitimacy back in the Security Council is the basis on which they claim the Security Council as the focus of legitimacy for using force. If we adopt the perspective of Coicaud, a rule is legitimate if it includes a normative dimension and if it is widely respected. The latter criteria seems fulfilled in the case of the Security Council, but one could raise important questions about whether an institution that privileges the power of five states over all others corresponds to a just world order. According to Alan Buchanan, legitimacy comes from the capacity of a structure to advance global norms, particularly those relating to democracy. But the Security Council, which regularly includes non-permanent members that are not democratic (and two permanent members—Russia and China—that are not very democratic), does not seem well placed to be the institution that will advance such norms. The emphasis on constitutionalism as a means to determine legitimacy, suggested by Clark's

account, would imply an important role for a balance of institutional functions and powers, which the Security Council also fails to provide.

For rules to both structure reality and regulate behavior they must be legitimate. American policies have challenged the widely accepted legitimacy of the Security Council, but in so doing, have ironically revealed the failure of that institution to embody a moral basis for its legitimacy. But recreating the old rules does not seem to be the right move either, for without American participation in the system, it will lack a key dimension of legitimacy, that is widespread consent. Also, as Colonomos demonstrates, the old order does not necessarily mean that security will be ensured. While the *Responsibility to Protect* sought to create a new set of rules, it really fell back upon the dilemmas of the previous order.

The central point here is obvious at one level—rules need to be legitimate to function. But, as this book suggests rules might exist and function, and thus seem to retain their legitimacy, even as they are collapsing. The collapse of such rules can be seen when their constitutive nature begins to weaken and they become solely regulative, concluding in a situation in which they are more coercive than anything else. While the United States may have "followed the rules" in waging a pre-emptive war, such actions no longer seem to garner widespread consent, suggesting that their constitutive nature has been undermined. Especially when a hegemonic power weakens the constitutive nature of rules without suggesting alternatives, those rules will be distinctly weaker.

Adaptability

As noted above, rules can provide security by providing predictability and certainty about the future. But in accomplishing this security, rules sometimes constrain the capacity of agents to adapt to new situations. Rules need to be flexible enough to change when necessary but they must also be strong enough to withstand attempts to change them for the benefits of individual agents pursuing their own interests at the expense of others.

The need to respond to the challenges of terrorism and especially the potential that terrorists will deploy weapons of mass destruction has shaped much of the debate in the international system. As a victim of a major terrorist attack, American leaders have been pushing for exactly this type of adaptability. This demand for adaptability has appeared in the US discourse of "freedom" or the need to be able to respond to situations of uncertainty by having the freedom to act in new ways. The US reinterpretation of international security rules moved to a new level with the publication of the first official US policy document of the post-9/11 period, the 2002 National Security Strategy of the United States. The 2002 NSS emphasizes first and foremost the importance of freedom, with the President's preface stating boldly:

> These values of freedom are right and true for every person, in every society—and the duty of protecting these values against their enemies is the common calling of freedom-loving people across the globe and across the ages.[51]

This assertion continues throughout the report, with statements such as freedom is "the birthright of every person, in every civilization."

For the Bush administration, however, freedom is not just for individuals but for powerful states as well. Rather than turn to international organizations and international legal rules to structure the American response to 9/11, the Bush administration states it will act alone when need be. While they gesture toward the idea of "enlisting the help of the international community," that community remains undefined throughout the text other than references to regional organizations and state partners.[52] The United Nations is mentioned in passing only once, with no suggestion that collective security or international law might play a role in the pursuit of freedom around the world. The idea of creating "coalitions of the willing" appears in this document, with particular attention focused on the other powerful states in the international system—Russia, China and India.[53]

This emphasis on freedom goes even further, however. International law is absent from the text, and when the concept of the "rule of law" appears it is in the context of ensuring American business interests can be secured against uncertainty.[54] Rules that might restrain the administration play no role in this statement. Even more strangely, the document resists rules that might guide decisions by giving some wider parameters: "No doctrine can anticipate every circumstance in which US action—direct or indirect—is warranted."[55] In other words, not only does the United States resist any notion of international institutional arrangement for its national security, rules or doctrines that might constrain the decisions necessary to defeat terrorists and ensure freedom are absent as well.[56]

In some sense, this emphasis on freedom makes sense. In the current international security order, in which non-state agents seek the destruction of those with whom they disagree, coupled with the destructive forms of violence currently available to those agents, the need to respond means that agents may need the freedom to act in ways that violate the rules in order to keep political order functioning. The concept of a 'state of exception" is a constitutional parallel to this situation, a concept recently conceptualized at the global level by Giorgio Agamben.[57] Agamben, drawing on Carl Schmitt, explores the idea that at certain moments the political order needs a suspension of the rules in order for the long-term order to function. While critical of the Bush administration's use of this concept, his analysis does reveal its heritage as a constitutional tool that is both necessary but also extremely dangerous to employ.

The demand for adaptability in relation to the rules speaks directly to the group of articles concerning technology and rules. Rules are often changed by technology, and the shifts in technologies require shifts in rules. Two chapters in this book deal with this theme. Michael Smith demonstrates how different kinds of technological changes can be incorporated into a rule-governed order, but also reveals how certain kinds of technological changes, particularly those relating to weapons, are more resistant to rules. William Walker explores the way in which nuclear weapons technology and debates about world order intersect in the rule-governed regime of the non-proliferation treaty. Walker demonstrates how the regime that governed this dangerous technology served a function at one time but seems to be collapsing.

The inability of the rules to respond to technological change is linked to the more general problem of how rules prevent adaptation to new situations. Technology and its application to weapons is linked to the need for international security; states develop weapons to secure themselves against opponents. But, in so doing, they not only endanger themselves but they disrupt the rules that had provided the certainty necessary for international security to function effectively. Again, we return to the constitutive role that rules play; the rules governing the current international security order appear to have structured the system in such a way that it cannot contain the technological developments that produce weapons of mass destruction.

Enforcement

If rules are consistently ignored or violated with no consequences, they cease to be rules and become suggestions for behavior. A rule, as noted in the first section, differs from a norm in that it has a stronger element of action guidance to it. At the same time, rules are not the same as laws (although they are law-like, as Hart noted), so they do not have the automatic enforcement mechanism of a law (what Kelsen called their inherent sanction).[58] Generally, though, international legal theorists tend to downplay the centrality of enforcement because without enforcement, many assume that law does not exist. As a result, they emphasize the fact that international law can function without the need for sanctions or enforcement.[59] These functional arguments are found in a wide range of analyses of international law, including those governing international security.

While the functional arguments explain general modes of compliance, violations of rules still occur. Because agents do not always comply with the rules of their own free will, authorities exist to ensure such compliance. The means by which authorities ensure compliance can be through reward or sanction. While rewards are theoretically possible as a means to ensure order, the more common means are punitive. This may be because the "reward" to be gained by compliance is the simple existence of an ordered system in which agents can pursue their own individual wants and plans. Whatever the case, it would appear that in most political systems, the primary means of enforcing compliance with a particular order is through punitive measures.

Punishment ensures that the individual who violates the rules suffers from such actions but also expresses to the larger community the need to follow the rules. In other words, the best punishments are both deterrent and retributive, as famously described by John Rawls. In an essay on rules, Rawls proposes a novel way to understand punishment, one that suggests a way to construct a political system that both recognizes the political dimensions of power yet also ensures that those who violate the rules can be punished. Rawls begins his essay by noting that there exist two types of rules: those that justify a practice as a whole and those that justify a particular application of that practice. He uses this distinction to make the case that punishment can be justified in both utilitarian and retributive ways. The practice of punishment as a means of enforcing justice in a society—that is, as an institution—is utilitarian. But the particular application of punishment in specific

cases—the action of punishment—is best understood as retributive. One way to see this distinction is through the different roles played by a legislator and a judge:

> One can say, then, that the judge and the legislator stand in different positions and look in different directions: one to the past, the other to the future. The justification of what the judge does, qua judge, sounds like the retributive view; the justification of what the (ideal) legislator does, qua legislator, sounds like the utilitarian view.[60]

Rawls' analysis demonstrates the need for a political order that includes both a legislative and a judicial function. For rules to be enforced, the deterrent function of the legislator must be combined with the retributive function of the judge.

Legislative and judicial institutions certainly exist at the global level, although they remain somewhat disconnected from each other. The United Nations includes both kinds of institutions, with the General Assembly and Security Council passing resolutions that become part of the body of international law and the International Court of Justice (ICJ) and International Criminal Court (ICC) passing judgments about the guilt and innocence of specific agents. Other institutions serve similar functions at regional levels (various human rights courts and international criminal tribunals, for instance) and at the domestic level in specific states.

The global level does not lack institutions capable of legislating new rules and enforcing those rules through various kinds of punishment. A lack of institutions is not as serious as a problem as two others that plague the enforcement of rules, problems that speak to the central issue of rules having both constitutive and regulative functions. Rules not only constitute the institutions and structures within which agents operate, they constitute the agents themselves. When it comes to enforcement of rules, one must first determine which agents the rules seek to regulate. Once that determination is made, their level of responsibility for outcomes must be determined.

At the global level, determinations of agency and responsibility pose special problems.[61] Because there exist not only many agents, but also many different kinds of agents, all of whom have a different status in the international legal and political order, determining to whom various rules ought to apply is not a simple matter. The crime of aggression, for instance, demonstrates some of these problems. While war has long been considered a problem to be addressed through the creation of institutions between states, it was largely following World War I that attempts were made to criminalize war. Defining aggression as a crime came about largely through the Nuremberg trials. Those trials established quite clearly that it was individuals and not states that should be held responsible for the crime of aggression, along with related crimes against humanity, the crime of genocide and more general war crimes. As the Nuremberg International Military Tribunal stated:

> Crimes against international law are committed by men, not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[62]

The fact that Nuremberg defined individuals as the agents capable of committing an act of aggression, however, has not completely clarified matters. In 1974, the UN General Assembly passed Resolution 3314 to define aggression. The resolution states in Article 1 of its annex that "Aggression is the use of armed force by a State …"[63] The ICC lists the crime of aggression as one of the crimes by which it can try individuals, but has established that it will not try individuals for this crime until it has been clarified further. The ICC has created a Special Working Group on the Crime of Aggression to further clarify aggression, including what agents can commit this crime. At the time of this writing, this aspect of the definition continues to be debated.[64]

Which agents should be held responsible for aggression is not simply a matter of conceptual clarification, but one of actually trying individuals and enforcing this primary rule of the system. But how to enforce this rule requires a larger set of rules that establishes which agents can be punished.[65] Larry May explores the issue of enforcement by focusing on the crime of aggression. May argues that the crime of aggression has failed to become a central, enforceable rule of international law because it relies on customary international law. He presents a strong case for the fact that because it is states that make treaties, they remain immune from prosecution, leading to individuals being responsible. Yet individuals are not prosecuted for this crime.

At the same time, perhaps responsibility need not result in a criminal/legal process. As Mario Aguilar proposes in his contribution to this volume, at times there is a need to move beyond rules and construct new ways of relating to others, a process he describes in his discussion of truth commissions and modes of forgiveness. These processes address the question of enforcement in a way, but they move toward alternative formulations of "holding someone responsible."

One might assume that if rules are clarified they will be better enforced. But often the attempts at clarification do not lead to enforcement because they result in much deeper questions about the constitution of the international system. In other words, the rules that regulate war will not work until the rules that constitute the agents waging war are clarified.

Conclusions

In this chapter, I have suggested how focusing on the constitutive and regulative functions of rules provides insights into problems of legitimacy, enforcement, and adaptability at the global level. These general problems with rules, however, do not only appear at the global level. They have long been central to any rule governed order; it is simply that the current international order, with its inherently anarchic nature, reveals them more clearly than domestic political systems.

One way in which political systems have sought to address these dimensions of rules is through the idea of constitutionalism.[66] Constitutionalism is a wide-ranging term that has been applied across different political contexts. At its core, constitutionalism revolves around two central ideas: rule of law and a balance of power. In terms of the first, political decisions should be made in reference to a

body of law that has been established within a political community, as opposed to making decisions on the basis of individual whim or personal interest. In terms of the second, there needs to be a balance of power among decision makers within a particular political community, the classic being a balance between legislature, executive, and judiciary. Constitutionalism, in other words, seeks to balance the need for adherence to rules with recognition that individuals within a political system will pursue their own interests in opposition to those rules, so that structural constraints need to be built into the system along with the rules. Constitutionalism does not necessarily require a "constitution" as a single text, with the United Kingdom demonstrating how a political system can function without such a text.

Constitutionalism has begun to appear more often among those exploring international affairs. International lawyers have only started exploring constitutionalism, often through an engagement with issues arising from the relations of international institutions with their constituent members.[67] Among those exploring questions of international relations more broadly, some of these themes have appeared in an emerging literature on republicanism.[68] This emerging literature, and the broader topic of constitutionalism, speaks to the dilemmas about rules identified here. A constitutional order provides legitimacy by ensuring that the law rules rather than the whims of individuals and that the most powerful can be constrained by both the rules and structures of the system. Enforcement is not automatic in a constitutional order but arises from the struggles between the different branches of government. And constitutions are defined by their adaptability, with the capacity of democratic process creating and recreating new constitutions through an amendment or complete rewriting of the constitution.

Creating constitutions is no easy matter, and governing according to a constitution will not solve all the problems identified here.[69] An absolutist focus on rules can also distort understandings of how communities serve other functions, such as giving individuals the opportunity to achieve their personal fulfillment, an alternative vision as described by Amanda Beattie in her contribution to this volume. Nicholas Rengger also poses important challenges to rules from a very different perspective, one that focuses on the importance of a more casuistic approach to judgment, something he finds in the just war tradition. He draws upon various attempts to use the "supreme emergency" justification for using force as a place where the dangers of a rule-bound notion of war might collapse.

This volume explores the challenges of rules in the current international security order. This introductory chapter has sought to lay out some of those challenges, and has proposed the idea of constitutionalism as a way to rethink some of these themes. In the workshop that produced this volume and in future projects arising from the Rethinking the Rules project, we hope to continue to investigate the rules of the global order and the ongoing task of refashioning them in light of new security challenges.

Notes

1 This chapter was significantly improved by the feedback of my co-editor, Amanda Beattie. William Walker, Larry May and Ariel Colonomos also read through it and offered valuable comments.

2 National Security Strategy of the United States of America, September 2002 (Washington DC: Government Printing Office, 2002:15. Accessed from http://www.whitehouse.gov/nsc/nss/.pdf on December 5, 2006.

3 For strategic and political works on pre-emptive versus preventive war, see Richard Betts, *Surprise Attack: Lessons for Defense Planning* (Washington DC: Brookings Institute, 1982) and Betty Glad, ed., *Striking First: The Preventive War Doctrine and the Reshaping of U. S. Foreign Policy* (New York: Palgrave, 2004). For legal analyses of these issues, see Thomas Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Oxford: Oxford University Press, 2002) and W. Michael Resiman and Andrea Armstrong, "The Past and Future of the Claim of Pre-emptive Self-Defense" *American Journal of International Law* 100, 3 (July 2006): 525–550. For a series of reflections on the ethical implications of such a change, see Anthony F. Lang, Jr., et al., "Roundtable: Evaluating the Pre-emptive Use of Force" *Ethics & International Affairs* 17, 1 (2003): 1–36.

4 For an overview of differerent explanations of the Iraq war, along with explanations for other states' reactions to the war, see Rick Fawn and Raymond Hinnebusch, eds, *The Iraq War: Causes and Consequences* (Boulder, CO: Lynne Rienner Publishers, 2006).

5 George W. Bush remarks before the United Nations General Assembley, 12 September 2002. Obtained from http://www.whitehouse.gov/news/releases/2002/09/20020912–1.html on May 22, 2007.

6 For samples of these legal arguments, see Karen Greenberg, et al., *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005). For critical analyses of these strategies, see Mark Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terror* (New York: New York Review Books, 2004). Kenneth Roth, ed., *Torture: Does it Make us Safer? It is Ever Okay? A Human Rights Perspective* (New York: The New Press, 2005).

7 See Helen Duffy, *The "War on Terror" and the Framework of International Law* (Cambridge: Cambridge University Press, 2005) for one such analysis.

8 This section is drawn from Anthony F. Lang, Jr. "The Violence of Rules? Rethinking the 2003 War with Iraq" *Contemporary Politics* 13, 3 (September 2007): 257–76.

9 For a text of the law, see http://www.intelligence.gov/0-natsecact_1947.shtml.

10 For a basic introduction to international security, see John Baylis, "International and Global Security in the Post-Cold War Era" in John Baylis and Steve Smith, eds, *The Globalisation of World Politics*, 3rd edn (Oxford: Oxford University Press, 2005): 297–324. Some conflate this term with human security, although this has a slightly different heritage.

11 See Keith Krause and Michael Williams, eds, *Critical Security Studies: Concepts and Cases* (Minneapolis: University of Minnesota Press, 1997) and Ken Booth, ed., *Critical Security Studies and World Politics* (Boulder CO: Lynne Rienner Press, 2004).

12 K.M. Fierke, *Critical Approaches to Security* (Cambridge: Polity Press, 2007): 15.

13 David Campbell, *Writing Security* (Minneapolis: University of Minnesota Press, 1991).

14 Michael Dillon, *Politics of Security: Toward a Political Philosophy of Continental Thought* (London: Routledge, 1996).

15 Torsten Michel, "Introduction: Knowledge and Security—a Neglected Relationship" in *Security and the Limits of Mere Reason*, PhD thesis ms. University of St Andrews, p. 2. Michel provides a penetrating analysis of the relationship between security and knowledge in this thesis, especially as this dialectic shapes modernity more broadly.

16 See Jan Klabbers, "The Meaning of Rules" *International Relations* 20, 3 (September 2006): 296–297.

17 See Anthony F. Lang, Jr, Nicholas Rengger, and William Walker, "The Role(s) of Rules: Some Conceptual Clarifications" *International Relations* 20, 3 (2006): 274–294, at 276–280 for a fuller description of these two types of rules.
18 There is a great deal of international legal scholarship that I have avoided in this simple distinction. Natural law versus positivism or morality versus legality might be other ways of exploring different types of rules. For one analysis of international law as a form of rules, see Anthony Clark Arend, *Legal Rules and International Society* (Oxford: Oxford University Press, 1999).
19 See Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999) for one statement of this position. Ironically, at the time of this writing, Krasner serves as the head of the US State Department Policy Planning Staff.
20 Peter Katzenstein, "Introduction: Alternative Perspectives on National Security" Katzenstein, ed., *The Culture of National Security* (New York: Columbia University Press, 1996): 5.
21 Nicholas Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (Columbia SC: University of South Carolina Press, 1989): 51.
22 His book is divided into two parts, the first of which explores "rules" and the second of which explores "rule."
23 Onuf, *World of Our Making:* 206–219.
24 Friedrich Kratochwil, *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1989).
25 Alexander Wendt, *Social Theory of International Relations* (Cambridge: Cambridge University Press, 1999).
26 H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1994): 81.
27 Although Hart denied that the international system was a truly legal one according to his theory; see ibid., 213–237.
28 Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004).
29 David Malone, *The International Struggle over Iraq: Politics in the UN Security Council, 1980–2005* (Oxford University Press, 2006).
30 David Kennedy, *Of War and Law* (Oxford: Oxford University Press, 2006).
31 For two works that put the onus of responsibility for the breakdown of rules on the US, see John Murphy, *The United States and the Rule of Law in International Affairs* (Cambridge: Cambridge University Press, 2004) and Philippe Sands, *Lawless World: America and the Making and Breaking of Global Rules* (London: Allen Lane, 2005).
32 Sanford Levinson, "Contemplating Torture: An Introduction" in Levinson, ed. *Torture: A Collection* (Oxford: Oxford University Press, 2004): 24.
33 Memorandum for Alberto R. Gonzales, Counsel to the President, Re Standards for Conduct for Interrogation Under 18 U. S. C. Sections 2340–2340A, reprinted in Karen Greenberg, ed., *The Torture Papers* (Cambridge: Cambridge University Press, 2004): 172–217.
34 Memorandum, p. 172.
35 See Alan Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press, 2002) for an argument that draws upon this basic premise to develop a set of legal rules governing when torture could be used. For a defence of this position against his critics, see Alan Dershowitz, "Tortured Reasoning" in Levinson, *Torture: A Collection:* 257–280.
36 "Legitimacy" and "Legitimate" in *Oxford English Dictionary* (Oxford: Oxford University Press, 1993): Volume 8, pp. 811–812.
37 See Weber's lecture "Politics as a Vocation" for one version of this tripartite conception of legitimacy, although it appears in various other places in Weber's work; reprinted in *From Max Weber: Essays in Sociology* edited by H. H. Gerth and C. Wright Mills (Oxford: Oxford University Press, 1958): 77–128.

38 Jean-Marc Coicaud, *Legitimacy and Politics: A Contribution to the Study of Political Right and Political Responsibility* translated by David Ames Curtis (Cambridge: Cambridge University Press, 2002): 10. Coicaud extends some of these themes to an examination of international institutions in his co-edited volume, Jean-Marc Coicaud and Viejo Heiskanan, eds, *The Legitimacy of International Organizations* (Tokyo: United Nations University Press, 2001).
39 Carl Schmitt, *Legality and Legitimacy*, translated and edited by Jeffrey Seitzer (Durham: Duke University Press, 2004 [1932]). Schmitt's argument was that the law does not determine legitimacy but that legitimacy comes from the political decision of the authority. This argument has become more important as a critique of liberal theory in recent years, and Schmitt's treatment of it is quite penetrating. To explore his arguments, however, would take me too far away from the themes of this introductory essay and the themes of the book as a whole. For a further exploration of these themes in Schmitt and others, see David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar* (Oxford: Clarendon Press, 1997).
40 Coicaud, *Legitimacy and Politics:* 25.
41 See, for instance, Thomas Franck, *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press, 1990), Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004), and Brad Roth, *Governmental Illegitimacy in International Law* (Oxford: Oxford University Press, 1999).
42 Ian Clark, *Legitimacy in International Society* (Oxford: Oxford University Press, 2005): 209.
43 David Chandler, *From Kosovo to Kabul: Human Rights and International Intervention* (London: Pluto Press, 2002).
44 International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001).
45 There exists an NGO devoted to promoting the Responsibility to Protect agenda, which can be found at: http://www.responsibilitytoprotect.org/.
46 *Responsibility to Protect:* 31–32.
47 *Responsibility to Protect:* 48.
48 *A More Secure World: Our Shared Responsibility* (New York: United Nations Publications, 2004).
49 *A More Secure World:* 63.
50 See Jan Klabbers "The Meaning of Rules" *International Relations* 20, 3 (September 2006): 295–301.
51 National Security Strategy of the United States of America, September 2002 (Washington DC: Government Printing Office, 2002): i. Accessed from http://www.whitehouse.gov/nsc/nss.pdf on 5 December 2006.
52 National Security Strategy, 2002: 7.
53 Ibid., 25–28.
54 Ibid., 17–19.
55 Ibid., 9.
56 Clearly, rules are not the same as doctrines. The point here is that rules and doctrines share an important similarity; both are designed to guide future action. The reason for linking them in this way is to emphasize that the Bush administration takes the principle of absolute freedom of action to the extreme by resisting any form of future oriented guidelines in their resistance to both rules and doctrines.
57 Giorgio Agamben, *State of Exception*, translated by Kevin Attell (Chicago: University of Chicago Press, 2005 [2003]).
58 Hans Kelsen, *Pure Theory of Law*, translated from the 2nd German edition by Max Knight (Berkeley: University of California Press, 1967).
59 See Abram and Antonia Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge: Cambridge University Press, 1995).

60 John Rawls, "Two Concepts of Rules" [1954] in H. B. Acton, ed., *The Philosophy of Punishment: Collected Papers* (London: Macmillian, 1969): 108.
61 See Toni Erskine, ed., *Can Institutions Have Responsibilities?* (New York: Palgrave, 2003) for essays that explore this question.
62 International Military Tribunal for the Trail of the Major War Criminals, judgment of October 1, 1946, reprinted in the *American Journal of International Law* 41 (1947): 221.
63 UN General Assembly Resolution 3314, reprinted in Louis Henkin, et al., *International Law: Cases and Materials*, 3rd edn (Minneapolis: West Publishing Co., 1993): 898.
64 For various working papers and summaries of discussions of this working group, see their website: http://www.icc-cpi.int/asp/aspaggression.html.
65 For an argument that states should be subject to punishment, see Anthony F. Lang, Jr., "Crime and Punishment: Holding States Accountable" *Ethics & International Affairs* 21, 2 (2007): 239–257.
66 The literature here is quite vast, both on the history and the theory of constitutionalism. For historical accounts, see Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (New York: Great Seal Books, 1958); James M. Blythe, *Ideal Government and the Mixed Constitution in the Middle Ages* (Princeton: Princeton University Press, 1992); and Brian Tierney, *Religion*, *Law and the Growth of Constitutional Thought, 115–1650* (Cambridge: Cambridge University Press, 1982). For theoretical accounts, see Larry Alexander, ed., *Constitutionalism: Philosophical Foundations* (Cambridge: Cambridge University Press, 1998); T. R. S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001); and Brian C. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004).
67 See Jose Alverez, *International Organizations as Law Makers* (Oxford: Oxford University Press, 2005), a text that includes a chapter on constitutional interpretation.
68 Nicholas Onuf, *The Republican Legacy in International Thought* (Cambridge: Cambridge University Press, 1998) and Daniel Deudney, *Bounding Power: Republican Security Theory from the Polis to the Global Village* (Princeton: Princeton University Press, 2006) are two central thinkers on this issue. G. John Ikenberry has also explored related themes, although not with the same emphasis on republicanism and constitutionalism; see *After Victory: Institutions, Strategic Restraint and the Rebuilding of Order after Major Wars* (Princeton: Princeton University Press, 2000). An older body of literature exploring the idea of internationalism also has relevance here; see Cornelia Navari, *Internationalism and the State in the 20th Century* (New York: Routledge, 2000) and Michelene Ishay, *Internationalism and its Betrayal* (Minneapolis: University of Minnesota Press, 1995).
69 Witnessing the construction of the Iraqi constitutional framework demonstrates the challenges of this task; for an insider's view of this process, see Larry Diamond, *Squandered Victory: The American Occupation and the Bungled Effort to Bring Democracy to Iraq* (New York: Owl Books, 2006).

Part I

Rules and practices

1 Rules for torture?

Nicholas Onuf

Pandora's box

"Whatever one might have to say about torture, there appear to be moral reasons for not saying it." This striking claim introduces Henry Shue's influential essay, first published in 1978, on "Torture."[1] Just as bad press is better than no press at all, even to condemn torture is to draw attention to it, to dignify it, to imply that it falls within the bounds of moral discourse. This is, as Shue pointed out, a variation of the argument that one must never open Pandora's box of evil spirits. Nevertheless, "Pandora's box is open"—opened most conspicuously, and with unimpeachable moral authority, by Amnesty International with its Report on Torture (1975).[2]

Here is Shue's unadorned summary of the report: "scores of governments are now using some torture—including governments that are widely viewed as fairly civilized—and a number of governments are heavily dependent upon torture for their very survival."[3] In the years since, many governments still use torture, which is to say, they deliberately inflict pain on individuals in their custody. Some governments have abandoned the practice, some did not survive, some have started the practice. That the government of the United States now engages in activities that seem like torture to many observers has attracted an enormous amount of attention. For the most part, observers condemn torture on moral and legal grounds. Governments rarely justify its practice or even admit to engaging in it, both because most government officials would prefer to avoid public condemnation and because international law, in the form of a widely ratified multilateral convention, requires that states treat torture as a criminal offense subject to extradition.[4]

In short, torture is an institutionalized practice in today's world. There are rules against torture, yet the practice continues, apparently unabated. It seems then that public discussion of torture is entirely warranted because the rules do not work and they should be made to work. Furthermore, most observers believe that discussion reinforces the widely shared conviction that torture joins slavery and genocide as the most egregious violations of human rights that we know. To suggest, however, that there are rules for torture—rules that people involved with torture make, follow, ignore and change—at least some observers might regard as morally dubious because it cloaks an unmitigated evil in the legitimating language of rules.

This objection is just the sort that Hannah Arendt provoked when she demystified the machinery of genocide.[5] Routine, normalized activities may not be morally defensible. Some legal rules may not be morally defensible; some rules may not be legal but are defensible; some rules are neither legal nor defensible. Whether rules are defensible depends on moral principles that are themselves contestable.[6] Whether any effort to identify rules for torture is defensible depends on the value one attaches to knowing why people engage in morally indefensible activities. Fine distinctions call for a dispassionate observer; feelings of horror and revulsion tend to obliterate such distinctions, and so does raising one's voice to condemn what one sees.

Many observers condemn torture because deliberately inflicting pain on someone else is reprehensible, and even more so when it is an officially authorized (if unacknowledged) practice that becomes institutionalized over time. Any such practice will be rule-informed; indeed processes of authorization and institutionalization describe the way rules are made available for social use. Yet few observers go on to ask what these rules are and what purpose they serve. In other words, they hesitate to ask why people are involved in the practice of torture, whether directly as torturers, indirectly as governmental officials, or obliquely as members of a society where torture is known to occur. More abstractly, they resist a functional analysis of torture as an institutionalized practice potentially implicating everyone.

As a result, much public discussion of torture as practiced today is focused on torturers and their masters. And the individuals in this relatively small category seem to have the same obvious if morally fraught motive for engaging in torture: they want information that the subject of torture—hereinafter, victim—is unwilling to disclose. Most observers take this goal for granted. So do those few writers seeking to develop a moral defense of torture by imagining a situation in which torturing a mad bomber is the only way to prevent a major catastrophe. Nevertheless history challenges the assumption that torture's purpose is to elicit information. Across epochs and cultures, people have been tortured most often to punish them for their misdeeds.

While so much discussion today focuses on interrogational torture, legal definitions of torture are not so limiting. Consider Article 1(1) of the U.N.'s 1984 Convention against Torture:

> For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity….

Here we find three kinds of torture specified by reference to purpose: punishment, interrogation and intimidation. With punishment and interrogation, purpose and target coincide: the victim is the target. With intimidation, the purpose is to have an effect on other people, at least some of whom are meant to conclude that they are potential victims.

Article 2 of the 1985 Inter-American Convention to Prevent and Punish Torture also identifies these three same categories.

> For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

More vaguely, the U.N.'s legal definition also refers to torture for the purpose of discrimination, and the Inter-American definition refers to methods that have the obliteration of personality as their purpose. In the former instance, discrimination may be less the purpose of torture than a basis for selecting victims. In the latter instance, the document does not make clear what purpose obliterating someone's personality might serve; an obliterated personality might be an incidental effect of torture undertaken for other purposes.

While these two treaties identify three distinct kinds of official torture, they leave open the possibility that other kinds of torture serve other purposes. Functional analysis generally starts with the observer stipulating a system of social relations for investigation, then asking what purposes, or functions, a particular practice might serve in that system, and only then looking for corroborating evidence. Everything hinges on the first of these operations. All systems are made up of functional parts forming a functioning whole, which is then a functional part of some larger whole. The more inclusively observers define the system, the more broadly they will look for evidence of functionally relevant practices. Looking broadly at the historical record, I see three additional kinds of torture.[7]

First are tests of faith. Inflicting pain to persuade victims to recant or disavow heretical beliefs, convert, or atone for their failings is not to be confused with coercive interrogation, even if both kinds of torture can result in a confession. In a test of faith, a confession is presumed to benefit the victim and, in an interrogation, the interrogator. Ordeals the outcome of which are believed to manifest a supernatural judgment may also count as torture of this kind.

Second are rites of membership, during which the infliction of pain can make the experience an indelible memory, bond victims with each other and their torturers, and even obliterate victim's personalities in the process of supplying them

with new ones. Hazing is widely practiced and officially condoned; sleep deprived resident physicians in hospitals and doctoral students often complain, with some small justification, that they are being tortured. In the seventeenth century the Iroquois tortured prisoners, and then killed some but adopted others.[8] When the Greek junta institutionalized torture between 1967 and 1974, torture was an integral feature of the system for training torturers.[9] In both cases, those who survived the experience may well have experienced the so-called Stockholm effect, in which hostages end up identifying with their abductors.

Third is torture as public spectacle. While the ostensible purpose of torture in this instance may be punishment for the victim, it may also serve a larger purpose. Michel Foucault's unforgettable description of the torture in 1757 of a man who had attempted to kill Louis XV introduces a claim that "the ceremonial of public punishment" reinforced the majesty of the crown and with it an extensive legal apparatus.[10] Foucault also suggested that modernity brought with it new penal practices. One may wonder, however, if graphic scenes of torture in movies and on television and the internet have not brought back torture as public spectacle.

The structure of torture

"The structure of torture"; this is the title Elaine Scarry gave to the first chapter of her extraordinary book, *The Body in Pain.* Scarry's book reminds us that the infliction of pain is the "primary physical act" that makes torture what it is; this is its immediate, never to be forgotten function. Her claim that torture also requires "a primary verbal act, the interrogation," is plainly wrong. Scarry's summary characterization of the structure of torture does not require anyone, victim or torturer, to speak.

> Torture is in its largest outlines the invariable and simultaneous occurrence of three phenomena which, if isolated into separate and sequential steps, would occur in the following order. First, pain is inflicted on a person in ever-intensified ways. Second, the pain, continually amplified within the person's body, is also amplified in the sense that it is objectified, made visible to those outside the person's body. Third, the objectified pain is denied as pain and read as power, a translation made possible by the obsessive mediation of agency.[11]

Adding a prior step (the victim must be detained) and a last step (torture ends with the victim's death or release) does not change the structure of torture or its function. The latter is not interrogation, which is an excuse or rationalization for the infliction of pain that happens to require speech; the "asserted motive" is a "false motive." Techniques for the conduct of torture produce pain as "an actual physical fact." This is what motivates their use and gives torture its actual function, a function unrelated to speech. The real motive for torture—especially for government officials who authorize torture—is to turn "the objectified elements of pain into the insignia of power,… into an emblem of the regime's strength."

In Scarry's conception, "it is not the pain but the regime that is incontestably real." As a "display of the fiction of power," torture makes the regime or government real by unmaking the victim's world. Torture takes the actual infliction of pain as a series of events and gives them meaning as an ensemble of motivated activities; it "endows agency with agency." Agents know who they are, because they construe what they do and why they do it as a seamless whole, a reality featuring themselves as agents. The social construction of agency (as an objective condition) and the social construction of reality (as a subjective state) are indistinguishable as processes. Torture's ultimate function is the social construction of agency, and thus of agents' realities.[12]

For Scarry, torture is an "ideal" illustration of how social construction works precisely because pain exposes the limits of language. By discriminating between ostensible, actual and real functions of torture, her structural characterization enabled her to order functions to suit her argument. Since structures are observers' constructs in the first instance, there is nothing wrong or peculiar in doing this. I see considerable value in Scarry's three-layered structure, all the more because it corrects my own tendency to privilege speech in processes in social construction. Yet any such characterization is arbitrary: it depends on the functions that an observer selects from the large number that any complex system is bound to reveal.

If, however, we ask what happens when agents act on observers' constructs (whether their own or others'), we shift attention from structure abstractly conceived to the institutions, or linked congeries of rules, that reflect agents' goals and guide their actions. Institutions express the "reality" of diverse agents who have mixed motives that are often unclear even to themselves, who make their best guesses about other agents' motives and choices, who size up their circumstances continuously, who remember the past selectively and mimic it unreflectively, who find rules everywhere and follow them most of the time. In practice, ostensible, actual and real motives converge as publicly available reasons for agents to make the choices they do. Institutionalized patterns of practice present observers with a broadly discriminate set of functions that any 'structure of action" (Scarry's words, p. 145) may be said to perform. As practiced in different societies, torture presents us with at least six distinctive institutional complexes performing identifiable functions for those societies.

People have motives; institutions perform functions. Much discussion of torture focuses on the people involved: victims and their rights; torturers, personality traits that motivate antisocial or even sadistic behavior; and conceivably defensible reasons for such behavior. After Arendt's controversial assessment of Adolf Eichmann's bureaucratic mentality and Stanley Milgram's notorious experiments on the common disposition to obey authority figures, some social psychologists have emphasized situational factors in making torturers what they are.[13] Anyone who is interested in social construction will also emphasize situational factors as the constituent features of the statuses, offices and roles that together confer agency on human beings. Yet an emphasis on situational factors, by itself, takes an institutional setting and its societal function

as a given. If the institutionalized practice of torture has different functions in different societies, or even in the same society, then we need to identify, at least in a preliminary way, the properties of institutions that we would expect to find in functionally differentiated settings.

If, in other words, we think we know why torture is taking place (what function it performs in that society), we would want to know who is being tortured, where and how torture takes place, and who does it. Institutionalized torture requires victims, fixed sites, specialized tools and techniques, and dependable personnel. Moreover, we may be able to identify the actual rules specifying these features of the six functionally differentiated kinds of torture that I enumerated above. Some of these rules will tell agents how to conduct themselves—as victims, torturers, or authorities.

Considered in functional-institutional terms, all such rules sort into the following kinds: (1) rules for selecting victims and deciding when they need no longer to be tortured, (2) rules for selecting torturers, (3) rules on places for torture and public access to these places, (4) rules on tools and techniques, (5) rules on comportment. This list is loosely constructed, as is my list of six kinds of torture (torture as punishment, for interrogation, as intimidation, as a test of faith, as a membership rite, as public spectacle). Other observers may construct different lists for different purposes. I claim only that the two lists broadly correspond in terms of ontological specificity and thus constitute a unified analytical domain. As such, it is suitably presented for analytical purposes as a matrix, with six rows (identifying kinds of torture) and five columns (identifying kinds of rules).

A 6×5 matrix yields 30 cells, each of which indicates what actual rules we should be looking for. Of course we may not find rules belonging in every cell, either because we lack relevant evidence, or because the practice in question is not as fully institutionalized as we might have thought. If we find rules that do not fit in an appropriate cell, we have reason to re-evaluate our (always provisional) judgment about functions and their institutional correlates. With the matrix in hand, we could undertake a systematic study of torture as a functionally differentiated, institutionalized practice. Published interviews and trial transcripts would provide a good deal of reliable evidence. In effect we are likely to find what we are looking for (and this is not a methodological problem because classification is not be to be confused with theory testing). The extensive secondary literature would provide ample additional, more or less reliable evidence.

My intention here is to be suggestive, not systematic. Where direct evidence for the existence of rules is not readily available but the function of an institutionalized practice is discernible from the evidence we do have, we can make inferences and state plausible versions of these rules. For observers of preliterate societies, this is a standard ethnographic procedure. In this essay, I make functionally informed inferences, and I suggest a small number of plausible rules for torture. I corroborate some of them with evidence selectively drawn from the secondary literature.

I begin with torture as punishment. Rules for selecting victims will typically be formal and therefore relatively well known and unambiguous. If someone is known to have committed an offense for which the infliction of pain is the accepted form of

punishment, then that person will be tortured. We might even say that some such people have selected themselves for torture by knowingly acting as they have. In many premodern societies, "blood sanctions" are the standard mode of punishment, morally warranted as retribution or just deserts and publicly less burdensome than incarceration.[14] Rules typically call for sanctions corresponding in kind to the offense (an eye for an eye) and suggest that proportionality operates as a principle or meta-rule. Homicide demands capital punishment; regicide, treason, heresy and comparably heinous crimes may require punishment worse than death, or torture escalating to the point that execution will seem like an act of mercy.

Punishment takes place at fixed, often public sites dedicated to this purpose. By making other people less likely to commit offenses punishable by torture, public awareness may be supposed to have a deterrent function—retribution and deterrence are complementary functional features of many institutions whose more general function is the maintenance of public order. Torturers and executioners will be trained and proficient in using standard tools and techniques; they uphold standards of conduct appropriate to their station and duties. Victims of high station are expected to conduct themselves with dignity; defiance may bring more pain. All such expectations reflect rules whose informality does nothing to vitiate their normative power.

When torture is undertaken to obtain information the victim is otherwise unwilling to give, torturers select victims whom they suspect have useful information about their intentions, acts they have already committed, or the intentions and acts of other people with whom they are associated. In medieval Western societies, inquisitorial torture rose in response to high standards of proof for criminal offenses. In the absence of two eyewitnesses, a judicial official would authorize and supervise torture until the suspect confessed; typically the victim would have to repeat the confession afterwards to validate it as proof.[15] Interrogation accompanied by torture may take place in improvised facilities, for example, on battlefields. Detention facilities reflect institutionalization, and even when these facilities are known to the public, torture itself is likely to be conducted in secret.

Widely considered a craft, effective interrogation requires training, while torture requires a different set of skills. Often periods of questioning and torture follow one after the other, in the process prompting the victim to identify with the interrogator (known to the public as "good cop, bad cop" psychology). Perhaps the most important set of rules for torture to abet interrogation call for the infliction of pain, as Scarry said, "in ever-intensified ways" (quoted above). In Italy, for example, inquisitorial torture by means of the strappado (victims were suspended by a rope tied to their hands, which were tied behind their backs) proceeded in five grades. The anticipation of pain marked the first degree: victims were stripped and tied. The fifth degree maximized pain: weights were attached to suspended victims' feet. At some point, prisoners reached the limit of their ability to bear pain and confessed; at that point torture ceased.[16] We see here the operation of a meta-rule analogous to the requirement of proportionality. Torturers should inflict as much pain as is needed to elicit the desired information, but no more than is needed.

The strappado is one of innumerably many tools that torturers have devised in different times and places. Choice of tools seems to reflect persistent cultural differences, not to mention situational requirements. Where information is wanted quickly, torturers may begin by inflicting severe pain, but a quick confession may be less reliable than one obtained with patience and the progressive application of pain. Torturers may be trained to do their jobs with professional efficiency and detachment, but they may feign pleasure to diminish victims' sense of self-worth or will to resist, or indeed they may experience pleasure in inflicting pain on helpless victims. Knowing that torture is likely to be progressively more painful, victims must decide when to confess. A confession early in the process may not be credible, yet resistance devalues time-sensitive information and begs for an acceleration of the process. Where time is unlimited, the rules may call for sustained, less severe forms of torture. Extended, indefinite confinement itself can be effective as attenuated torture. As Scarry observed, walls become the torturer's "weapon."[17]

Walls have an ambiguous relation to torture when its purpose is intimidation. Here the actual victims of torture are not the real target. Instead, torturers hope to intimidate victims' associates, people like the victims or the public at large. Governments are given to intimidation when they see treason everywhere: terror warrants terror in return; limits do not apply.[18] While interrogation generally calls for secrecy, finesse and some sense of proportionality, intimidation works even better when people have enough information about what is happening behind the walls to imagine what might be in store for themselves. Yet the unlimited brutality that intimidation encourages can have the effect of angering rather than intimidating the public.

Underlying torture as a test of faith is the conviction that the victim has failed to meet some absolute requirement, whether of belief or character, or to perform some absolutely necessary duty. Society does not and perhaps cannot impose such a requirement or duty. Instead it arises from what is taken to be a supernatural condition (or a natural condition with supernatural properties) that human beings have no choice but to submit to or help bring about. In this respect torture as a test of faith resembles the ordeal, or "judgment of God," in which victims must meet a challenge, typically taking the form of torture by fire or water, that requires a supernatural intervention not to result in the infliction of horrendous pain.[19]

For tests of faith, there are no lesser offenses, and proportionality is beside the point. The only remedy for heresy is confession, absolution and perhaps death. Torturers must be believers whose faith is beyond impugning; a priest (someone with privileged knowledge of the supernatural) is ideally suited to this awesome responsibility. Victims must have already exhibited signs of disbelief or flaws in character, which torture and confession will inevitably confirm. As with ordeals, tests of faith are often conducted publicly and the means by which pain is inflicted are likely to be ritually significant. Torturers must perform their tasks gravely. Victims cannot confess too readily or their sincerity will be doubted. Absolution or death cleanses the faithless and restores the world to its (super)natural order, even as the faithful must always watch for the next heresy.

While heresy presupposes membership in a community of faith, membership rites certify that new members have fully accepted the obligations of the community into which they are being accepted. Even if the members of the community do not insist on a supernatural warrant for their beliefs, rites of membership have the effect of setting members apart and reminding them of their obligations to each other. Torturers may include all members of the community, the occasion typically open to all members but closed to the outside world. Pain endorses the normative significance of the experience for torturers and recruits alike. Thus the torture must be substantial but not life-threatening or crippling, its form often decreed by ritual and tradition. Recruits should be subjected to torture in roughly equal amounts; those who cannot bear what others endure are castigated for their weakness and denied membership. Those who endure are bonded as a cohort and empowered by the promise of inflicting pain on the next cohort. Repeated at regular intervals, rites of membership attest to the community's continuous history and exclusive character.

Whenever torture is conducted in public, it may function as an incidental spectacle—as an entertainment or diversion for anyone who happens to be present. Sometimes torture is a blood sport, whether instigated by jaded emperors or schoolyard bullies for their own entertainment, or institutionalized by an insecure government as a way of distracting a restless public. Such a government may count deterrence as an additional benefit. Victims are chosen not just for alleged offenses such as treason or heresy, but also for personal qualities: they are said to be deviant or abnormal, seen to be defenseless or conversely, as with gladiators, seen to be able to defend themselves in entertaining ways. Victims may even be required to torture each other. Tools and techniques tend to maximize the visible marks of pain; stoning, crucifixion and exposure to wild animals are familiar choices. If torture is drawn out, it is only to heighten the audience's anticipation of a gruesome finale, making death itself anticlimactic. With agency reduced or eliminated, rules of comportment are minimal. All rules point to degradation and dehumanization as both the objective and the outcome of torture as public spectacle.

Slippery slopes, inverted worlds

Earlier I mentioned the mad bomber as an imagined situation in which torture might be morally warranted to obtain formation. Anyone offering this example seems bound to offer an opinion on the problem of "slippery slopes." If torture is justified in this situation, is it justifiable in a slightly more ambiguous situation, and so on, until we end up believing that torture is routinely warranted?[20] Slippery slopes are everywhere—is detention for questioning the first step down (or up) a slope? Reversing the metaphor does not change the moral issue, even if it does imply that some slopes, such as the infliction of pain by degrees, are subject to rules and rational judgment.

If we look at the broad spectrum of functionally differentiated, institutionalized practices associated with torture, it is not so difficult to reconceptualize them

as a long, continuous slope. Torturing the mad bomber is at the tip, even if there is no one actually up there. Next on the slope is detention for suspicious activity, by degrees vaguer and less substantiated. Then comes interrogation, in a general way inversely related to the grounds for detention: the vaguer the charges, the more coercive interrogation is needed to substantiate them. Interrogation gives way to intimidation, and intimidation gives way to the punishment of groups of people for the actual or imagined offenses of a few of their members. Down the slope torture becomes more public by degrees. At the bottom, blood-soaked spectacles divert people more than deter them; degradation is complete.

I do not wish to suggest that people are incapable of drawing lines and imposing limits on slippery situations.[21] Indeed I believe this is at the very core of the human disposition to make and use rules. In effect, institutionalized practices terrace every slope that our senses and desires perch us on. Not every instance of interrogation descends into brutality, not every torturer becomes a sadist, not every government slips from coercive interrogation to intimidation, not every public emergency becomes a way of life. Nevertheless, there does seem to be a recurring and perhaps a general tendency for the institutionalized practice of torture to show signs of what we might call functional slippage.

We should recall that observers "see" structures in social relations and "find" functions that structures perform. This process goes both ways; neither structure nor function has to come first. The structures of torture that many observers have identified, typically relying on functional language, and the functions I have identified, relying as I have on the reports of many observers (and not just about the structures of torture), are actual only to the extent that people, here meaning agents, see them the same way and act on them consistently. When these people act more or less consistently and see this happening (observers are agents when they act on what they see), rules emerge, and rules foster consistency in conduct.

Since people never see things exactly the same way, rarely act with complete consistency, and often disagree the way they think things should be, functions are constantly subject to slippage. Institutionalized practices lose their observable structure. Rules seem to become looser, vaguer, more qualified and themselves inconsistent. Functional slippage means mixed motives, changing circumstances and chronic disingenuousness. In societies where institutionalized practices and moral sensibilities seem most at odds, we should expect nothing else.

The long slope places several of the functions of torture in descending order—descending in moral terms. Torturing the mad bomber is most readily justified, torturing as public spectacle least justified. From this point of view, functional slippage is moral backsliding. If we have learned anything in the last century, we learned that whatever we have built, morally speaking, we can destroy, and quickly: climbing up is harder than sliding down.

If torture is an "inversion," as Scarry has claimed, an "interruption and redirecting of a basic moral reflex," then that moral reflex would seem (at least to me) to be an acquired disposition, and not a natural one. People make their worlds by giving normative force to what they see and do and by generalizing normative content as moral meaning. Over the centuries we have come to see that "intense

pain…destroys a person's self and world," and we have made our world morally meaningful, in part, by condemning the infliction of intense pain for most, but not all purposes—war remains the large and conspicuous exception. Torture we condemn because it destroys victims' worlds and, in the process, it threatens to destroy the world we have built together with so much effort and, yes, blood and pain.[22]

What we are disposed to call the modern world reflects an acute sense of, and commitment to, what we moderns think of as progress—material, social and moral progress as complementary features of a world unlike any other. The very possibility of torture inspires an almost panicky fear that such a world can be inverted, turned upside down. Functional slippage inspires an allied fear that we are reverting to an earlier world. Like other worlds, even those that we take to have been civilized, that world turned on different moral premises.

In the premodern world, human beings held different, reality-defining statuses, or stations, most of them from birth and for life. Stations institutionalized family position and relations among families in the first instance: bloodlines always mattered; purity was a regulative ideal. Every station had a fixed place, from high to low, in relation to every other. Honor attached to one's station; questions of honor formed a moral imperative pre-empting all other normative concerns. Dishonor was a fate worse than death or indeed any pain that one might suffer. Affronts to one's honor were to be avenged by inflicting pain, even at the cost of one's life; blood sanctions institutionalized blood-letting vengeance. Even the slightest offense against the standing order affected one's standing and induced shame, which functioned as an all-purpose deterrent. Blood shed in sacrifice propitiated an awesome and demanding nature, fickle unseen spirits, a stern but sometimes forgiving God.

However stylized the description, this world was recognizably our own not so many centuries ago. Despite modernity's repudiation of its social and moral premises, despite our sense of moral progress, traces remain in quests for national glory and the carnage of war, images of the Crucifixion and the performance of the Eucharist. We see similar concerns in other great civilizations, and not just those that are gone. We see them in the tribes we take to be relics of humanity's earliest social arrangements, and in the gangs and clubs we take to be self-encapsulating reversions to an earlier way of life. In all such worlds, the infliction of pain serves functions that modernity has disavowed: punishment for offenses of station, confirmation of the natural order of things through tests of faith, status assignments warranted through rites of passage and membership, a sense of power that comes from watching people lose not just their lives but, more importantly, their dignity.

The ritual infliction of pain is so entrenched in so many settings that it seems hardly appropriate to call this phenomenon an inversion. Perhaps the unprecedented normative requirements of the modern world should be considered an inversion (if we can free this term from its prejudicial connotations). We who believe ourselves to be modern also believe that blood rituals are normatively inadmissible because they violate intrinsic rights and serve no good (instrumentally useful) purpose. Yet the modern world experiences a surfeit of torture—far more torture than it "needs," given the modest benefits of clandestine, sanitized torture as an adjunct to interrogation. The normative requirements of modernity

notwithstanding, torture today tends to be public, even ceremonial. As such, it would seem to be functional (if we can free this term from its favorable connotations) for the public as a whole.

Rites of membership often require members to participate directly. Public punishment for grave offenses and heresy has the effect of making many, if not most, members of society vicarious participants.[23] Even when torture as mass entertainment brings the crowd to a frenzy, the larger result is public passivity. While actual torture is condemned in the modern world, virtual torture is pervasive. Television, movies, video games, comic books and internet sites shower the public with images of deliberate violence and every imaginable sort of human degradation. We are casual, sometimes involuntary participants in rituals of blood and violation.

At least in the United States, the onslaught of virtual torture has increased dramatically since September 11, 2001 and the war on terror.[24] Intimidation begets intimidation, humiliation calls for revenge, anxiety gives rise to fantasies of domination. Nevertheless, the torture we see everyday is rarely actual, Abu Ghraib notwithstanding. Instead it is sufficiently realistic (as we say) for us to suspend disbelief. We participate safely in a spectacle replete with familiar rules, and return to a world where we smugly believe our moral reflexes are intact, even strengthened by the revulsion we felt.

For Scarry, the ultimate function of torture is to produce the illusion of power—the real powers of untrammeled agency. Yet virtual terror is a second order illusion, as such attenuated by our conscious realization that what we see is, after all, only a series manufactured images designed to play on our emotions. That we see so many images of the same sort makes us even more aware of their illusory character; a surfeit of images yields boredom, not power. Perhaps Scarry's argument is incomplete.

Scenes of torture, degradation and humiliation remind us of powers unseen, powers possessed by malevolent spirits and awesome monsters. For many people today, a supernatural world remains as real as it has been for most people in human history: a world of miracles and augurs, gods and heroes, angels and demons. Actual torture today—torture for interrogation and as intimidation—may indeed speak to our thirst for power, our need for the kind of agency that modernity denies us most of the time. Yet the virtual torture so pervasive today—torture as punishment, test of faith, membership rite or entertainment—fuses our attenuated actual power with the supernatural powers animating a world that modernity sought and failed to banish from popular consciousness.

Notes

1 Henry Shue, "Torture," reprinted with elisions in Sanford Levinson, ed., *Torture: A Collection*, rev. edn (Oxford: Oxford University Press, 2006), 47.
2 Ibid. Amnesty International, *Report on Torture* (New York: Farrar, Straus and Giroux, 1975).
3 Ibid.
4 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification and accession by General

Assembly Resolution 39/46, December 10, 1984. The Convention entered into force on June 26, 1987 and has 142 parties, including the U.S. According to Article 4(1), "Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture." On extradition see articles 7–8. Also see the Inter-American Convention entered into force on February 28, 1987; the U.S. is not a party.

5 Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Viking Press, 1964).

6 See further Anthony Lang, Jr. et al., "The Role(s) of Rules: Some Conceptual Clarifications," *International Relations*, 20, 3 (2006), 274–294.

7 For broad surveys, see Henry C. Lea, *Superstition and Force: Essays on the Wager of Law*, *the Wager of Battle*, *the Ordeal*, *Torture*, 2nd edn (1870) (New York: Greenwood Press, 1968), 323–459; George Ryley Scott, *The History of Torture throughout the Ages* [1939] (London: Kegan Paul, 2003); Malise Ruthven, *Torture: The Grand Conspiracy* (London: Weidenfeld and Nicolson, 1978); Edward Peters, *Torture,* expanded edn (Philadelphia: University of Pennsylvania Press, 1996). While Peters' book is the best of these surveys, it fails to consider non-Western practices; his anotated bibliography, 188–210, is invaluable. Also see Ronald D. Crelinsten and Albert J. Jongman's extensive, well-organized bibliography in Crelinsten and Alex P. Schmid, eds, *The Politics of Pain: Torturers and their Masters* (Boulder: Westview Press, 1995), 151–183.

8 Daniel K. Richter, *The Ordeal of the Longhouse: The Peoples of the Iroquois League in the Era of European Colonization* (Chapel Hill: University of North Carolina Press, 1992), 33–36, 66–70.

9 Mika Haritos-Fatouros, *The Psychological Origins of Institutionalized Torture* (London: Routledge, 2003), 40–48.

10 Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage Books, 1979), p. 43. Also see Darius M. Rejali, *Modernity and Torture: Self, Society, and State in Modern Iran* (Boulder: Westview Press, 1994), 11–32.

11 Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (New York: Oxford University Press, 1985), 28.

12 Ibid., 56–58. Also see 143–150, where the function of actualization ("material realization," p. 146) finds fuller expression. While I have made the Kantian faculty of apperception indispensable to the social construction of reality, Scarry's argument does not do so explicitly.

13 Arendt, *Eichmann in Jerusalem;* Stanley Milgram, *Obedience to Authority: An Experimental View* (New York: Harper & Row, 1974); Martha K. Huggins et al., *Violence Workers: Police Torturers and Murderers Reconstruct Brazilian Atrocities* (Berkeley: University of California Press, 2002); Haritos-Fatouros, *The Psychological Origins of Institutionalized Torture.*

14 John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* (Chicago: University of Chicago Press, 1977), 27–44. For a moral justification of retribution, and thus of torture, see Stephen Kershnar, *Desert, Retribution, and Torture* (Lanham MD: University Press of America, 2001).

15 Langbein, *Torture and the Law of Proof*, 45–60; Peters, *Torture*, 40–73.

16 Ruthven, *Torture*, 58–59. For a recent example (Greece, 1967–1974) involving three "so-called 'Plans,' numbered according to severity," see Haritos-Fatouros, *The Psychological Origins of Institutionalized Torture*, 57–58. "These were applied progressively to a prisoner if he refused to confess."

17 Scarry, *The Body in Pain*, 45.

18 "I admit many excesses [meaning torture by security forces] because it was necessary to repress other excesses [by subversive forces]." Wolfgang S. Heinz, "The Military,

Torture, and Human Rights; Experiences from Argentina, Brazil, Chile and Uruguay," in Crelinsten and Schmid, *The Politics of Pain*, quoting a Chilean general.

19 Here see Lea, *Superstition and Force*, 201–321.

20 See Shue, "Torture," 56–59, and essays by Oren Gross, Alan Dershowitz and Elaine Scarry in the same volume.

21 See Michael Levin, "Torture and Other Extreme Measures Taken for the General Good: Further Reflections on a Philosophical Problem," in Peter Suedfeld, *Psychology and Torture* (New York: Hemisphere Publishing, 1990), 89–92, for a similar argument about slippery slopes.

22 Scarry, *The Body in Pain*, 35–42, quoting p. 35. On war, see ch. 2. In short, "torture uses, inverts, and destroys the trappings of civilization." John T. Parry, "Escalation and Necessity: Defining Torture at Home and Abroad," in Levinson, *Torture*, 153.

23 See Rejali, *Torture and Modernity*, 12, for a graphic description of the fate of thirty Persian heretics in 1852. They were distributed to government ministers, nobles, military personnel, merchants, artisans, university students, servants and stable hands, tortured, marched in public and executed.

24 Between 1996 and 2001, 102 "scenes of torture" aired on U.S. television during prime viewing hours, while 624 scenes aired between 2002 and 2005. Martin Miller, "'24' Gets a Lesson in Torture from the Experts," *Los Angeles Times* (February 13, 2007), E1, 14. Experts interviewed for the article advise producers to "make scenes more realistic, not bloodier."

2 Contextualising torture

Rules and conventions in the Roman Digest

Jill Harries

> History is an encounter between the past and the present, a present in which something is at stake. Torture, democracy and truth in the ancient world become visible through our recognition of a significant nexus of these things in the present.[1]

There are two methods (at least) of confronting the phenomenon of torture in judicial and extra-judicial contexts. One is to forbid its exercise, absolutely. The moral attractions of this option are obvious, the practical drawbacks less so. For if such regulation is to be enforced, there must be clarity as to what is forbidden. In a judicial context, what measure of physical or psychological pressure is acceptable and what is not; or, in other words, when does (acceptable) pressure become (unacceptable) coercion? The alternative, which is the subject of this chapter, is what may happen when it is conceded that the use of torture is, even in limited contexts, permissible. In the past, rules governing legal, and in particular criminal, process have been based on the assumption that torture is required for ascertaining the truth. At the same time the rules laid down strict controls on the situations in which, and the people on whom, it may be used. This concession, that torture is acceptable, it will be argued, worked, and may still work, to undermine the safeguards present in the rules as to its use. For, in certain circumstances, where getting at the truth is perceived as essential for removing or curtailing a threat to the community at large, the rules enjoining safeguards may come into conflict with a society's concern for its own preservation. Thus, as we shall see, the two aims, which justified the use of judicial torture, to get at the truth and protect from threat, may work together over time to subvert the legal safeguards as to its use. In this paper, the phenomenon of what I have called 'torture creep' will be analysed in relation to what happened to the rules governing torture under the Roman Empire from the first to the fifth centuries CE.

The Roman Empire was run by laws, rules and conventions imposed on a multitude of states, tribes and peoples scattered over the Mediterranean littoral and beyond to Hadrian's Wall in the north, the Sahara to the south, and eastwards as far as the Euphrates. Its expansion was justified in the language of the 'just war'

(that is, war which the gods accepted as right) and reinforced by ritual (Livy, *History of Rome from Its Foundation,* 1.32). As we shall see, threats to the gods or the accepted divine order could be construed as threats to the community and that perception of threat influenced the application and spread of torture in the Roman judicial system.

Like other Mediterranean societies, the Romans acknowledged the existence of a concept of 'international law', although their phrase for it, *ius gentium,* could also designate laws and customs, which were common to all mankind. The 'world order' established by Rome covered that part of the world which was under Roman rule or control, and the ruling power, while it acknowledged in practice continuing local customs in civil law, saw no need for the creation of institutions to enforce the *pax Romana* other than those already integral to their own system. Although periodic armed enforcement was required for the suppression of revolts, the long-term strategy was to encourage the assimilation of local to Roman identities through the extension of Roman citizenship and with it the observance of Roman law. This chapter, therefore, is about a Roman set of rules and conventions, which is not in the strict sense 'international', although it applied over a heterogeneous territory.

It is argued elsewhere in this volume that the extension of torture in various modern international contexts is in part a response to threat, requiring the suspension of previous rules and legal protections. Although for centuries the survival and security of the Roman Empire were never put seriously at risk, it will be argued below that the reason for the extension of torture in the context of judicial interrogation was in part a perception of threat on two levels. One was the danger posed to the whole community by the actions of traitors. From the beginning, the crime of treason was regarded as being in a special category, and it was accepted that the rights of the community to be protected overrode the right of individuals of a certain status to be exempt from torture. The second, which is perhaps more alien to modern cultures, was the threat posed to the divine protection on which the state relied by those who practised wrong beliefs amounting to atheism, that is, the Christians. As will be shown below, the use of torture in relation to the trials and executions of Christian martyrs down to the early fourth century CE does not accord with the rules on judicial interrogation laid down by Roman legal commentators and deriving from statute and imperial regulation. Rather, it conforms to a different use of torture, the use of pain to 'convert' the victim's ideology to that of the torturer. Christians were not tortured so that the judge could find out whether they were Christians or not, but to make them change belief by renouncing Christianity and offering sacrifice to the gods or the imperial cult.

Definitions

What is torture? The historian is aware that its meaning changes with social context and over time.[2] Its parameters are so vague that some might despair of defining torture altogether; best to express moral abhorrence and be done with it. But if the search for rules to limit or ban 'torture' is to be successful, then there

must be some consensus about what it is, or at the very least, which of competing definitions can be most usefully adopted. If what is outlawed can be defined, there may be some chance that rules banning certain specific practices can be made efficacious over time, through formal enforcement, or the shaming of the perpetrators.

Definitions depend also on the perspectives of those who do the defining. At the risk of over-generalisation, champions of human rights tend to take a broader view of what 'torture' is or was than do lawyers or legal commentators, who focus on the rules of 'judicial torture'. The title of this chapter indicates its main focus, the rules governing judicial torture under the Roman Empire. However, the legal conventions governing torture cannot be studied independently of wider social assumptions about pain, punishment and the criminal.

Two examples, of the narrower and then of the broader definition, may suffice. First, a legal historian on the law of torture as established in Europe from the thirteenth century:

> When we speak of "judicial torture", we are referring to the use of physical coercion by officers of the state in order to gather evidence for judicial proceedings. The law of torture regulates this form of judicial investigation. In matters of state, torture was also used to extract information in circumstances not directly related to judicial proceedings.[3]

This provides a clear and restricted context for the discussion (and regulation) of the use of the infliction of pain. The context is the criminal trial, the agents of the torture are the officials appointed by the state, the purpose is the gathering of evidence and the ascertaining of the truth; in some circumstances, torture could be used extra-judicially, but even this was for public purposes. Langbein added that judicial torture, is distinct from the punishment inflicted on the convicted and condemned criminal 'however gruesome'. Rules on torture thus defined are therefore naturally directed only at its use in judicial contexts; such rules will not address torture by other agents or in other contexts.

The regulation – or preferably the abolition – of judicial torture is a project made more viable by the existence of a clear context. But such a limitation runs counter to how torture is perceived in the context of international concerns for human rights in general. Writing on the subject of rape as torture, Dr Michael Peel opined that,

> Torture is the deliberate infliction of physical or psychological pain. In the context of human rights law, to be tortured, the infliction of pain must be in the custody of, or under the control of, a state agent or by a non-state agent acting in an organised group (such as a rebel group in control of territory), using organised violence, which the state is either unwilling or unable to control.
>
> Most human rights instruments have required there to be a purpose for an act to be categorised as torture, such as gaining a confession (whether true or false), punishing or intimidating.[4]

Peel's definition begins with a broad statement, which is then made subject to a number of qualifications. The agent, as in the case of judicial torture, may be the state, but it may also be an organised group outside the jurisdiction of the state. There must also be a purpose but that purpose is not restricted to the gathering of evidence in the form of the alleged criminal's confession: unlike analysts of judicial torture, the human rights agenda objects also to cruel and unusual punishments in general, and to the use of pain for intimidation – or, it may be added, humiliation – of the victim, a form of torture sometimes branded as 'terroristic'. Moreover, the pain may be psychological as well as physical. All these qualifications relate to rules governing, or rather preventing, torture. Where this discourse diverges from the terms of discussion in Roman rules is that the 'unlawful' element, the aim to change not only the story (confession of guilt) of the victim but also his or her world-view, is never explicitly acknowledged or condoned. In the case of torture of the Christians, where the object was to change belief, the state was itself the 'terrorist'.

While we may assume distaste for such behavior should surely be universal, imperial Rome thought otherwise. Romans in fact believed that judicial and state terror had positive advantages (an idea picked up by the ideologues of the French Revolution at the end of the eighteenth century). From its foundation, Roman society was aggressively militaristic. Every adult male citizen was required to do military service for ten or more years and even its system of justice was based partly on violent self-help, with the right to kill in self-defence enshrined as an enduring legal principle. Much conduct deemed unacceptable today was not only accepted but even required of Romans at war, provided the war was justified. While today the mass slaughter of civilians is outlawed as a war crime, among the Romans, the organised killing of enemy non-combatants who had failed to engineer the surrender of their city, was expected *pour encourager les autres*. A Greek observer of Rome at war in the second century BCE described the capture of an enemy stronghold in Spain:

> When Scipio thought that a sufficient number of troops had entered, he sent most of them, as is the Roman custom, against the inhabitants of the city with orders to kill all they encountered, sparing none. They do this, I think, to inspire terror, so that when towns are taken by the Romans one may often see not only the corpses of human beings but dogs cut in half and the dismembered limbs of other animals, and on this occasion such scenes were very many owing to the numbers of those in the place.
>
> (Polybius, *History,* 10.15)

This tactic was not, of course, openly endorsed by a formal statute about how to fight wars but, as a convention or a custom, it was in general use. In one respect, it was even institutionalised: Roman generals seeking the ultimate honour of a triumph (a celebratory procession through the streets of Rome) were required to prove that they had killed not less than five thousand of the enemy. Those unlucky enough to be taken prisoner might be reserved for the entertainment of the Roman

plebs, as food for wild animals or as enforced combatants in the arena. If an ancient Roman were confronted with the modern human rights perspective on torture in the broad sense, his likely response would be incomprehension. Pain, like Donald Rumsfeld's 'stuff', 'happened'.

However, in the context of legal procedures, different conventions applied. Roman legal discourse recognised 'rights', although they appeared rather different from those operating today. Going to law in a civil case was described as 'seeking right' (*ius petere*); going before the magistrate for the legal hearing was 'to go into a judgment of right' (*in ius ire*). Roman legal commentators related the word *ius,* right, to *iustitia,* justice (Digest 1.1.1 pr, Ulpian, *Teaching Manual*). Process, especially civil process, was designed to ascertain where the 'right' lay at every stage. In public, criminal law, where the rights of the community were at stake, 'anyone who wished' could prosecute, in the interests of society as a whole, and lesser rights (such as the principle that the innocent should not be made to suffer) were diluted, although, as we shall see, there were (supposedly) safeguards. As a free Roman citizen, and therefore by definition subject to Roman law, a prosecutor would have known that, according to the rules, judicial torture was to be used only on slaves. But under the Empire, all that was to change.

Roman judicial torture: the rules

It is in a cultural context in which the exercise of violence was habitual and commonplace that the Roman rules for the use of torture in its narrow sense, torture as investigation, should be assessed. The word for torture derives from the Latin *torquere,* literally 'to twist'. But when the Roman legal writers and codifiers of law discussed the rules for judicial torture, they subsumed them under the process itself, the *quaestio,* or 'investigation'. For Romans, judicial torture was, as it was to be in later centuries, the Question. The use of torture, which the Romans defined with deceptive simplicity as 'the infliction of pain' (*Digest*, 48.18.1, *tormenta*), was therefore part of an inquisitorial process, to determine the facts, or the 'truth'. The conditions for its use were determined by its purpose, to gain evidence and thus achieve a just outcome. The cases in which it was to be used were those concerning a variety of 'public' crimes (such as treason, homicide, adultery, public and private violence and others), where the interests of the community as a whole were perceived to be at risk. Because the 'crime' was public, so also was the process, and that included the infliction of torture, through the rack, the 'hooks' or 'claws', and beating with whips, whose lashes were sometimes tipped with lead.[5] The place of torture was not, therefore, the dungeon or prison, as it was to be later, but the open air, before crowds of witnesses. Judicial torture, like its punitive counterpart in the arena, could be a form of theatre. Responsibility for ordering torture and upholding the rules lay with the judge in the case, who was the representative of the state; the individuals who administered the tortures were largely faceless, the instruments of the state's will, without moral identities of their own.[6]

Rules governing the use of torture had a context in the use of evidence in general, a practice, which was to continue in the Middle Ages, in part through the reception of Roman law. It was not consistent with the principles of right or justice that pain should be inflicted on the innocent. Therefore some suspicion of wrongdoing must already be present. From the emperor Augustus (30 BCE to 14 CE) onwards, judicial torture was never to be used as a device of first resort. Instead, it was a requirement that there be other evidence, suggesting, but not necessarily establishing guilt (*Digest* 48.1.8.1 pr.). By the sixteenth century in Germany, this principle had been subject to detailed refinement by legal commentators, who evolved a principle of 'half-proof', requiring the testimony of one eyewitness, rather than the more conclusive two, and a set of persuasive circumstantial evidence.[7]

The peoples of the ancient Mediterranean accepted the use of torture but perceived at least one drawback: in the course of a trial, despite the evidential safeguards, innocents subjected to torture would suffer. Therefore, under the Romans' rules, judicial torture by definition should not end in the death of the, perhaps innocent, victim (although it sometimes did). Moreover, death under torture would contradict the aim of the process, which was to establish the truth. It also followed that a person should not be executed by torture (or flogging or scourging). The difference from judicial torture was clear and, as far as the rules went, consistently sustained. In court practice, as we shall see, the situation was rather different.

Roman legal discourse, especially when conducted by thinkers with a more philosophical bent, emphasised the principles of freedom, equality and dignity.[8] While these may appear forerunners of modern views of human rights, in the ancient context they were limited by social factors, not least the presence of slavery. It was the practice not only in Rome but also in some other ancient societies to take the evidence of slaves under torture. Law court orators in democratic Athens in the fourth century BC appear to take for granted the validity of slave evidence given under torture; as Demosthenes rather unhelpfully observed, such evidence had never been disproved (Dem. 30.37). The starting point of the ancient willingness to torture slaves for evidence was the fact that the victims were slaves, a form of property, and therefore not eligible for the rights accorded free people. An accused slave, against whom there was other evidence could well be subjected to *tormenta* to force a confession; even if he held out, he might still be condemned (Valerius Maximus 8.4.2). But it was also recognised that slaves had a special relationship with their masters and could not be required to testify against them, except in cases of treason or sacrilege, where normal exemptions did not apply; Augustus got round this by having the slaves of an accused man sold to someone else, so that they would be free to testify (Cassius Dio, *Roman History* 55.5).

Free citizens could, in theory, expect better treatment. But the accepted, and indeed mandatory, use of torture of slaves, which, having been established, was never seriously questioned, had an unintended consequence. Under the Roman Empire, legal and social changes eroded the unique value of the Roman citizenship,

which was gradually extended throughout the Empire, until 212CE, when all free inhabitants were granted the Roman franchise by the emperor Caracalla. The difference between 'upper' and 'lower' class status thereafter became expressed through a dual categorisation of people as either members of the 'more honourable' class (*honestiores*) or as 'the more humble' (*humiliores*). And along with superior status came legal privileges, which included the 'right' both to exemption from torture and to less painful punishment for capital offences.[9] Conversely, the rights of the free poor were gradually eroded through judicial practice and the rulings of legal interpreters. The poor could expect to suffer both physical pain and humiliation in punishment – modes of execution that were both painful and degrading, and consignment to hard labour in the mines.[10]

At the same time, investigations began to display the features of what might (on the analogy of missions) be called "torture creep". For, as judicial torture, albeit only of slaves, was already an indispensable part of the legal process, cultural and legal acceptance of the principle that the use of torture was an essential device to be used in the search for the truth enabled its extension by the courts to low status free people. By the fourth century, only people of the rank of city councillor and above could be sure of exemption and even then, legal safeguards could be ignored by over-zealous judges. In a North African case heard under Constantine (306–337), a city councillor, in theory exempt from torture, produced suspect answers under interrogation, and was taken away to be subjected later to 'more severe questioning'. Witnesses and litigants learned to dread the judge's question, 'of what rank are you?' In the fifth century, those suspected of forgery, a criminal offence which could also be relevant to civil cases, might be liable to torture as well: 'in order to ascertain the truth', wrote the emperor Honorius in 421 CE, 'these individuals shall be interrogated under oath, if they are of high rank, or else [i.e. if of lower rank] they shall be subjected to the terror of torture' (*Theodosian Code* 2.27.1.2a).

There was one area where the civil rights of every individual, regardless of status, traditionally gave way to the interests and survival of the community as a whole – the process for treason (*maiestas*). Romans under the Empire recognised two versions of this offence: one was conduct damaging to public safety; the other was offending against the 'greatness' of the emperor. As emperors were chronically insecure, and threats to their position tended to come mostly from the upper classes, the rule that the 'more honourable' should not be liable to give evidence under torture was under constant challenge. Although by convention, senators remained immune, even the position of the high aristocracy could be challenged by the ignorance or the fears of emperors. The historian Tacitus, himself a senator, attests to the use of torture against men of rank suspected of conspiracy against Nero (*Annals* 15. 56, cf. 11.22). Emperors could even be ignorant of the traditional safeguards; in 370, when an emperor's agent ran wild in Rome, subjecting senators to torture on the basis of a permission received from the emperor, it required the intervention of a distinguished delegation of senators, backed by the emperor's top legal adviser, to get the immunity reinstated.[11]

Finally, as has been noted above, human rights perceptions of torture include the infliction of pain in punishment. It must be emphasised that Roman rules on torture applied only to pain inflicted in the course of investigation. There were no limits on the pain inflicted in the course of painful punishments, such as crucifixion, burning alive, and the exposure of criminals to wild beasts and other bizarre forms of execution for the entertainment of the mob;[12] under the rules the victims of these were either non-citizens or, later, the *humiliores,* the 'lower-class' citizens below the rank of city councillor. But, as noted above, the Romans would not see this as 'torture' at all. Public pain inflicted in the amphitheatre before a crowd representing the virtuous community underlined the separation of the guilty from the society of which he or she was no longer part; humiliation further underlined the point of the ritual. When the Romans thought about the infliction of pain in the context of punishment, they saw its purpose as being to reinforce the function of punishment as deterrent or as an affirmation of the power of the state over the body of the criminal.

Torture and truth

It was widely acknowledged, even by legal writers, that as a device for ascertaining the truth judicial torture was unreliable; those tortured might be strong enough to hold out, say what was expected or, if hostile to the accused, try to incriminate him. For this reason the Romans operated the rule of corroboration: an accused person could not be condemned on the basis of torture evidence alone. Indeed, in theory the proceedings themselves should have given rise to a suspicion that all was not well with the evidence as presented. Increasingly, strict written records were kept of the course of the judge's questioning of free witnesses and of the answers; confusion and contradiction in these would justify the judge's resort to interrogation under torture, as there was already prima facie evidence for lying.

Views on the use (and abuse) of torture as a means of interrogation were mixed, and could affect the course of events in court. A manual on rhetoric by Aristotle in the fourth century BCE laid out the arguments that advocates could use when supporting or refuting evidence gained under torture (*Rhetorica* 1376b–1377a). While, on the one side, was the assumption accepted by the legal rule-makers that evidence derived from torture was the only 'true' evidence, arguments on the other side could be multiplied: those under compulsion were as likely to give false evidence as true, either by making things up or by holding out against the pain; evidence under torture would thus depend on character, with some better equipped to endure than others. Nor was cooperation in providing truth by the naming even of genuine associates always admirable. Refusal to name names under torture could be flagged as a virtue, if the naming involved betrayal of trust; the historian Tacitus honoured the bravery of a female slave accomplice tortured to reveal details of a conspiracy against Nero in 65, conduct he contrasted with the cowardly behavior of the noble traitors, who rushed to betray each other.

As a former advocate, the first-century teacher of rhetoric, Quintilian was well qualified to argue both sides of the torture issue. Echoing Aristotle, he wrote (*Inst. Or.* 5.4) that, on one view, torture made admission of the truth inevitable. The other was that it resulted in false statements, either because the victim was tough and could persuade the torturers that his/her lies were truth, or because he (she) was weak and told lies because that was what was wanted. Quintilian's view seems to have been that evidence under torture could itself be disputed. The advocate could ask who had asked for torture to be used, or offered a particular witness? Against whom was the evidence given? Why had the victim been requested or volunteered? More questions could be asked about the process itself: Who was in charge of the torture? What were the methods used and against whom? Was the evidence extracted credible or consistent? Did the victim persist in his (her) initial statement or change it, because of the pain? Did the change happen at the start or as the torture progressed? Quintilian's questions may also shed light on why the use of torture persisted, despite doubts as to the veracity of the evidence produced. Whatever the counter-arguments, the presence of pain allowed an extra dimension to the evidence and to the disputes of advocates about it.

Discussion of torture was not, as we have seen, confined to the legal rule-makers. Advocates discussed the merits of evidence thus obtained and the judges' imperative to reach decisions based on firm evidence allowed the development of 'torture creep'. Legal rules were, then, both debated and circumvented. But to what extent were they challenged? In some cases, writers supportive of the tortured used representations of their suffering, often highly coloured, to win sympathy for their sufferings and, in the process, challenge the legitimacy of the judges involved. The fourth-century historian Ammianus Marcellinus, for example, supplied lurid details of the torturers of nobles at Antioch suspected of treasonable conspiracy (*History* 29.1.23):

> The racks were tightened, the lead weights brought out, along with the ropes and whips, and the whole place echoed with the ghastly shouts of instructions amid the clanking of the chains, 'Hold, clamp, tighten – away!' as the assistants carried out their dreadful task.

But this is not evidence for a broader humanitarian challenge to torture as a means of getting evidence. As a fellow-member of the city's ruling class, Ammianus was naturally upset by the torments undergone by his friends and associates, but elsewhere he welcomes the richly deserved incineration of crooked officials and other villains, showing that he had no objection to the infliction of pain on principle.[13] Although the legitimacy of the process might be questioned in specific cases, where the innocent were being unjustly made to suffer, this was far short of challenging the use of judicial torture itself to get at the truth. Attacking the misbehavior of agents of the state was not the same as attacking the state itself.

The advent of the Christian Empire in the fourth century AD might encourage hopes of a more humanitarian approach to torture, by commentators if not by the

state. But for the Church Father, Augustine of Hippo, judicial torture was a regrettable, but continuing necessity, because of the ignorance of the human judge (by contrast with the omniscience of God). For Augustine, it was the ignorance of the facts on the part of the judge, which generated the injustices perpetrated by the torture of suspects and witnesses alike (*City of God,* 19. 6). Blurring, perhaps deliberately, the divide between torture as investigation and what we would see as torture as punishment, Augustine argued that the system inflicted pain equivalent to that of punishment on the innocent as well as the guilty; the 'ignorance of the judge' was thus disastrous for the innocent and, worse, the process designed to get at the truth of a man's innocence (or guilt), and avoid the conviction of an innocent person, might well end up killing the innocent whom the judge had tortured to establish innocence. Yet the process itself could fail for numerous reasons: innocent witnesses could be tortured, though not involved with the case; the accused might make a false confession; people died under torture before being convicted; honest prosecutors might find themselves frustrated and punished in their turn, because witnesses may lie and defendants under torture may refuse to admit guilt. For Augustine, the system was deeply flawed, yet, as he argued, it was also accepted by judges as a necessity and, even when they got things wrong, they could not be blamed as they did not intend harm.

Social attitudes to torture in history were circumscribed by general cultural expectations – as they still are today. A fourth-century school book described for the benefit of small children learning to read various scenes that could be witnessed in the Forum, among them a judge inflicting 'the usual list of tortures', publicly, on a bandit, who, despite his denials, is duly convicted and dragged off to execution.[14] Such scenes were to be expected in the large cities, and the school book seems to draw the expected moral lesson, which was not that torture was wrong but that the bandit got what he deserved. Augustine is often, and rightly, criticised as 'the advocate of salutary pain, the theorist and supporter of legitimized violence'.[15] Yet his culture was that of his time, a time when judicial torture was the accepted and, in cases of doubt, the only way to arrive at the 'truth'. He did lodge limited protests against the use of torture on ecclesiastical opponents (*Letter* 133.2) and laid stress on the importance of intercession and forgiveness, but he believed in, and at times exploited for his own ends, the power of emperors, the right of the judge to execute wrongdoers, the 'torturer's hooks' and the right of masters to correct slaves and fathers to discipline children (*Letter* 153.16).

Judicial torture and the Christians

The torture of Christians for their faith illustrates how the rules failed, or more accurately, were altered by the exigencies of judicial procedures. Going by the rules, the use of torture on Christians appears to be anomalous. The aim was not to extract information to get at the truth, although there were exceptions because the Christians were suspected of law-breaking in their secret rites: when Pliny, governor of the Black Sea province of Bithynia in the early second century CE, put two slaves 'whom they call deaconnesses' to the torture (Pliny, *Letter* 10. 96), it was not to

force recantation but to check on the existence of criminal practices (for which Pliny found no evidence). Christian martyrs were (allegedly) all too eager to announce themselves guilty as charged; the statement 'I am (a) Christian' (*Christianus sum*) was formulaic. The official process appears to have sought to achieve public recantation on the Christian's part, which would be evidenced by their offering sacrifice or incense to the emperor and cursing Christ; this would both diminish the number of Christians and deter the rest of the Christian community.

The martyr accounts emphasise the tortures to underline the message about the courage of their witness. That literary and propagandistic purpose may well obscure the real techniques and aims of the authorities, which were to destroy what they saw as a subversive organisation, which challenged the authority of the emperor by denying formal observance to his cult, and angered the gods on whose protection and favour the whole Roman community relied. But the authorities were also worried about allegations of cannibalism and incest, which Christian apologists themselves tried persistently to refute. Confusion continued to exist about why Christians were legally suspect and what should be done about them throughout the second century. However, both Pliny's emperor, Trajan (98–117 CE) and his successor Hadrian (117–138) insisted that Christians had a right to due process and that they were not to be anonymously accused or hunted down. Despite this, mob lynchings, in which the local provincial governor was complicit, continued to take place, along with the continued judicial – and punitive – torture of Christians (*Passion of Polycarp,* Smyrna, 155 CE; Eusebius, *Church History* 5.1, on the martyrs of Lyon, 177 CE).

Whatever the technicalities of their treatment, the use of torture as part of court practice to encourage apostasy marked a significant departure from the limited and carefully regulated use of torture for interrogation. Christians were not 'questioned' to force them to admit their Christianity, as would have been the case in a conventional hearing, but to make them renounce it. Local prejudice and doubtless genuine fear of divine anger generated a new court practice in the use of torture which was not recognised by the rules and which became so ingrained in the system (despite the relative infrequency of its use, as numbers of Christians were small) that it could not be dislodged. This was not, therefore, intended to be torture as punishment or execution, both of which were against the rules, but the creation of a different kind of 'example', the undermining and splitting of the Christian community by the forcible creation of apostates.

Why did this change occur? Although the legal interpreters, and those modern writers who have analysed judicial torture, were clear that the infliction of pain for purposes of discovering the truth was distinctive and could be regulated as such, popular culture and usages were less scrupulous about such distinctions. People died under torture; it would not always be clear to the casual observer whether the torture was judicial or punitive, especially as the same judge presided over both. Moreover the public display of judicial torture blended with that of the infliction of pain in the course of public punishment, and the function of the latter was both to reinforce the social order – and to entertain. As we have seen, convicted lower-class criminals (and some Christians) were 'sentenced' to be thrown

to the wild animals in the arena (and might be kept in prison, pending the next games, *Digest* 48.19.29); but no part of the sentence formally stipulated that they should be dressed in the robes of pagan priesthoods, as was the proposed fate of Perpetua and her friends at Carthage in 203 (*Passion of Perpetua* 18. 4–5), or dressed up as Hercules before being burnt alive (Tertullian, *Apology* 15.4–5); such refinements on the judge's part were both discretionary and habitual.

Between 303 and 313 CE, Christians, especially in the eastern part of the Roman Empire, were subjected to state-sponsored persecution. A series of imperial laws were passed, authorising the authorities to take action against the Christians. Their churches were destroyed and meetings forbidden, the sacred books were seized and the clergy and other Christians imprisoned and publicly tortured in bizarre ways. Accounts by alleged eyewitnesses, notably Eusebius (*Church History,* Books 8 and 9), stage the conflict as one between the steadfast witness of Christ and the emperors and local governors, who are cast as the bloodthirsty and tyrannical, even sadistic, representatives of an unjust state.[16] Resisting torture and refusing to recant enhanced the value of the martyrs' witness (the original meaning of the word) to their faith. However, by definition, such martyrs 'witnessed' for themselves alone, their stance harmed no one but themselves and they were prepared to abide by the consequences of their witness, which fell only on themselves. Their philosophy and that of the modern suicide-bomber as martyr are a world (and 1500 hundred years) apart.

While Christians understandably emphasised the sufferings of the innocent, the concern of the authorities was with perceived threats to state security. Such competing perceptions – and representations – of reality were irreconcilable. Yet, even in the most biased of Christian accounts, it is possible to discern a rationale for the behavior of the authorities, which was based on the perceived threat posed by the 'atheist' Christians to the community in general and the emperors in particular. The issuing of the first persecution edicts coincided with attempts to burn down the imperial palace by agents unknown (Lactantius, *On the Deaths of the Persecutors,* 14, blaming one of the emperors), whom the authorities could have identified with the Christians; and further suspicions may have been aroused by outbreaks of disorder in Cappadocia and Syria, which are credited by Eusebius with prompting further anti-Christian measures (*Church History* 8.6.8). Suspected arson against the emperors and revolt counted, in law, not as religious dissidence but as treason and, as we have seen, the civil rights of all subjects could be suspended if treason was at issue.

The Christians were also a threat to the whole social order because they denied the existence of all gods but their own; the fear was that the atheists would so anger the gods that they would vent their wrath on the Roman Empire as a whole (a view justified by a series of military, political and economic catastrophes in the third century). In this connection, the use of torture, outside the rules but for a recognised purpose, namely the protection of the community, became the judicial norm. The purpose was to change the world-view of the tortured, thus destroying the atheist: by renouncing their faith, the Christians also were forced to change their whole philosophy. Apostates would thus publicly acknowledge the gods and

the divinity of the emperors by offering sacrifice and receiving a certificate that they had done so. Like George Orwell's Winston Smith in *1984,* they would 'love' the ancient equivalent of Big Brother (not to be confused with a UK Channel 4 series of the same name). As an analyst of North African martyr stories put it, 'torture creates a new world, one in which the world construction of the torturers replaces that of the victims *in the minds of the victims themselves.*'[17]

Where techniques of interrogation (as, under the rules, they were intended to be) are abused and such abuse is public, observers with their own agendas are not usually slow to react. Already, by Eusebius's day, martyr-acts were both propaganda and literary genre and Christians who came after him produced elaborate accounts of torture, in order to enhance the status of past Christian martyrs. In these the martyrs have names and places of residence and they are often in a group. They bear witness at length and with extraordinary eloquence, they 'wear out' the torturers and their masters, they go to death confident of their place in heaven. It may be worth a pause to contrast this image with what is witnessed by the torture pictures of Abu Ghraib, where the victim has no name, no family, no face (for it is covered by a hood) and is given no words. Yet the witness of that image is no less powerful for its silence.

The Roman Empire of Constantine (306–337 CE) and his successors was itself Christian, at least as far as the religion of the emperors went. With the threat removed, commemoration of martyrs no longer ran the risk of subverting the state, as the state itself was now Christian. Acts of the Martyrs, written in retrospect, retained the dramatic juxtaposition of suffering saint and the tyrant as torturer, but the aim was no longer to subvert pagan emperors but to celebrate the forerunners of the triumph of Christianity. Lurid accounts of torture sustained and overcome were a form of entertainment, morally elevating but no longer a challenge to the social or divine order. Christians no longer needed to have their nerve steadied in face of persecution and their resolve strengthened by saintly exemplars; the cults of the martyrs were part of the liturgical and ceremonial life of the Church, but martyrdom itself was no longer a threat either to the state or to the Christians themselves.

Conclusions

The aim of this paper has been to offer some thoughts on judicial torture in the Roman Empire as a cultural construct. This approach may seem cold-blooded. It is hard to be dispassionate, when torture and the infliction of pain in general arouse strong emotions and, in many modern cultures, including that of this writer, revulsion. One form of modern discourse on torture is to insist that it (whatever 'it' is) should be abolished or, at the very least, where practiced in other sovereign states, not condoned and limited where possible. I have suggested above that there may be practical difficulties with this. When torture is conceptualised in a broad sense, then we are looking at the creation of rules which will prevent the infliction of gratuitous pain not only by state authorities but also by other groups bent on behavior designed to both injure and terrorise. Part of what

this paper argues is that such cultural assumptions were, and by extension are, not universal.

However, I would also suggest on the basis of the Roman precedent that to concede that the use of torture should be condoned, even under strictly controlled, rule-governed conditions, is in effect to sell the pass. Roman rules on the administration of judicial torture were clear on its purpose: to establish the truth as part of a process of interrogation. All other rules followed from this principle. The use of torture was prohibited in the absence of other evidence, and it was initially confined to slaves. As the aim was to provide evidence and not to punish, it was not expected that those tortured should die as a result of their experience; moreover, torture was not to be used as a punishment (although criminals once convicted were subjected to painful and humiliating punishments, defined as such, not as torture). Infringement of these rules could result in appeals from the local judge to the emperor. Yet almost all these rules and conventions were increasingly diluted or ignored over time.

How did this happen? I have argued that the rules were stretched because of two imperatives, the judicial requirement to arrive at the truth and a casual attitude to safeguards created by a sense of threat to imperial security and the social order. As we have seen, a vigorous controversy existed in antiquity as to whether 'truth' could actually be extracted or ensured by these means – yet the practice persisted. In their eagerness to arrive at the 'truth' imperial judges surreptitiously extended the use of torture beyond the slave to the poor free person. The trend was assisted by the precedent of the suspension of exemption from torture, where treason was suspected; the definition of treason itself also expanded and with it the application of torture to citizens of every level. The prohibition of using torture to inflict the death penalty appears often to have been ignored in practice, notably by governors and judges dealing with Christians. In the case of the Christians torture was used in a manner never recognised by the rules to change belief. Again, perception of a threat, in this case to the 'peace of the gods' justified the suspension of legal safeguards.

Even for the Romans, more inured to pain in their daily lives, torture was an emotive subject. Indignation was vividly expressed about the torture of the innocent, both by the pagan Ammianus and the Christian celebrants of the sufferings and witness of the martyrs. Such indignation was also harnessed by Christian writers in the service of propaganda; the injustice of the state torturer was an indictment also of the injustice of those in charge of the state. But while the abuse of torture was challenged, no serious alternative to the use of judicial torture was put forward, even under the Christian Empire of the fourth century and onwards. Such measures, though harsh and therefore repugnant to Christian ideas of justice and the reformation of the criminal, were nonetheless rendered necessary, in Augustine's eyes, by the ignorance of the judge, whose humanity debarred him from the knowledge of the truth vouchsafed to God alone. In common with his contemporaries, the most enlightened of Christian thinkers was still a prisoner of the culture of which he was part.

Perhaps the most gloomy lesson to be drawn from all this is that rules and safeguards alone may not be enough to guarantee the rights of the accused or the suspect where national security is believed to be at stake. The Roman system laid down clear rules, there was an apparatus for enforcement, and judges' decisions were subject to appeal. Yet a combination of judicial laxity, cultural indifference to pain (unless inflicted unjustly) and an ever prevalent sense of threat expanded the role of the torturer and the numbers of those likely to end up as his victims. Given the historical fact of 'torture creep', we may and probably should reject the ancients' concession that the use of judicial torture may sometimes be justified; deciding as a world community on internationally binding rules for interrogation and then enforcing that decision is the real challenge we face.

Notes

1 Page Dubois, *Torture and Truth* (London: Routledge, 1991), 153.
2 Ibid.
3 J.H. Langbein, *Torture and the Law of Proof. Europe and England in the Ancien Régime* (Chicago: University of Chicago Press, 1977), 3.
4 M. Peel, *Rape as a Method of Torture* (London: Medical Foundation for Care of Victims of Torture, 2004), 11.
5 See G. Abbott, *Rack, Rope and Red-Hot Pincers: A History of Torture and its Instruments* (London: Headline, 1993), for practices in the Tower of London in the sixteenth century).
6 G. Clark, 'Desires of the hangman: Augustine on Legitimized Violence' in H.A. Drake (ed.) *Violence in Late Antiquity. Perceptions and Practices* (London: Ashgate, 2006) 137–146.
7 J.H. Langbein, *Torture and the Law of Proof*, 12–16.
8 Tony Honoré, *Ulpian: Pioneer of Human Rights* (Oxford: Oxford University Press, 2002), 85.
9 P.D.A. Garnsey, *Social Status and Legal Privilege in the Roman Empire* (Oxford: Oxford University Press, 1970).
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11 Ammianus Marcellinus, *History* 28. 1.24; and, J. Matthews, *The Roman Empire of Ammianus* (London: Duckworth, 1989), 212–215.
12 K.M. Coleman, 'Fatal Charades: Roman Executions Staged as Mythological Enactments', *Journal of Roman Studies* 80: 44–73.
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14 See A.C. Dionisotti 'From Ausonius' Schooldays? A Schoolbook and Its Relatives', *Journal of Roman Studies* 72: 104–105.
15 G. Clark, 'Desires of the Hangman', 146.
16 J. Harries 'Constructing the Judge: Judicial Accountability and the Culture of Criticism in Late Antiquity' in R. Miles (ed.) *Constructing Identities in Late Antiquity* (London: Routledge, 1999), 229–232.
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3 Is torture ever justified?

Torture, rights and rules from Northern Ireland to Iraq

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Introduction

The rules of war – both general and civil – have long included a complete ban on torture. In the aftermath of the 9/11 attacks in New York and Washington, defences of 'coercive interrogation' – in some circles at least seen as synonymous with torture – became, if not commonplace, certainly much more respectable than they had been. And for many who were critical of this development, this seemed almost unprecedented. Yet their historical memory is playing them false. There have been other contexts, and other situations in which similar reactions can be noted, and to assess the efficacy and applicability of such attempts in the current context it might perhaps be the case that we should examine other occasions. One such case is Northern Ireland.

The Good Friday Agreement of 1998 signalled a profound transformation in the politics of Northern Ireland. The stagnation that had long paralysed the region was broken up. Old certainties were undermined and those engaged in Northern Ireland acknowledged it. Against the backdrop of the end of the Cold War, Sinn Fein with the backing of some (but not all) of the IRA engaged in a series of attempts to negotiate new political structures; a process which owes much to the ideas of constitutional nationalism espoused over many years by John Hume and the Social Democratic and Labour Party (SDLP). The Blair Government, following the example of the previous Conservative Government, engaged in dialogue with Sinn Fein/IRA and made public its readiness to rethink constitutional arrangements to enable new institutions with broad cross-community support to emerge. Tony Blair, as British Prime Minister, went further than his Conservative predecessors with the unprecedented step of acknowledging and apologizing for some of the more tragic aspects of the British legacy in Ireland, including the events of Bloody Sunday which arose directly from anger over the British use of internment and interrogation in the Province. More importantly for this chapter has been the attempt by scholars, politicians and those engaged in post-conflict politics to understand the legacies of the 'long war' in the Province and the consequences of the way in which the security forces waged the campaign against terrorists not only on the streets of Ireland but in its special detention camps and prisons.

It is, as war is waged in Iraq, an important time to take stock of the lessons of Ireland. The terrorist attacks of 9/11 on the United States transformed our understandings of the threats posed by terrorist and paramilitary groups. The activities of al-Qaeda and terrorist atrocities in locations as diverse as Bali, Kenya and Madrid all seemed to herald a new and spectacular age of violent conflict demanding extraordinary responses by liberal states. There has been understandably a rush to understand the motivations of these men (and women) of violence. It may be accurate to see Irish paramilitaries and politics as rather homely in comparison to the al-Qaeda network and the struggle over the decommissioning of paramilitary materials as rather trivial compared to the potential for a WMD attack on Western subways and institutions. Yet, hopes in Ireland for a permanent peace face a number of continuing difficulties. There is continued opposition to and suspicion of the settlement on both sides of the communal divide and continued paramilitary activity. There also remains a substantial British military presence. There is also of course the legacy of grief in the province for those whose families and communities have been affected by the thirty years of violence. Indeed, these victims are now expected to accept into mainstream politics some of those who perpetrated the violence. The politics of reconciliation are therefore not easy. Part of this problem is that for three decades a different code of conduct was applied to the politics of the province. Human rights and civil liberties were suspended on a routine basis. It is also the case that Northern Ireland remains perhaps the startling example of a developed liberal state using extraordinary and illegal methods to resolve a terrorist threat.

This chapter revisits the politics of Northern Ireland to examine how and why torture came to be used in the context of a liberal state such as the United Kingdom and to ask what the ramifications of interrogation/internment and the abrogation of human rights have been. One question is what role did interrogation techniques play in extending or ending the conflict. To accomplish this task, this chapter is divided into several sections. The first looks at some particular issues raised by the practice of torture in general, paying particular attention to the arguments of Henry Shue and Alan Dershowitz; the second explores the policy of the British Government and the use of detention and interrogation in order to critically assess the criminalization of terrorist activities and the onset of a human rights discourse; the third examines the special case of terrorists as civil prisoners and the political roles such individuals gained as agents in their own right. The chapter concludes by way of a discussion of the intersection of political and civil rights alongside the use of terrorism and torture in the contemporary age.

Torture: some preliminaries

To explore the more general issue of torture, we want to focus on the divergent views of Henry Shue and Alan Dershowitz on justifying torture.[2] Shue's essay, published in *Philosophy and Public Affairs,* aims to challenge the possibility that torture could ever be justified. His examination of 'just combat killing' reveals that torture cannot meet the standards it sets out. He begins with the classic just

war (*jus in bello*) distinction between combatant and non-combatant to say that in as much as just combat killing can never be just when it involves non-combatants, torture of non combatants could clearly never be permissible. Moreover, he suggests that torture of anyone is effectively an assault on a defenceless adversary and, at least on most understandings of the just war, that automatically casts someone as a non-combatant. He also however, uses another distinction: that between what he calls 'terroristic torture' and 'interrogational torture'. Terroristic torture – which Shue believes to be the dominant type of contemporary torture – is held to mean torture undertaken to intimidate those other than the victim. 'The victims suffering – indeed the victim – is being used entirely as a means to an end over which the victim has no control.'[3] What Shue calls 'interrogational torture', a *jus in bello* practice, is torture to gain information. Terroristic torture, consequently, becomes a *jus in bello* case; but, Shue concedes that interrogational torture might, at least plausibly, be seen as satisfying a just combat rule. However, Shue's argument here is that purely 'interrogational torture' is very unlikely to occur and anyway, it assumes in advance of the evidence that the person has the required information. If they do not, there is no way that the 'torturers' could know it and so the compliance test could never be met. Finally Shue comments on 'the ticking bomb' defence of interrogational torture arguing in such circumstances that it might be morally permissible; however, the possibility of such a scenario remains highly unlikely. As a defence, as Shue suggests, this is about as flimsy as it gets.

On the other hand, Alan Dershowitz argues that we need to legalize torture in order to bring an inevitable practice into some legal normality.[4] Dershowitz is clear that his normative preference is against torture. In light of the continuing use of torture in many countries party to the international convention banning the use of torture, it is necessary to debate the norms surrounding the complicit use of torture. The distinction is important as it paves the way for his proposed 'torture warrants'. Like Shue, Dershowitz begins his examination of torture from a 'ticking bomb' scenario. An examination of such a scenario reveals that citizens, within a threatened country, acknowledge that in such a situation torture would, in all likelihood, be used, but that such a practice ought to be used, at best, in a worse case scenario. Unlike Shue however, Dershowtiz proposes a legal means through which the practice is monitored and evaluated calling into the debate the legal arm of domestic government in order to balance the ability of law enforcement and intelligence officers to protect the citizens all the while maintaining the rights of those accused of (potential) terrorist activities.

The crux of Dershowitz's arguments rests on the notion of necessity. The defence of necessity, in his opinion, exists so as to fill the grey area not covered by legislative and judicial procedures. Left undefined, the discretion to use torture in order to acquire information is open-ended and rests on the moral decision-making capacities of the intelligence gatherer. In this situation the boundaries of acceptable and unacceptable behavior are purposefully vague and, in the opinion of Dershowitz, unfair to all parties involved. By suggesting the use of a torture warrant he thus seeks to create a situation whereby the

acknowledged use of torture conforms to the rule of law associated with any democratic regime; namely, in the hands of an independent judiciary. Albeit an imperfect situation, due to the fact that torture remains a last resort, the judiciary is able to evaluate, on a case by case situation, the merit of the use of torture and thereby impose a system of checks and balances creating, in the process, a normative criterion for the use of torture.

At the heart of the matter, both Dershowtiz and Shue remain against torture and would, in a normative context, deny its use; in the present situation however, Dershowtiz presents a pragmatic solution, in line with the principles of democratic governance in which torture can be controlled. Dershowitz thus presents a summary account, examination and defence of torture which differs significantly from that of Shue. Shue, on the other hand, remains steadfast in his opinion that torture remains an unacceptable practice. He finds himself at odds with the position of Dershowitz denying an openness which the later author believes is necessary in order to reign in its practice. Taken together these two pieces highlight many controversial aspects of the torture debates. They highlight the roles of the actors involved in the practice of torture – the intelligence community, the judiciary and those upon whom the practice is inflicted. We wish to address these controversies paying particular attention to civil and political rights in order to shed light on the current War on Terror through an examination of the case of Northern Ireland.

The Irish case

Although it is now rather fashionable to recognize the impact of international events such as the end of the Cold War on the politics of Ireland,[5] influence of a potent kind was exercised by the international civil rights agenda of the 1960s. In January 1967, in part inspired by civil rights movements in the United States, the Northern Ireland Civil Rights Association was founded and drew support across both communities to bring about the abolition of discriminatory practices in the region. The nationalist slogan of 'equal rights' drew international attention and proved exceptionally damaging to the reputation of the Stormont regime. Brian Faulkner, under pressure from the Civil Rights movement, Westminster, and the demands of an ailing economy instigated reforms that granted the minority a greater degree of equality in employment, housing and electoral legislation and proposed a reconstruction of the security apparatus. Not surprisingly, reform met resistance from parts of the unionist community, which saw livelihood and government now threatened by the demands of an increasingly restless and articulate minority.

The first bloody encounter of the troubles occurred in Londonderry/Derry on 5 October 1968 when marchers clashed with the police. The eruption of violence on the streets and the wholesale movement of populations in urban areas into separate communities of Protestants and Catholics led to the formation of local vigilantes which in turn contributed to the resurgence of paramilitary groups. The scale and intensity of the sectarian violence throughout the summer of 1969, plus

the inability of the Royal Ulster Constabulary (RUC) to maintain order resulted in a request from Stormont to the British Labour Government for the deployment of additional troops to support the police.

The Labour Government, under pressure from Dublin, which itself threatened not to stand idly by as Belfast burned, embarrassed by international media coverage and explicitly appealed to by a minority group whose political representatives had hitherto refused to accept the authority of the British had little option but to respond to the crisis.[6] British troops arrived on the streets of Belfast and Londonderry/Derry in the summer of 1969 after a period of intense deliberation by both the British military and politicians.[7] Initially, troops were welcomed by the Catholic community, just as British troops appeared to have been welcomed in Iraq, which believed itself defenceless against sectarian attacks. Seven thousand refugees were reputed to have moved across the border into the Republic of Ireland. The Lynch Government in the south established camps for 'refugees' on the southern side of the border, called for a United Nations Peacekeeping force to be deployed and objected to the emergency legislation invoked by Stormont.[8]

The British Labour Government at this point eschewed the notion of taking direct control. The deployment of British troops in large numbers was not intended to be permanent.[9] Attempts were made to reassure those in both communities that what might be termed an improved status quo would prevail: the Union and Stormont would continue but action on discrimination would be taken. As a result of the findings of the Cameron Commission appointed in March 1969 to investigate the causes of the violence, public housing came under the control of the Northern Ireland Housing Executive and little political power was left in the hands of local councils, which were viewed by Westminster as the source of sectarianism.[10] Lord Hunt's recommendation that an independent police authority be set up, the RUC be disarmed, the Ulster Special Constabulary (USC) disbanded and a new part time force, the Ulster Defence Regiment (UDR), be set up under the General Officer commanding the Army was also implemented in attempts to render the institutions of the North acceptable to the minority community.[11]

Reform of this, however, did little to ameliorate either unionist or nationalist anxieties. Unionists resented the negative findings of the Hunt report and this was compounded by suspicion of a Labour Government regarded as sympathetic to the nationalist cause. Unionist anger especially in working-class areas was also reflected in the reinvigoration of paramilitary organizations which dedicated themselves to what Bruce has termed 'pro-state violence'.[12] On the Loyalist side most notable, or notorious were the Ulster Volunteer Force (UVF) and the Ulster Defence Association (UDA) which, in response to Republican paramilitary activity engaged in random attacks against Catholic communities. The IRA, notable only by its absence in the early stages of the 'troubles' (graffiti within Catholic areas had identified IRA with 'I Ran Away' noting its feebleness in protecting the minority areas) re-emerged in Catholic areas.[13]

In a bid to deal with the threat posed by the IRA and a general rise in street violence, Stormont, backed by the newly elected Conservative Government invoked emergency legislation and on 9 August 1971, introduced a process of internment without trial. In September 1971 the then British Home Secretary stated that the aim of the policy of internment was to

> hold in safety, where they can do no further harm, active members of the IRA and, secondly to obtain more information about their activities, their conspiracy and organisation, to help the security forces in their job of protecting the public as a whole.' [14]

The public remit for internment was therefore twofold. First, it was justified on the grounds of public safety to take violent young men off the streets and ensure that they could not conspire to affect public safety; the second to gain information about terrorist organisations.

Special prisons, including on ships, were established and filled, at least initially, with just those drawn from the Catholic religion. Some of these incarcerated were subjected to 'interrogation in depth'. The techniques used during interrogation inspired a public outcry and two public inquiries.[15] Rather than containing the violence, these actions along with the use of curfews and house searches, resonant of British military campaigns in the colonies, fuelled the conflict. Internment led to a campaign of civil disobedience, to prolonged street violence and to an escalation of support within Catholic communities for the paramilitaries.[16] The IRA was therefore in the period of internment able to increase its levels of violent attacks – so the number of explosions increased from 79 in July to 142, 186, 155, 117 and 123 in the months from August through to December.[17] This of course raises the question of how exactly public safety was enhanced by the process of internment. At the time, some sources claimed that certain security aims were achieved, claiming that 160 of those interned on 9 August were indeed active members of the IRA.[18] The problem was that the intelligence upon which the arrests had been made was flawed and many of those arrested turned out not to be members of the IRA at all. From 9 August 1971 to 14 February 1972, 2,447 people were arrested. Yet, it was not just a matter of imprisonment. Of those 342 interned on 9 August, twelve (according to some sources the number of those subjected to this treatment was actually fourteen)[19] were also subjected to so-called interrogation in depth or torture.

The intersection of rights and torture

In Ireland, those men selected for 'interrogation in depth' became known as the 'guinea pigs' and were interrogated through what became known as the 'Five Techniques'. According to Peter Taylor part of the interrogation process consisted of food deprivation and a limited amount of water to drink. Suspects were made to stand against a wall for a total of 245 hours with each period lasting between four

and six hours. It was also the case that hooding of the 'suspects' took place, as did beatings. Perhaps most controversial was the use of 'white noise' to disorientate. One of those subjected to the Five Techniques described the process thus:

> Time means nothing. The tiredness was greater than anything else. I collapsed several times because I couldn't stand it any longer. I was bundled against the wall again. I received a few slaps. I tried to remonstrate with the people but to no avail. The hood was tied tightly and securely around my neck. It was like a canvas bag and the strings were tied round the epaulettes (of the boiler suit). They then started the Five Techniques. The 'white noise' I can only describe to be like compressed air or steam hissing from a pipe. The degree varied from time to time. Sometimes it was soft and at other times it got very loud, almost like ear-piercing. It was terrible. You completely lost it altogether.[20]

In response to public disquiet over the use of these techniques, the Prime Minister Edward Heath announced that the Five Techniques would not be used in the same fashion again.

Aside from the use of the Five Techniques there were, during the early 1970s, also allegations of the use of electric shock torture on suspects. Five men claimed to have been given electric shock treatment at the Palace barracks. After representations from lawyers, the complaints were upheld and Heath personally ordered that there should be no further electric shock treatment.[21] Indeed, for a short period in the spring and summer of 1972 there appears to have been a suspension of 'torture' in the province as the British Government sought an agreement with the IRA on a ceasefire. This was a familiar pattern in the Province in that the use of certain interrogation techniques was dependent upon the political context. In times of crisis/emergency, internment and interrogation appeared to have been the fallback position of the authorities which prompted the death of prisoners and increased violence. In the week following the first batch of those interned, 20 people died, sixteen of them shot by the army and two by the IRA. During 1972, there were extraordinarily high levels of conflict in the Province. A total of 103 soldiers, 41 police and 323 civilians were killed. Such levels of violence and the military response raised the question of Westminster's objectives in Ireland. But the crisis led to a reliance on torture by the authorities and in turn sparked an even greater degree of violence. The British Government became engaged in a massive military campaign, in which they suspended normal judicial processes and engaged in the colonial politics of repression. It was in this climate of violence and the onset of a rights discourse and activism which promoted the British Government from 1974 onwards to change the terms of engagement with the Province and the terrorists alike.

From 1975 onwards, Britain, first under a Labour government and then under the Conservative government of Margaret Thatcher, implemented policies designed to redefine the problem of Northern Ireland as one of criminal activity, not a political or constitutional struggle. Successive British governments had refused to declare a war against the IRA and, unlike in colonial struggles, there had

been no open declaration of a state of emergency in Northern Ireland.[22] Furthermore, British politicians associated with Northern Ireland in the late 1970s and 1980s were reluctant to concede the use of the term 'war' or even 'civil war' to describe events in the region lest the very use of the word confer a degree of legitimacy upon the IRA. Yet throughout this time the use of torture did not cease. In September 1976, the European Commission on Human Rights (ECHR) delivered its verdict on the use of the Five Techniques during the early period of internment declaring that Britain was guilty of torture but when the case went to the higher authority of the European Court of Human Rights two years later the finding was dropped, although Britain was still found guilty of 'inhuman and degrading treatment'.[23] Within a year there were reports of many terrorist suspects being ill-treated whilst being detained at the RUC's holding centre in Castlereagh, Belfast. The centre had opened in 1977 and this coincided with a major increase in the number of complaints against the police in respect of ill-treatment during interrogation. There were 180 complaints in 1975, 854 in 1976 and 671 in 1977. The ill-treatment of prisoners in this situation recalls the normative distinction made by Dershowitz: namely, the veiled use of torture in order to acquire information of terrorist activities. It brings to bear an interesting example in a democratic country, engaged in the discourse of human rights, on how to approach the regulation of torture when in fact it is being employed behind closed doors.

Castlereagh, as well as her sister Gough Barracks in Armagh, were designed in such a way as to increase the sense of isolation of those held. The cells did not have windows and neither did the interrogation rooms. Both were in fact special interrogation centres capable of achieving positive, if not questionable, results. Castlereagh provided the evidence which saw scores of paramilitaries put behind bars. Perhaps even more crucially from the point of view of security forces, the interrogations at Castlereagh provided evidence to 'lift' members of the IRA off the streets. The techniques employed were claimed to be an 'intensive interview' process but there were clear grounds to believe that there was also ill-treatment of those held. In addition to descriptions of general beatings and of suspects being made to stand in various 'stress' positions, the Association of Forensic Medical Officers reported that there was evidence of ill-treatment. Castlereagh therefore proved controversial and in November 1977, Amnesty International sent a team to the Province to investigate the allegations of abuse while in custody. The Amnesty team concluded in May 1978 after examining 78 cases of alleged ill-treatment that the maltreatment of those held warranted the establishment of a public inquiry.[24] In pragmatic terms the high rate of confessions and the methods used to enforce the process of interrogation provided the IRA with the means, a sympathetic population, and the justification, in some minds, for a political counteroffensive through the prisons and the prison population of Northern Ireland.

The role of the judiciary in Northern Ireland began to take on an increasingly prominent role at this point of the conflict. In 1972 Lord Diplock headed a Commission which recommended that trial by jury for terrorist offences should be abolished in the Province as jurors were often intimidated by paramilitaries on both sides. The Diplock Courts were used for many of the inmates detained in

Castlereagh and Gough Barracks and allowed for their confessions, obtained in a questionable manner, to be heard in a legitimate institution. In order to make it easier to obtain convictions, the Government changed the law so that such confessions could be accepted just so long as the Diplock judge was certain that they had not been the result of treatment which was inhumane and degrading. In a way which recalls the 'torture warrants' advocated by Dershowitz, the Diplock courts, on the surface, reveal a legal institution which sought, above all else, to respect the rule of law, and the rights of the accused. In the absence of a jury, the judge presiding over such cases acted as a balance assessing the needs of the public safety, the role of the intelligence and police communities aware of the civil and political rights of the accused. The public debates thus reflected a normative distinction on how best to proceed, a task which fell to the Northern Irish judiciary.

Prisons – 'Special Category status'

Historically the IRA has always seen prisons and what occurs within the prisons as a central part of the struggle with the British. At the start of the conflict, Republicans used the prisons to try to demonstrate their legitimacy as recognised combatants in a war setting. In 1972, Billy McKee, quoted above, led a hunger strike in Belfast Prison, which resulted in the granting of what was known as special category status – a form of 'political' recognition for Republican and Loyalist prisoners. As a result of this, prisoners were held in segregated compounds and would impose their own discipline and regulate affairs in much the same way as POWs did. The movement away from the tacit recognition of the IRA as a 'legitimate' opponent was evidenced in 1976 as part of the drive to treat the terrorists as quite simply criminals. This led to the withdrawal of special category status from paramilitary prisoners which ended the distinction between prisoners for ordinary and political crimes. After March 1976, prisoners convicted of terrorist offences were categorized as criminals. Up until this point 'political' prisoners had been permitted certain concessions; they had been allowed to wear their own clothes and had the freedom to associate with other political prisoners.[25] The problem here was that this seemed to be the opposite of the argument that the government had used in 1971.

It was primarily but not only Republican prisoners though who after 1976 challenged the Government on this issue.[26] Some Republicans though refused to wear prison uniform and dressed only in blankets. The dispute escalated from 'blanket' protest, through a 'dirty' protest and finally in October 1980 into 'hunger' strikes. During a second hunger strike, the Thatcher Government refused to make concessions and ten strikers died. These hunger strikes were a turning point in internal, European and international perceptions of the British position in Ireland. For Sinn Fein, the election of Sands, a former detainee, confirmed the viability of entering candidates for election as it paved the door for two other hunger strikers to be elected to the Parliament.[27]

This was the era in which the Provisionals really made the decision to pursue a political/electoral as well as a paramilitary strategy for ejecting the British from Ireland. Buoyed by the negative impressions both at home and abroad created by

the British attitude towards the hunger strikers, IRA leaders opted for a dual strategy of the 'Armalite and the ballot box'. At this point the rhetoric of political and civil rights, combined with human rights activism, began to play an increased role in the campaign against the British Government policies in Northern Ireland. Not only did this strategy challenge the legitimacy of government action, it further alienated the Irish populace by bringing about more violence and alternative means with which to quell the problems.

This period of so-called normalization and criminalization saw the intensification of the 'dirty war' in Ireland. The constant crisis over the use of interrogation in many ways led to security policy being driven underground bringing about the use of special forces in order to eradicate the terrorists through armed force. While the use of special military forces had been part of the British Army campaign against the Provisionals since 1971, the deployment of the SAS in 1976 had marked an escalation of the military effort to defeat the Republican paramilitaries. Controversy and grievance escalated when members of the Catholic community alleged that a 'shoot to kill' policy was operated not only by the SAS but also within segments of the RUC in collusion with the British intelligence services. Allegations of security force collusion with Loyalist paramilitaries also became commonplace and indeed still reverberate today. So too do the allegations of assassination squads.[28] While doubts must assail anyone trying to evaluate the record of the British security forces in Ireland during the 1980s,[29] the alleged 'shoot to kill' policy operated by the SAS, the supergrass trials and the strange affair of the Stalker inquiry and the subsequent refusal to prosecute anyone in the wake of the Sampson inquiry on the grounds of national security left serious question marks over the behavior of some segments of the army and RUC.

The Northern Ireland troubles reflect an interesting mix of military and political attempts to curb violent terrorist activities all the while respecting the civil and political rights of those involved in the conflict. The invocation of the Diplock Courts reflects one political approach which sought to alleviate some of the tensions within the conflict. The use of the judiciary demonstrated the value of prosecuting terrorists as criminals and not as military combatants; hence the move away from a POW status within the prisons. As Paul Wilkinson has pointed out on numerous occasions the use of the military in order to curb terrorist activities is a double-edged sword, generating at first a sense of political safety and government capability; however, the long-term engagement of military endeavours in such a practice can ultimately challenge the pathway to peace and the cessation of the conflict.[30] In the case of Northern Ireland however, the invocation of a rights discourse alongside the use of the judiciary provided an alternative context to pursue the ends which motivated the conflict in the first place. Political prisoners who adopted the language of rights were offered a platform into the political arena all the while arguing against the use of torture in detention facilities. Similarly, the police and military accused of employing interrogation torture had to justify their practice in light of Lord Diplock's recommendations. The normative context of this debate reveals an interesting series of questions beyond the original torture warrants advocated by Dershowitz.

Conclusion

By way of conclusion it is helpful to return to the opening essays which structure this work. Much reference has been made to the arguments of Dershowitz throughout the chapter, but very little mention has been made of Shue's conclusions. Thus, a quick summary of the reasons for the use of torture in Northern Ireland will quickly move into a discussion of the more general aims and ends of torture in an international, and contemporary, context providing a framework in which to examine the Global War on Terror and the practice of torture therein.

There appear to have been five main reasons why the Army and Police 'tortured' and continued to torture terrorist suspects in Northern Ireland. The first was to gain intelligence. Torture helped to get information rather rapidly. There is of course a question mark over the quality of that information. The second was to obtain confessions to be used in the special courts. The third was perhaps to mete out punishment. Torture was always more frequent after a soldier or police officer had been killed in an area. There is thus an element of revenge on the part of the authorities and thus a spiral of violence was created. Fourth, torture helped create a climate of fear and it was hoped would perhaps lead to a weakening of support for the terrorists. Fifth, the news of torture it was hoped would create fear in the minds of 'younger' terrorist suspects that they would indeed suffer mistreatment and thus they would 'break' more easily in the cells.[31] At the end of the day, however, the question of whether such method 'worked' remains controversial.

The first thing to say, in light of this, is that both kinds of torture discussed by Shue appear to have been present in the British case. The early internment system was essentially a form of interrogational torture. As the prisoners housed in both Castlereagh and Gough Barracks have shown, the end of such a practice was their own terror. Its practice violated their humanity and their dignity seeking only to inflict fear and denying any form of control over the victim. In the same vein, the later shoot to kill policy adopted by the military spread fear within the community denying individuals any recourse to security within the community. Both instances reflect the immorality of terroristic torture in denying to community members their civil and political right to security of person.

It should also be said that terrorist groups, as well as the government, also employed terroristic torture, but far less usually interrogational torture. The 'punishment beatings' provide one good example of inciting fear within the community. The distinction of such a practice, from that of government policy and military procedure, is that they occurred outside the rule and regulations of civil society and its institutions. While such practices are broadly speaking in line with Shue's discussion of terroristic torture, such instances pose serious problems for Dershowitz's reasoning. In fact, the use of torture outside of institutional rules and regulations reveals one potential flaw in his arguments; namely, how can torture employed outside the structures of legitimate political bodies be regulated? If torture, stemming from terroristic activities, provides one means of illegitimate actors entering into the foray of legitimate political practices, much remains to be said about the political structuring of the rules regulating torture in relation to the laws

of armed conflict in International Relations. It begs the question, not posed by Dershowitz, of whether normative discussions about the regulation of torture actually normalize activities inviting actors into the sphere of legitimate politics who ought not to enjoy such a distinction. Moving beyond the problems of Northern Ireland, one can begin to pose a variety of questions in light of the Global War on Terror and the ensuing fallout.

The United States-led incursion into Afghanistan paved the way for the 'Long' War on Terror and the development of a Coalition of the Willing to further involve themselves in the War in Iraq. These actions paved the way for the creation of detainment camps at Guantanamo Bay for individuals suspected of having links with al-Qaeda and harbouring terroristic tendencies. President George Bush declared these individuals to be outside the parameters of international law, and in particular the Geneva Conventions. Thus they were labelled 'unlawful combatants' calling into question the rights of such individuals as well as the jurisdiction of the United States to detain and question these individuals at length. In January of 2002 the United States Department of Justice declared its authority to suspend the Geneva Conventions which was followed by a Presidential directive on 7 February 2002 in which President Bush declared that all political detainees would be treated humanely in accord with the inherent dignity of persons. The grey area in which the United States government and military were operating, however, reveals startling similarities to the conflict in Northern Ireland before the intervention of Lord Diplock and brings to mind the defence of 'necessity' criticized by Dershowitz and Shue alike.

Indeed, this grey area has gone on to pose considerable problems for those charged with the maintenance of political prisoners in the War on Terror. As the stunning photos of the practices occurring in Abu Ghraib prison reveal, the lack of clear institutional guidelines paves the way for an abuse of authority and practices which contravene the universal humanity and dignity associated with a global rights discourse. At Abu Ghraib prison, it is clear, like in the Northern Irish conflict, terroristic torture was a common practice employed by the US military. In an international scenario such as this however, questions remain as to which institutions have a legitimate mandate to investigate, and if necessary, hold individuals and institutions responsible for such practices. Indeed, the normative framework of torture warrants in this case are long past their sell-by dates, begging the question of whether proactive or reactive rules of engagement are necessary.

If one is to draw on the example of Northern Ireland one final time it is to recall the particular role of the Diplock Courts in the conflict. As these bodies demonstrate, the attempt to create a legal regime to regulate the use of torture, be it interrogation or terroristic, failed. Indeed, at one level it can be argued that the attempt to regulate the practice of torture actually prompted wider instances of abuse, as evidenced in the shoot to kill policy advocated by the military. It recalls the argument made by Shue that any attempt to control a practice like torture requires an almost superhuman level of moral probity and institutional efficiency which it is simply impossible to assume can exist in any institutional structure when those structures are under pressure. As he illustrates with the example of

Israel, Dershowitz is keen to argue that the judiciary is well placed to handle such pressure, yet he does not go on, in this essay, to discuss how such a structure could ultimately function in an international realm.

The challenges faced by the Government in Northern Ireland suggest that it would be very foolish to assume that torture can be – at least in the formal sense – rule bound. By its very nature it presses at the usual boundaries we would use to attempt to regulate and control even highly morally questionable practices (such as just combat killing) and that suggests in turn that the safest rule governing the use of torture is a total prohibition. Yet, Dershowitz is surely right to claim that it is a practice that is being used, it is being used by *our* states, in the here and now, and it cannot be enough simply to repeat endlessly that 'we shouldn't do it'; we do and we will continue to do so, in flagrant disobedience to treaties entered into and practices solemnly foresworn. So how do we think about that in the context of the rules that govern any practice, domestic or international?

A rule that is simply flouted with impunity, very swiftly ceases to become a rule of any real sort at all. With this in mind, the current structuring of international law, the role of the International Criminal Court (ICC), and its relationship with the United Nations (UN) provide one recourse to examine instead, how to punish those states who engage in the practice of torture taking the role of the judiciary one step further than that envisioned by Dershowitz. The ICC has jurisdiction over torture in the International Arena. Its jurisdiction complements that of domestic state legislation and its international obligations in order to curb its practice. Its authority rests on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and through this Treaty has established a relationship with the UN, in particular, its Committee Against Torture. This committee is charged with the responsibility of investigating instances of claimed torture. Its particular value lies in the fact that it is able to investigate both matters of state and individual abuse and practice and for this reason is capable of holding both states, institutions and individuals accountable.[32]

The relationship of these two institutions may, at some point in the future, be capable of creating and enforcing international law prohibiting the use of torture, thereby creating a reactive regime which denies a particular role for the 'ticking bomb' defence of necessity in international politics. At the moment the framework that these institutions sustain simply stands as one arena in which discussions can be held in order to generate a series of norms and rules reflecting the abhorrent attitudes surrounding the protracted use, and abuse, of torture. With this in mind, the focus of the debate remains firmly in line with a reactive system of rules which seeks, wherever possible, to punish those who engage in such practices. Consequently, the current debate on the regulation of torture ought to centre less on what rules might (or might not) exist to constrain or regulate a practice like torture and focus instead on what rules we might have (and how we might enforce compliance with them) to punish those who violate such rules as there are. Without some such discussion it seems to us that the 'rule' of an absolute prohibition on torture runs the risk of simply draining way into the sand.

Notes

1 We would like to thank Amanda Russell Beattie who greatly assisted in editing this piece for publication. Our thanks also to Nick Rengger for valuable comments.
2 Both authors found in Sanford Levinson, (ed.) *Torture: a Collection* (New York: Oxford University Press, 2004).
3 Ibid., 53.
4 Ibid.
5 For instance, see Michael Cox, 'The War that Came in from the Cold' *World Policy Journal* XIV, 1 (Spring 1999).
6 For an assessment of British policy in the weeks before deployment of troops see Peter Rose, *How the Troubles Came to Northern Ireland Contemporary History in Context Series* (Houndmills, Basingstoke: Macmillan Press, 2000) Chapter 7.
7 Ibid.
8 J.J. Lee, *Ireland 1912–1985 Politics and Society* (Cambridge: Cambridge University Press, 1989), 430.
9 James Callaghan, *A House Divided: The Dilemma of Northern Ireland* (London: Collins, 1973).
10 Disturbances in Northern Ireland: Report of the Committee Appointed by the Governor of Northern Ireland (Belfast: HMSO,1969).
11 Hunt Committee, Report of the Advisory Committee on Police in Northern Ireland, Cmd, 535, (Belfast, HMSO, 1969).
12 Steve Bruce, *The Red Hand. Protestant Paramilitaries in Northern Ireland* (Oxford: Oxford University Press, 1992).
13 See M.L.R. Smith, *Fighting for Ireland: The Military Strategy of the Irish Republican Movement* (London: Routledge, 1995), 83.
14 House of Commons Debates. Vol. 823. col.8. September 22, 1971.
15 See David A. Charters, 'Intelligence and Psychological Warfare Operations in Northern Ireland' in *Journal of the Royal Services Institute for Defence Studies* (1977), 122: 22–27.
16 P. Hillyard, 'Law and Order' in J. Darby, (ed.) *Northern Ireland: the Background to the Conflict* (New York: Appletree Press, 1983).
17 See R.J. Spjut, 'Internment and Detention without Trial in Northern Ireland 1971–1975: Ministerial Policy and Practice' in *The Modern Law Review* 49 (November 1986), 712–740.
18 House of Commons Debates. Vol. 823. Col.10. September 22, 1971.
19 John McGuffin, *The Guineapigs* (London: Penguin, 1974).
20 Quoted in Peter Taylor, *Brits: The War Against the IRA* (London: Bloomsbury, 2001), 70.
21 See McGuffin, 43–77.
22 R.Weitzer, 'Contested Order: The Struggle over British Security Policy in Northern Ireland' in *Comparative Politics*, 19 (1987) 293–295.
23 See Peter Taylor, *Provos: The IRA and Sinn Fein* (London: Bloomsbury, 1997), 96.
24 See Kevin Boyle, Tom Hadden and Paddy Hillyard, *Ten Years on in Northern Ireland: The Legal Control of Political Violence.* (Nottingham: The Cobden Trust 1980), 39.
25 Michael Von Tangen Page, *Prisons, Peace and Terrorism: Penal Policy in the Reduction of Political Violence in Northern Ireland and the Spanish Basque Country, 1968–97* (London: Macmillan, 1998), 62–63.
26 Ibid.
27 Bobby Sands, the leader of IRA prisoners in the H-block and a hunger striker defeated Harry West of the UUP in a by-election for Parliament and was elected as an MP for Fermanagh and South Tyrone. During a second hunger strike, the Thatcher Government refused to make concessions and ten strikers, including Sands himself, died.
28 Peter Taylor, *The Search for the Truth* (London: Faber and Faber, 1987); John Stalker, *Stalker* (London: Harrap,1988).

29 This sentiment is expressed by Charles Townshend, in Townshend, 'The Supreme Law: Public Safety and State Security in Northern Ireland' in Keogh and Haltzel, *Northern Ireland*, op.cit. p.98. See Mark Urban, *Big Boy's Rules. The SAS and the Secret Struggle against the IRA* (London: Faber and Faber, 1993).

30 See for example, Paul Wilkinson, *Terrorism versus Demoracy: The Liberal State Response* (London: Frank Cass Publishing, 2001). He argues that only in extreme cases should militaries be used in domestic conflict and when employed, they ought to establish a strong working relationship with civil authorities and police institutions in order to ensure that the civil and political rights of civilians are not harmed.

31 McGuffin, op. cit. 156–157.

32 This relationship was further cemented on the 16 December 2005 when the General Assembly, on the advice of the committee and with the cooperation of the ICC adopted Resolution A/RES/60/148 which recognized, again, torture as a war crime and crime against humanity reaffirming simultaneously the goals, aims and ends of the International Treaty banning the use of torture.

Part II

Rules and legitimacy

4 Cannon before canon

The dynamics of *ad bellum* rule change

Janne Haaland Matlary

Introduction

This chapter seeks to show how and why the 'failed states' agenda became securitized after 9/11 paying particular attention to the legitimating function the 'humanitarian intervention-cum-failed state' has for pre-emptive and even preventive use of force as it relates to regime change. It demonstrates that legitimation, particularly from the United Nations Security Council (UNSC), has become a necessary, but not sufficient, condition for using force among Western states. The chapter will substantiate the thesis that norms relating to the use of force have been reinterpreted in an ever-widening manner as evidenced in the birth, and quick death, of humanitarian intervention practices. It is further argued that actual intervention practice has not led to any new rules for using force, intervening in the affairs of other states, nor engaging in preventive warfare. Rather the situation appears very unclear, as the rules for using force both in a reactive and pre-emptive fashion are severely contested. Yet this is where the state interest in using force is predominant at present. In the absence of UNSC and United Nations Charter (UNC) normative legitimacy all this chapter can conclude is that the legitimation – the necessary, but not sufficient condition – for such use of force may draw on norms found within the Responsibility to Protect (R2P).

The formal norms for using military force – the *ad bellum* norms – are enshrined in the UNC, art. 2.4, which forbids both aggression and coercive diplomacy. Only the UNSC can grant a mandate to use force, other than in situations of self-defence. However, throughout the Cold War states rarely resorted to the UNSC for a mandate: the informal rule for using force was that of 'spheres of interest'. The Soviets claimed their sphere and the Americans theirs, and the superpowers tolerated the use of force in these spheres. While protesting politically, they did nothing militarily to hinder the adversary. The wars fought by the superpowers were 'proxy' wars. Thus, in the Cold War period the rules of the game differed greatly from the norms of legal canon and there was seemingly no need for the legitimacy that the UNSC mandate provides. Legitimacy for using force was derived from the 'sphere of interest' logic.

The post-Cold War period saw a renewed attention paid to the role of the UNSC in legitimizing the use of military force. Its legal abilities are the same today as in the Cold War period, but the UNSC plays a new and important role as the bestower of legitimacy for using force. States seek a mandate before they attack. However, the UNSC bestows mandates for interventions that never happen, such as in the case of Rwanda which never reached the Council's agenda due to the veto powers of the five permanent members. Similarly, China ensures that there is no robust mandate to intervene in Darfur. Despite this, a UNSC mandate is deemed necessary, even for the US.[1] While states continue to invoke Art. 51 – the article that allows the use of force for purposes of self-defence – for attacks on other states they continue to seek the UN's approval for their interpretation, as in the case of Afghanistan. Consequently, the use of military force without a UNSC mandate is increasingly problematic, demonstrating that the use of force increasingly revolves around the UN and the UNSC to an unprecedented degree. The rule for getting to the point of using force has changed; there is a need for a UN stamp of approval.

The rules about *when* to use military force have also changed. State-to-state war has largely been replaced by internal wars where Western states increasingly intervene in the face of major humanitarian crises leading to the development of 'humanitarian intervention'. In the 1990s Western states intervened in Somalia, Bosnia and Kosovo and sent military missions to Macedonia and a number of African states. The lack of clear security interests made these interventions special. They seemed to signal that Western states were willing to use force to rectify gross violations of human rights and to stop genocide. However, as the cases of Rwanda and Darfur demonstrate, evidence of genocidal acts does not suffice to prompt intervention. The call for additional forces for Rwanda from the UN Secretary-General in 1994 was made to 21 states, all of which declined to intervene.[2] In Darfur, the government of Sudan has managed to stop effective international action. Also, the Bosnian intervention from the air mainly came about after and not before the genocide in Srebrenica. In the case of Kosovo the driving force for the intervention was the lesson from Screbrenica, not one that was politically repeatable.[3] The era of humanitarian intervention was both short-lived and shaky in terms of foundations. The UN legal norm of intervention derived from article 7 of the UNC articulating 'a threat to international peace and security' had been stretched to include threats to democracy and human rights.[4] The meaning of these terms was therefore increasingly empty. The inclusion of a right to intervene to restore democracy in Haiti in 1994 is an example of such 'stretch'. It implies that virtually every crisis may be included in this definition, something which lessens its authority and exclusivity. After all, the UNSC mandate for the use of force was intended to be for exceptional cases.

The events of 9/11 provided a new platform for intervention through the adoption of the rhetoric of 'regime change'. The 'responsibility to protect' became fused with anti-terror pre-emption, as 'winning the peace' became a corollary of 'winning the war'.

Norms, rules and rule change

In this chapter *norms* refer to legal norms, particularly those of the UNC which concern *ad bellum* matters. They are the norms that pertain to the UNSC in Ch. VII and Art. 51 on self-defence. They have not changed since the creation of the pact, and are not likely to change. The UNSC is the supreme arbiter of these norms, especially and uniquely in terms of determining whether Ch. VII's 'threat to international peace and security' applies.

In the period under study, the post-Cold War period, the interpretation of this key concept has widened as evidenced by the undertaking of UN bodies leading to the development of the International Commission on Intervention and State Sovereignty (ICISS) and the High-Level Panel's Report *A More Secure World (*2004). The outcome of these proceedings provided a normative interpretation of non-intervention as a political norm, leading to the development of the Responsibility to Protect (R2P).

Is this normative evolution of *ad bellum* definitions important? Here we need to distinguish between the actual use of force and *rules* for using force. By *rule* it is meant an accepted practice for using force by the so-called international community, which includes the major Western states and above all the UNSC. A new *rule* for using force is thus something different from mere *use* of force; it is the result of *legitimate and consistent military practice.* It is no longer enough that major states condone intervention practices, as in previous times. But UN approval alone is not enough either. There has to be a general consensus, particularly for the general public, for the use of force.[5] The slippery term 'legitimacy' implies that interventions that divide Western states, such as Iraq, do not contribute to creating a new intervention rule. Thus, much use of force continues to be single events – not forming a consistent pattern and not having the support of legitimacy in the form of UN normative approval.

Legitimacy is supplied by the UN and other states, largely in the cases where there is a humanitarian crisis. But the lack of consistency in intervention practice is prevalent; UNSC mandates and/or diagnoses of genocide, as exemplified in the cases of Rwanda and Darfur, are not followed by actual interventions. This lack of practice of a possible new rule weakens the rule. Likewise, when interventions happen without a mandate, this also weakens the rules. Thus, the question: is there a new rule for using force based on R2P today? It would appear that the answer is no. There is a new norm, but there is no new rule. There is also no new practice, which refers to the actual interventions that take place.

This is further substantiated when we look at the so-called 'humanitarian interventions' that did take place: Bosnia only after the fact of genocide, confined to air power mostly; Kosovo, with air power only and as a direct consequence of the failures in Bosnia; and Somalia prior to this, the only case that came about to assist humanitarian aid work, but which suffered from extremely weak military contributions and where the US withdrew after its own losses. This evidence clearly shows that the willingness to intervene is

extremely low in humanitarian crises. We thus have the situation that a normative change has taken place, but without a rule change because states do not practise what they teach. They do not intervene to stop humanitarian crises, but they preach that it should be done, even to the point of making this an obligation, a 'responsibility to protect'.

But the story does not stop here. The normative support for R2P may be invoked in cases where the 'failed state' is directly relevant in new anti-terror threats, thus providing some legitimacy for pre-emptive or even preventive attacks. While states rarely use force to avert humanitarian crises, they do so when they perceive a threat that is existential to them: Fighting terrorism is on top of the threat hierarchy for NATO, as stated in the Comprehensive Political Guidance adopted at the Riga Summit, in the US National Security Strategy, both the versions of 2002 and 2006, as well as in the EU's security strategy (ESS).[6]

The fight against terrorism takes interventions to places that harbour terrorists, and these places have by and large been identified as so-called 'failed' states. Such states were the original targets of the R2P which sought to restore order introducing human rights and democratic practices therein; however, these states suddenly find themselves potential targets for intervention because of the terrorist connection, real or alleged. Jack Straw, the former UK Foreign Secretary further demonstrates this relationship in comments made on 14 September 2001. 'It is no longer tolerable that any state should harbour or give succour to terrorists. The international community must unite as never before to take determined action against the threat that failing and failed states pose to the global community.'[7] This act of sudden securitization of the failed state took place only three days after 9/11 and moves the failed state to the forefront of security policy; indeed to the very top of a state's security threat hierarchy. It makes the failed state the pre-eminent candidate for intervention, but only if the failed state in question harbours terrorists. Consequently, failed states have now become 'securitized'.[8]

The importance and relevance of the norm R2P here becomes clear; should a state wish to intervene in a failed state in order to hunt terrorists, it can invoke R2P as its basis for legitimacy. This is exactly what happened in the case of Afghanistan when a major NATO participation became desirable. The International Stabilisation and Assistance Force (ISAF) has a mandate of state building, not one of warfighting against the Taliban, which remains the province of Operation Enduring Freedom (OEF). As will be shown below, the Bush administration embraced state building – the R2P agenda – only when it became clear that this was necessary in order to get the Europeans, especially their publics, on board.

Moreover, OEF was undertaken with an entirely new reading of Art. 51 on self-defence. Interpreting the attack from al-Qaeda as an attack from the state of Afghanistan because the Taliban was protecting al-Qaeda – an undisputed fact – implies that self-defence against terrorism must have a *locus,* in the current international system, inside a state. Given evidence of state-terrorist

connections, one may now attack states that harbour terrorists. It should be recalled that this interpretation of Art. 51, novel and radical in its implications, was supported by a statement from the UNSC and by an alliance of 36 participating states. It thus had massive legitimacy. The NATO Council identified it as the first instance of an Art. 5 situation in its history. Here state threats of a traditional kind were replaced by threats to populations and values, akin to the understanding of R2P.

Also, this interpretation involved a new interpretation of 'imminence'. It took several weeks before the Taliban government was attacked, and the timing was not determined by any consideration of imminence, as the attack on the US had already taken place. Instead the consideration was one of preventing future attacks by destroying the infrastructure of the terrorists. As in the Bush administration National Security Strategy, prevention rather than pre-emption was the intention. The attack on the Taliban was therefore a preventive war.

The need for a new interpretation of the *ad bellum* norm in Art. 51 is only advocated by the US in its National Security Strategy although, as in the Afghanistan case, legitimated by the UN itself. We also see a certain recognition of this issue and its importance in the work of the High-Level Panel, as discussed below. However, only American scholars and politicians have engaged in this debate so far. Yet the fact remains that preventive and pre-emptive strikes and even interventions may be necessary in order to fight terrorists effectively. This is similar to the Afghan case where the evidence of Taliban–al-Qaeda links was strong.

The state practice of using force is based on the level of security threat, as suggested above. This is a truism, as the use of force is risky, costly and uncertain in terms of effect. It is therefore not surprising that humanitarian interventions rarely occur. Conversely, it is to be expected that interventions against terrorists will occur to the extent that the latter are perceived as threats to the intervening state, whatever the legal norms be.

But can such state practice be said to constitute a new rule for the use of force? This is the question that interests us in this chapter: below I substantiate these arguments in greater detail.

The new norm: the R2P, failed states and the case of Afghanistan

The current inconsistencies which surround the legitimacy and practice of *ad bellum* practices reflect the historical ideas and political goals which distinguish the United States and Europe.[9] European norms are more multilateral and require UN approval in order to use force legitimately; whereas the American norm relies more on unilateralism, coalitions ad hoc and legitimacy that stems from the perception of the threat itself. Whereas for the United States the role and authority of the United Nations plays little part in deciding whether or not to engage in military action for European countries its authority is extremely important. It is a point that is well documented in the controversies surrounding

the military activities in Iraq and the diplomatic rhetoric which lead to its undertaking. This section delves into the relationship between the normative ideas sustaining the R2P and the security agendas that have emerged since 9/11 which seem to advocate the pre-emptive use of force. An investigation into failed states in general, and the ongoing conflict in Afghanistan in particular provides the necessary documentation in order to proceed with this investigation.

What is a 'failed' state and how does it relate to the use of force? A 'failed' state is nothing but a state without government which fulfils its obligations to provide order, welfare and democracy to its people. The long debates about humanitarian intervention that gradually came to include state-building are now given a new name with a clear security dimension: the failed state that as such may threaten the world because it is a place where terrorism may develop.

In summer 2005, *Foreign Policy* published an index of failed states and a set of articles on the theme, arguing that 'America is now threatened less by conquering states than we are by failing ones'. Here the editors were citing the USNSS, but also hastened to add that Kofi Annan had diagnosed the problem of failed states thus: 'ignoring failed states creates problems that sometimes come back to bite us.'[10] Thus, the *good* – helping the failed state to become democratic – and the *expedient* – preventing security threats from terrorists or WMDs – meet in the failed state agenda.

The failed state concept became salient after terrorism was launched from bases and training camps in Afghanistan. As the editorial in *Foreign Policy* points out,

> failed states have made a remarkable odyssey from the periphery to the very centre of global politics … In the 1990s, 'failed states' fell largely into the province of humanitarians and human rights activists … Now, it seems, everybody cares. The dangerous exports of failed states – whether international terrorists, drug barons, or weapons arsenals – are the subject of endless discussion and concern.[11]

The failed states agenda has emerged in the multilateral UN setting through the steady expansion of the 'democratic entitlement'. The culmination of this can readily be seen in the UN Reform Panel's report *A More Secure World* (2004), where it is proposed that the UN should undertake the task of post-conflict reconstruction and democratization. These tasks are evident in ongoing peace operations, but they have not been enshrined as political 'doctrine' in the UN until now, in particular, the UN Reform Panel's suggestion that the UN itself may have to authorize such use of force, a point which will be discussed in the final section of this chapter. The UN support for Operation Enduring Freedom, the attack on Afghanistan, consisted in the endorsement of the US interpretation of Art. 51 of the UNC, and European states could easily support both this operation and ISAF, which was given a UN mandate. In the case of Iraq, however, the UNSC did not produce an explicit mandate. Most European states made their support conditional on the latter. In the same vein a doctrine for such use is articulated in the USNSS.

In the case of Afghanistan we see, however, a growing 'mission creep' from intervention claimed as self-defence against terrorism to increasing 'nation-building'. At first President Bush proclaimed a 'lengthy campaign' involving 'far more than instant retaliation'.[12] This was consistent with the insistence during his presidential campaign in 2000 that 'we've got to be clear to our friends and allies about how we use our troops for nation-building exercises, which I have rebuffed as a kind of strategy for the military'.[13] However, as it became clear that military success was dependent on the wider effort to establish stable rule, and also that support from European states depended on the willingness to assist in post-conflict work, the nation-building agenda was embraced.

However, this was supported by the arguments of doing good for its own sake. After the intervention had started on a traditional self-defence basis, the Bush administration started to use the language of values more and more. The Taliban oppressed women, the regime denied human rights of the most fundamental kind to its citizens, etc. As the US President stated in his 2002 State of the Union address, referring to Afghanistan:

> America will always stand firm for the non-negotiable demands of human dignity: the rule of law; limits on the power of the state; respect for women; private property; free speech; equal justice; and religious tolerance (…) we have a greater objective than eliminating threats and containing resentment. We seek a just and peaceful world beyond the war on terror.

Reconstruction, another euphemism for democratization or state-building, became the second primary goal for the intervention forces ISAF and 'Operation Enduring Freedom'. So-called PRTs – Provisional Reconstruction Teams – have been established in various locations in Afghanistan under ISAF auspices. They will assist in developing local communities. NATO is thus engaged in nation-building, mandated by the UN. Again security was a pre-condition for humanitarian aid work, and reconstruction followed as the logical next task.

The US view on 'nation-building' has been rather negative, both politically and militarily, although it has been undertaken by the US at times. Military doctrine emphasizes the view that war-fighting should be decisive and short, and that forces should withdraw as soon as they finish the military task. The Powell-Weinberger doctrine adds that military force should be used only when it will be successful, and notes that protracted engagements will easily lead to quagmires. In the 'Dobbins Report', ambassador Dobbins stated that after the Cold War, the US 'was free to ignore regional instability when it did not threaten US interests'.[14] Despite much more interventionism after the Cold War, the USA has been reserved. Dobbins noted that 'it withdrew from Somalia at the first serious resistance'.[15] Thus, in domestic US policy-making, nation-building is a controversial issue. There is institutional resistance in both the State Department and the Pentagon to this daunting policy-task, and 'successive administrations have treated each new mission as if it were the first, and more importantly, as if it were the last'.[16]

The renewed emphasis on the UN's ability to mandate the preventive use of force coupled with the acceptance of a post-conflict responsibility for state-building may both lead in the same direction; towards more of an 'intervention menu' that states can draw on if they decide to use force. Simon Chesterman concludes 'nation-building (invited or coerced) may form a substantial part of the on-going "war on terror" in the future'. He notes that 'as the aims (of the operation) evolved, so did the asserted motivations for US military operations'.[17] In November 2001, President Bush equated the Taliban with terrorism; in the State of the Union address in January 2002, the motivations included democratization, as cited above. Noting that nothing was done to remove the Taliban before the link to terrorism and al-Qaeda, it is clear that neither the 'failed state' of the Afghan political regime nor the humanitarian situation would have prompted an intervention. The desperate situation for women under the Taliban, for instance, should have been a prime candidate for an R2P intervention, but was never discussed as such.

The UN and state-building: The Reform Panel's report

The Reform Panel continues the work of the International Commission on Intervention and State Sovereignty (ICISS) with regard to the concept they entitled 'the responsibility to protect' envisioning a strong role for the United Nations endorsing an international collective security agenda. In so doing it recommends new criteria for the use of military force delving into the responsibilities and obligations associated with state sovereignty. It states that sovereignty implies responsibilities, and that these have become more pronounced and clear over the years:

> Whatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of state sovereignty, today it clearly carries with it the obligation of a state to protect the welfare of its own peoples and meet its obligations to the wider international community.[18]

That statement says two things: first, that sovereignty is contingent, changing with the times; and second, that contemporary definitions of sovereignty are explicitly tied to a state's obligations to its citizens.

What are the implications of such conditional sovereignty? Here the panel is equally clear: When a state is unable or unwilling to assume its responsibilities, 'the principles of collective security mean that some portion of those responsibilities should be taken up by the international community … to help build the necessary capacity or supply the necessary protection, as the case may be'.[19] Here we witness a major change with regard to the norm of intervention: sovereignty, based on conditionality, somehow reverts to the 'international community' when the state fails to meet its obligations of sovereignty. This can also imply 'protection', which in turn can mean the use of force. The logic of this connection between conditional sovereignty and intervention is obvious, but has

never before been spelt out so clearly in a UN setting. The panel continues to assert this new concept of sovereignty in even clearer terms, by stating that it is not only states' sovereignty – it is a 'shared sovereignty': 'The collective security we seek to build today asserts a shared responsibility on the part of all States and international institutions, and those who lead them, to do just that (fulfil the rights of citizens).'[20]

Part Three of the report deals with the use of force. Here it is first noted that the UN is also tasked to deal preventively with 'threats to international peace and security'. The Charter is cited on this important point: 'the framers of the Charter of the UN recognized that force may be necessary for the "prevention and removal of threats to the peace, and for the suppression of aggression or other breaches of the peace"'.[21] The authors go on to note that a system of collective security depends on a common understanding of certain common rules for the use of force; these must be both 'legal and legitimate'. When the use of force is legal and not legitimate, or vice versa, it will weaken the international legal order: 'one of these elements being satisfied without the other will always weaken the international legal order.' In sum, without public support for 'value-based' wars, a legal mandate is not enough. But public support without a mandate may be sufficient, as the case of Kosovo showed. But a mandate creates such public support in most cases and is for this reason the key variable.

This represents a considerable departure from the common positivistic and procedural notion of legitimacy which is the only one that officially can be derived from the formal UN rules themselves, namely, that only a legal mandate is a legitimate mandate. But as seen in the Kosovo case, ethical substance matters very much for the question of legitimacy. It is not always equal to a legal mandate, as also underlined by Kofi Annan himself in his statement on the lack of such in the Kosovo case:

> To those for whom the greatest threat to the international order is the use of force in the absence of a Security Council mandate, one might ask – not in the context of Kosovo – but in the context of Rwanda: If, in those dark days and hours leading up to the genocide, a coalition of states had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold?[22]

Here we see the 'good' – the ethical factor of preventing genocide and humanitarian disaster – becoming the basis for a less juridical concept of legitimacy. But the less important the legal mandate is in the building of legitimacy, the more it opens the way for ethical as well as *Realpolitik* factors to play the key roles. Chesterman fears a development where the UNSC may become a 'law-laundering service', since

> military action has taken place only when circumstances coincided with the national interest of a state that was prepared to act…. [S]uch an approach

> downgrades the importance of authorization to the point where it may be seen a policy justification rather than as a matter of legal significance.[23]

Art. 51: Anticipatory self-defence and terrorism

The use of force *preventively* represents the most difficult issue for the UN today. The Reform Panel pinpoints the main issue: can a state use force against *non*-imminent threats? Noting that the norm of self-defence is accepted as applying to pre-emptive attacks against imminent threats, the question raised by terrorism applies to non-imminence: 'The problem arises where the threat in question is not imminent but still claimed to be real: e.g. the acquisition, with allegedly hostile intent, of nuclear weapons-making capability'[24]. As to the question of unilateral action, the panel gives a clear 'no' to such use of force, because it would become a 'free for all' and endanger the world through the licence to attack without a multilateral process that would ensure that the reasoning and evidence are solid enough. The panel concludes that it 'does not favour the rewriting or the reinterpretation of Art. 51'.[25] Further, the need for anticipatory self-defence may be justified, but it is the UNSC and not the individual state itself that should be the actor: 'if there are good arguments for preventive military action with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to.'[26] Kofi Annan underlined this prerogative of the UN in his address to the 41st Munich Conference on Security Policy:

> Art. 51 preserves the right of all states to act in self-defence against armed attack. Most lawyers recognize that this right includes the right to take pre-emptive action against an imminent threat. However, as the panel points out, in today's world we may also face threats that are not imminent, but which could become actual with little or no warning, and might culminate in nightmare scenarios if left unaddressed. The Security Council is fully empowered by the Charter to deal with such threats. It must stand ready to do so.[27]

Having a legal mandate is therefore not sufficient to legitimize the use of force; conversely, *not* having a legal mandate does not imply that legitimacy for anticipatory self-defence is lacking. *If one can achieve legitimacy for the use of force in cases of humanitarian intervention without a UN mandate, logically this is also possible in cases of self-defence based on preventive use of force.* One such case could be if intelligence reveals plans for a terrorist attack to be carried out by a cell in country X, a failed state with no internal order and control. There is no time for political deliberation among UNSC member states, and the country which possesses the intelligence – often the superpower or a great power – moves to act with a military strike. It is fully possible to envisage a situation where only one state has such intelligence resources.

The legal debate: Weak states and anticipatory self-defence

International law stipulates that a state that allows its territory to be used for attacks on another state can also be deemed an aggressor. This is relevant for the terrorism discussion. The USNSS spells this out in the form of *weak* states as the main security problem:

> The US will disrupt and destroy terrorist organizations by defending the US, the American people and our interests at home and abroad by identifying and destroying the threat before it reaches our borders. While the US will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting pre-emptively against such terrorists, to prevent them from doing harm against our people and our country.[28]

Using force pre-emptively is recognized as a right in customary international law – but is the same true for anticipatory self-defence, which refers to non-imminent threats? Legal scholars have noted that recent state practice points to greater recognition of this concept; and, as pointed out, customary international law develops from consistent state practice.[29] The Israeli attack on the Osirak reactor in Iraq in 1981, although lauded by many politicians as very useful, was rejected as being inconsistent with the legal norm of self-defence by scholars.[30] By contrast, the Israeli pre-emptive attacks in 1967 were generally accepted because the imminence of the threat was clearly established. Despite this, however, legal scholars hesitate to embrace this case for fear of setting a precedent. In the USNSS there is a call for 'adapt(ing) the concept of imminent threat to the capabilities and objectives of today's adversaries'.[31] This is a very difficult and dangerous task, and one that only the US has called for. While the UN Reform Panel report underlines the exclusive right of the UNSC to mandate the use of force in such cases, it carefully avoids any discussion of criteria of such use.

The consequences of going down the road of non-imminence could be enormous, hence the reticence of the rest of the world community. The German attack on Poland in 1939 was presented as anticipatory self-defence, and led in time to the UN Charter's requirement that an armed attack occur before one responds. However, it can be argued that the non-territorial nature of terrorism as well as its hidden nature changes the threat picture so much that an altogether new interpretation of self-defence must be developed. As we have seen, the UN Reform Panel report clearly says 'no' to such, but nonetheless develops the norm of intervention into failed states and underlines that the UNSC must be ready to use force preventively in the case of terror. This greatly weakens the relationship of state sovereignty and non-intervention, or, put differently*, the territoriality on which these norms are premised.*

Among legal scholars there is dispute about the connection between weak state actors, who may be not only unwilling but also unable to deal with terrorists on their soil, and non-state actors, such as terrorists themselves. Can the weak state

be said to have lost sovereignty? This is precisely the issue discussed in the report of the Reform Panel, and which it answers in the affirmative. For instance, were Turkish military incursions into Northern Iraq (against alleged Kurdish insurgents) a violation of the sovereignty of Iraq even if that country did not exercise territorial control of the said territory? In this case, the UNSC did not agree that this was an illegal invasion. As Cassese points out in his authoritative study of the relationship between legality and military force, the general relationship between the two has been an intimate one – the legal rules have condoned political and military facts: 'A body of law gradually evolved under the impulse of convergent interests and exigencies of states' where 'most rules grant a wide sphere of action to states … and tend to legitimize situations that have acquired *de facto* force'.[32] Further, when force acts in new situations, international law has traditionally tended to condone and legitimize such new practices: 'moreover, if in the exercise of this almost unfettered freedom, they (the states) bring about new situations by force, the law gives its blessing to these situations.'[33]

Conclusion

I have argued that a rule emerges when states practise the use of force in a *consistent* manner, supported by the *legitimacy* of UN norms and public opinion/other Western states. In the case of R2P 'candidates', legitimacy was present, but states refused to intervene because failed states were not securitized. In the case of terrorism, the R2P norm provides legitimacy for interventions for the states that have not securitized terrorism – the European NATO allies except Britain – whereas a new interpretation of Art. 51 provides legitimacy for preventive and pre-emptive intervention when there is clear evidence of a link between the failed state and terrorists, as was the case for OEF.

The question remains: Does this signify an emerging new rule for using force in interventions into failed states? Clearly one case cannot establish a rule since we cannot talk about state practice even with a small number of cases, let alone one or two. The Iraq intervention confuses the picture because it was 'pegged onto' the 'war on terror' but had little to do with either terror or WMDs. Yet the US has routinely struck with missiles in the Sudan, Somalia and Afghanistan against terrorist camps, both prior to 9/11, afterwards and until the present. The case for a US rule for using force preventively/pre-emptively can therefore be made: the US will strike at terrorists wherever they be identified. This is consistent with the doctrine of the USNSS. This intervention rule is based on unilateralism: 'The mission determines the coalition', but a coalition is not necessary.

The Europeans, however, in this case including Britain and France insist on multilateral interventions and UN legitimacy. UN norms are not likely to support preventive strikes and interventions, but do support helping failed states and advocate the R2P.[34] Therefore, European states may come along, perhaps *post bellum,* in stabilization and reconstruction missions, as is the case with ISAF and with the limited NATO undertaking in Iraq. The point is that this presence in failed states strengthens the emerging rule for using force against failed states:

the US legitimates their interventions as a new type of self-defence according to Art. 51, while the Europeans prefer to keep the definition of what goes on within the R2P-remit. The ensuing *post bellum* UN mandate thus acts as a 'law-laundering' device, to paraphrase Chesterman.

To sum up the argument of this chapter, a new rule for using force requires consistent state practice and legitimacy in the form of normative support from the UN and 'fellow' states. Driving forces for rule change have however nothing to do with available legitimation, only with the security interests of states. But norms provide legitimacy for rules. In this respect the R2P norm may aid in establishing a preventive rule for intervention into failed states, especially on the part of European states.

Notes

1 Janne Matlary, *Values and Weapons: From Humanitarian Intervention to Regime Change?* (London: Routledge, 2006).
2 Trevor Findlay, *The Use of Force in UN Peace Operations* (Oxford: Oxford University Press, 2002).
3 Jennifer Welsh, (ed.) *Humanitarian Intervention and International Relations* (Oxford: Oxford University Press, 2004).
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5 Ibid.
6 European Security Strategy, adopted by Council of Ministers, 2003.
7 Statement by Jack Straw in House of Commons Debates, 14 September 2001; cited from online record of HC Debates at http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmhansrd/vo010914/debtext/10914-04.htm.
8 Barry Buzan and Ole Weaver, (eds), *Regions and Powers: The Structure of International Security* (Cambridge: Cambridge University Press, 2004).
9 In *Values and Weapons*, upon which this chapter draws extensively, I discuss what legitimacy consists of and why it is differs in the US and Europe.
10 'The Failed State Index' *Foreign Policy* (July/August 2005): 56.
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12 Cited in Simon Chesterman, 'Humanitarian Intervention and Afghanistan' in Welsh, *Humanitarian Intervention and International Relations*, 165.
13 Ibid., 167.
14 James Dobbins *et al*., *America's Role in Nation Building: From Germany to Iraq* (Santa Monica CA: Rand Corporation, 2003), xiv.
15 Ibid., xv.
16 Ibid., xxix
17 Chesterman, 'Humanitarian Intervention and Afghanistan', 167.
18 *A More Secure World: Our Shared Responsibility*, Report of the Secretary General's High Level Panel on Threats, Challenges and Change (New York: UN Publications, 2004), 17.
19 Ibid.
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21 Ibid., 67.
22 Secretary General's Annual Report to the General Assembly, 20.9 1999. UN Doc SG/SM/7136-GA, 9526.
23 Chesterman, 'Humanitarian Intervention and Afghanistan', 174.
24 *A More Secure World*, 63.
25 Ibid.

26 Ibid.
27 Comment at Munich Security Conference, February 2006.
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29 See, for example, Colin Gray, *International Law and the Use of Force* (Oxford: Oxford University Press, 2004), 130 and Antonio Cassese, *International Law in a Divided World* (Oxford: Clarendon Press, 1986), 232.
30 Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1991), 702.
31 *The National Security Strategy of the United States of America*, 15.
32 Antonio Cassese, *International Law*, 2nd ed. (Oxford: Oxford University Press, 2005), 3.
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34 Janne Matlary, *EU Security Dynamics in the New National Interest* (London: Palgrave Macmillian, forthcoming).

5 Preventive war à l'Américaine

In the fog of norms

Ariel Colonomos

Introduction

In the aftermath of 9/11, President George Bush declared that the US would act pre-emptively to fight the two major threats it faced: terrorism and rogue states.[1] The decision to go to war against Iraq soon followed this declaration. Shortly after the intervention, US leaders were severely criticized both at home and abroad. The common assumption is that this new security policy—pre-emption, or perhaps more accurately prevention[2]—created turbulence at three different levels: in the domestic politics of Iraq; in American alliance relations; and in the larger international security order. International legal critiques were prominent both prior to and following the war; because the US was not under attack and because it acted unilaterally, it had violated the most basic international legal prohibitions concerning the use of military force.

In the *fog of war*, the attacker moves in a *fog of norms* creating, in some cases, an even thicker fog of norms. Such is the case with the conflict in Iraq. The preventive war emerging out of the US security policy of 2006 created not only a situation of political and strategic uncertainty; the US created normative turmoil by challenging key norms within the just war tradition. This chapter will explore the reasons brought by the US when launching the war and the political, legal and moral tensions this has created. It introduced a justification for the use of force that parallels Israel's justifications for using force, whether in its past and ongoing conflict with the Palestinians or in its intervention into Lebanon in July 2006. A consensus prevails at the international level on the legitimacy and the functionality of the norm of self-defense. Acting preventively undermines the system that relies on this norm. As the US contemplates other forms of preventive military action—such as against Iran—the opposition between these normative visions also creates major political tensions. The US created a divide between states that share an "ethos of the offensive" and those that are opposed to prevention and scared by such an alternative, particularly its allies in Europe.

A preventive war *de facto* creates a debate over its legitimacy for three reasons. As it is a war of choice, a preventive war needs to be justified *ex ante.* Its justification should be more robust than in other cases such as defensive or humanitarian wars. Traditionally, legitimate sanction for engaging in warfare was

drawn from the just war tradition, in particular, the requirements of *jus ad bellum;* however, preventive security doctrines challenge the norms associated with *jus ad bellum.* Consequently, questions surrounding the proportionate use of force emerge, challenging ideas associated with the discourse of *jus in bello.*

The focus on *ad bellum* requirements, to the detriment of *in bello* practices, reflects the idea that Western societies welcome moral claims inspired by regret and resentment which seek to induce repentance and reparations.[3] Government lawyers, military analysts, humanitarian agents and doctors provide analyses and justifications for such wars. There are recurrent debates about the level of suffering of the vanquished as well as on the human and economic costs borne by the US (or more generally by the preventer). Costs are inflicted on the enemy and its society. Were these costs worth the outcome of the war? The proportionality of ends is an a priori criterion, though it is here being used after the fact, without however knowing when to make a final assessment of the war.

This is all the more difficult in the case of Iraq. The conflict can be divided in two phases. The first phase of the conflict has been very short. It took only a few weeks for the US army and the coalition to defeat Iraq. The second phase of the conflict has been ongoing for several years. It is hardly possible to know when it will come to an end up until which the US could be considered responsible for the turmoil affecting the country.

Finally, a rupture in a traditional normative order necessarily creates a debate on the value of the existing order. It has consequences for the way the international normative order is apprehended by different players: states, international organizations, NGOs, lawyers and intellectuals. The interaction between these different players creates conditions for a new definition of legitimacy and possibly changes in the normative order. It necessarily has some effects on the actual normative order even when it does not induce any changes, since its protagonists have to respond to a *de facto* situation which contradicts their set of rules and prevents (if they are able to) any forthcoming transgression.

This paper discusses norms as a specific form of rule. Gibbs makes here an interesting and useful typology of norms.[4] The author presents three types of norms: a collective evaluation of behavior; a rule that lies on a collective expectation of behavior; and a reaction to behavior. A norm is also a rule that can or cannot transform itself into a law and an idea that arises from various ethical traditions whether religious or secular. This chapter explores the dynamic nature of norms. In this paper I will focus more specifically on the second type, a norm as a rule that represents a collective expectation of behavior. There are many attempts to justify prevention: the Bush administration, as expressed in its National Security Strategy statements of 2002 and 2006, see it as a "necessity." Prevention exists within a collective expectation of security in the context of risk adverse Western societies. As I will show in the chapter, this norm also arises from an intellectual tradition, in this case the just war tradition and its conception of natural law.

The purpose of this paper is to understand the normative change that has occurred as a result of the United States choosing prevention for fighting what it

considers its new threats. I explore the changes that could occur as a consequence of the current situation. I examine historical reasons that have led to prevention and the factors—most often neglected as preventive war is mostly seen as an idiosyncrasy of the Bush administration and therefore as an epiphenomenon in the American history of war making—that favored it. My analysis reveals the impact on the international system because these factors are likely to continue to prevail and therefore affect future political decisions. They also structure the legal and normative problems that characterize the current situation. I make the case that preventive action creates a "Gordian knot" where politics, ethics and the law are tied one to the other. Finally, I imagine different possible future scenarios, possibly an untying of such a knot.

The idea of prevention in the making

Although prevention has a long history, it has been understudied. The main reason why it has been downplayed in the literature as compared to other types of war (war of conquest, defensive wars, humanitarian interventions) in the fields of history and political science[5] is that preventive war has been for the most part identified with offensive war. Indeed, this neglect results from a regrettable conceptual flaw: if the two concepts were strictly speaking the same, using the term preventive would make no sense.

Assuming that that there is such a thing as preventive war, there is an urgent need for a definition. In this chapter, I define preventive war as a specific category of offensive war that includes defensive aspects. Launching a preventive war has to be justified by strong arguments, that is justification is "part" of the war. Law and ethics are the two main fields where the coherence of justificatory arguments is put to the test. Institutions—including professional lawyers and ethicists—provide such arguments. When studying preventive war empirically it is therefore necessary to discuss those justifications; the "marketplace of ideas" is embedded within the battlefield.

Preventive war has many of the traits of a war of aggression. No conditions of direct necessity prevail when the decision is made. Offensive action is justified on the basis of a threat, remote in the case of prevention, immediate in the case of pre-emption. The decision to go to war is motivated by "just fear."[6] Such fear is to a certain extent subjective yet also relies on different types of evidence: the increase of the capacities of another state which expresses its hostile intentions vis-à-vis the preventer and previous provocations supporting the idea that the target is a menace.

A war of conquest does not require such a justification; this of course does not exclude the fact that a preventive war can be a disguised war of conquest. Preventive wars indeed have some of the traits of a war of aggression: they are launched by a strong state that wants to prevent a future change in the balance of power in its disfavour. One of its most common objectives is to destroy the means the potential challenger will use in order to affect that balance, for example nuclear capacities. That does not mean that every preventive war *is* always a

disguised war of conquest or that the preventer has good reasons to be truly concerned by the threat the target represents, notably to its citizens.

These characteristics result from a historical evolution in the terrain of military action in strategic thinking as well as in the Christian tradition of just war. The military doctrine of preventive war is more historically rooted than one might think. Preventive war is not a new form of war making.[7] The Peloponnesian war can be interpreted as a preventive war; Athens declares war against Sparta and attacks its allies because the Athenians fear that Sparta is a future threat for their security and they fear the ruthlessness of its regime, an account given by Thucydides, considered to be the first historian or theorist of international relations to have provided a military and political analysis and definition of preventive war. Other wars such as the Seven Years War fought by Frederick the Great and his British ally against the French are also commonly referred to as preventive.[8]

Preventive war was, of course, crucial in Cold War thinking, which has had some influence on the formation of the current military paradigm. The US contemplated the idea of a strike against Soviet nuclear sites until the early 1950s when the Soviet nuclear program was in its earlier stages.[9] At the strategic level, brilliant game theorists such as Joseph von Neumann supported the idea. Air power was the central tactical element; officers such as General Orvil Anderson, commander of the Air War College, were fully confident the US would have the capacity to destroy the Soviet installations. This idea was driven by mathematics, rational choice theory and technology. Nuclear weapons favoured a move to more offensive approaches to war.[10] Air power and the very idea of precision (the case for precision was made by another mathematician and game theorist, Albert Wohlstetter[11]) gave this idea a certain degree of plausibility.

It is all the more possible to justify a bold action when a normative tradition has opened the way for its justification. Such is the case of the just war tradition. It is commonly thought that, according to this tradition, defensive wars are the only just wars. Such is not the case. Its different authors gave room to other possibilities for justifying the use of force. Preventive wars are a very interesting case in this regard. Suarez considers that offensive wars must be efficient to be justified: their chances of success have to be very high (which is not a strong prerequisite for defensive wars, as one has no other choice than to defend oneself when attacked).[12] Such a view leaves a wide range of maneuvers when prevention is being considered as a reasonable option to counter future attacks. Offences are also considered a reason to launch an attack against a transgressor of a legitimate order, for if he is not punished, he would be encouraged to go even further in his attempt to harm. Authors such as Gentili[13] and Vattel[14] expressly considered a preventive attack to be legitimate if the preventer is confronted with an enemy that has a clear hostile intention to attack its territory.[15] They do not mention when and how this possibly could happen yet they accept the general rule of the preventive use of force.

Grotius's thought is more complex. Grotius considers offensive wars to be illegitimate. He is clear on one point, though: preventing the shift of the balance of power against one's advantage is not a legal justification of the use of force, it is—

as the history of armed conflict and the explanation of major wars amply suggests—a mere matter of "expediency."[16] Yet he considers that when there is a supposed hostile intention on behalf of another state some "measures of armed prevention" are legitimate.[17] Grotius also stresses the state duty to protect its citizens and therefore to prevent a "remote as well as an immediate aggression".[18] That does mean that he would favor war.

Grotius's complexity is ambiguous. In an early work written in 1604 (*De Jure Belli ac Pacis* is written in 1625) and discovered in 1864,[19] Grotius discusses prevention.[20] He states that the preventive use of force can be acceptable when one faces potential enemies who are well known for violating the rules of war, since a lawful response should not be expected.[21] Facing unlawful combatants, force would not need to be bound by law. In the current context of the "global war on terror," such words are very enlightening.[22]

Preventive action also highlights major debates in the field of international law. Preventive war introduced doubts and uncertainties in a legal framework which traditionally relies on the notion of self-defense. Indeed, anticipatory self-defense, the term most often used to characterize preventive action, is not an invention of neoconservative lawyers. While it has not been that prominent in the international realm there have been instances of preventive wars, for instance in the security policies of Israel. The 1967 War[23] and more recently the destruction of the Iraqi nuclear plant Osiraq in 1981 had already created a debate among jurists. Some of them—a minority—argued that the Osiraq strike could have been consistent with international law.[24] Yet, shortly after the bombing, the Security Council condemned the action in the strongest possible terms.[25]

Leaders who have sought to maintain the power of their states and have used force in order to do so have been strong critics of a restrictive interpretation of the norm of self-defense. It has been criticized on the grounds that its strict application would lead a nation to suicide if it were to be confronted by a serious threat. This case was made by Secretary Shultz when the decision to bomb Libya was taken in 1986. The old Bismarckian realist maxim could be invoked: "no leader would commit suicide to abide by international law." International law is challenged on another ground. According to the British representative at the UN who defended the US bombing of Libya, self-defense ought not to be a mere passive right, it should be considered as an active right. As natural law could authorize the anticipatory use of force, the just war tradition is ambiguous here, as is reflected in both the just war tradition and the history of warfare.

However, international lawyers have traditionally made the claim that preventive action was clearly a rupture from the international legal order and undermining this order would weaken the United Nations. An inequality of rights based on a differential of power would prevail. The norm of sovereignty would be weakened. For those who believe that ideals should play some role in foreign policy decision making, there is a split between those who see force as an acceptable means to impose justice abroad and those who do not.

The impact of the preventive use of force on post-9/11 politics

Morally, politically and legally preventive action reveals and creates several problems that affect the stability of the international system. Indeed, it undermines interstate relations and regulations, creates a rupture in the international legal order, and weakens the UN and sovereignty. It creates tensions in the fields of international security, human rights, military rules of engagement and international law. One of the strongest critiques American preventive action has to face is the claim that American exceptionalism undermines the accepted rules of interstate relations. Indeed, the rule of preventive war would fail the test of universalization. It would be hard to imagine a world where other states than the US or Israel would take unilateral preventive action in order to protect their interests and maximize their security. If other states express the desire to adopt prevention as their doctrine, even in the absence of war, this would create the conditions for great instability. Mutual suspicion would encourage any of two competitors to attack the other for fear of being attacked by surprise.

The preventive use of force has however some positive consequences. It creates an ample and rich debate in military doctrines, rules of engagement, human rights, international humanitarian law and international law. It fosters social interaction within different circles of experts such as security specialists, political scientists, philosophers, doctors and most of all lawyers, whether they are theorists or practitioners. Lawyers and ethicists now play a greater role than they did previously. A new US manual of the Law of Armed Conflict is about to be released (the last one dates back to 1956).[26] There are over 5000 lawyers in the US armed forces, and about 1000 lawyers working at the Pentagon.[27] At the White House, other lawyers are in charge of international affairs, whether they are diplomatic issues or war issues. In other words, a wide range of legal analysis plays a role in US security and foreign policy. Practical ethics has become an area of expertise for several normative theorists who work within the US military. About thirty PhDs now teach ethics in the different military academies of the country. These courses are sometimes mandatory, such as is the case at West Point. About ten of them also teach in war academies. Ethics has an educational and socializing function. There is also an increasingly practical dimension to this focus on ethics. The task of certain specialists of ethics is directly operational, as they are involved in the discussion of certain "real life" situations that confront soldiers on the ground. As they are in some cases in charge of writing ethical codes and field manuals,[28] ethicists also interact with lawyers creating an overlap between the ethical and legal domains, which reinforces their shared common background, the just war tradition.

Ethicists and lawyers are of crucial importance. They encourage the military to be more precise and to restrain its use of force. As it is more difficult to give an objective and fully convincing justification for preventive action, the US government and the US military developed new procedures of targeting and new rules of engagement[29] that led to minimize the number of casualties during the first phase of the combat when the US defeated Saddam Hussein's army. Precision serves as a line of justification for the use of force.

The war against Iraq and the Bush doctrine created turmoil in these different areas of expertise. Democracy has played its role even though as some argue, had the deliberation process really been effective, the idea of going to war against Iraq would have been less convincing than it was in 2003. Indeed, expertise has been more reactive than proactive. Nonetheless, it has encouraged humanitarian organizations to dedicate more resources to international humanitarian law whereas their main line of expertise had traditionally been civil law or human rights law.[30] It is unlikely that the US will face a direct attack on its soil other than a terrorist strike. Therefore, the US will probably not be put in a situation where it would have to fight an interstate defensive war. In such a context, preventive wars remain the option that is most likely, as threats will not fade away, whether because of the nuclear build-up of states which express hostile intentions vis-à-vis the US or because of the presence and activity of terrorist organizations. It is therefore not surprising that the US is preparing for a new battle: an ideological battle to justify its use of force. Such a battle is crucial in a democracy and for the sake of democracy as such.

The law is the most interesting area of debate where the preventive framework is being put to the test. Although there is much debate, it does not seem that most lawyers would want to make preventive war legal. However some law professors have taken a public stand in favor of the preventive use of force, such as Jack Goldsmith, Eric Posner or Robert Turner.[31] In addition to their publications, other scholars have also worked within the administration; such is the case of John Yoo who has become well known in the public arena for being involved in the writing of the "torture memos." Yoo strongly makes the case in favour of preventive action; one of his arguments is that the US is in a time of war and that therefore extended powers should be given to the President. Indeed, strong states—whether they are led by dictators, autocrats or where the executive branch prevails over the legislative branch—fight preventive wars. To decide about these wars a strong executive is a requirement. Decisions have to be taken quickly, when "it is now or never" and counter-powers such as the legislative branch or a strong civil society create indecision and slow down the decision process. Yoo argues that unilateral action is acceptable since the US is the only state to have the capacity (and the willingness) to act in favor of a common international "public good."

These reformist lawyers ground their reasoning on the weaknesses of international law and on the vagueness of certain notions such as "imminent threat." They argue that since the world has changed and weapons of mass destruction are in the hands of other players than states, making them non-accountable, certain types of action that were not legal ought now to be authorized.[32] They base their arguments on the just war tradition and natural law.[33] Turner and Bradford argue (and they are correct in this writer's view) that several authors belonging to the just war tradition considered that a war could be launched when a state is confronted by a challenger that builds up his military capacities, manifests hostile intentions and is able to modify the balance of power in his favor. Prevention is the reflection of a new American nationalism in international politics. Prevention has also created an ample debate in international politics in the US. Its results are

mitigated, neocons have imposed their views and this victory has shown the weakness of civil society and its members. Yet, as debates over the war increased, the US government and the military understood the importance of norms and rules of war, as a consequence *jus in bello* and international humanitarian law have been reinforced.

The Gordian knot

The move to prevention and the post 9/11 general security framework have not only resulted in great tensions between states over the best means to employ in order to face the current international situation. It also creates inextricable knots between three different spheres: politics, law and ethics. First, let me consider three different areas of politics: domestic politics, bilateral state relations and interstate relations.

Prevention lies at the very core of the so-called "war against terror." The war against Iraq is not the only occurrence of the preventive use of force. The war against terror—the gathering of information on threats that are likely to affect the lives of Americans—fuels future preventive measures. Prevention has two faces: it includes both military and police action. Prevention is not only about using force, it is a global security paradigm.

The politics of prevention rely on accurate information over the strategies of the enemies who ought to represent a threat to the security of the preventer. The leeway the members of the security community have when they want to obtain information is ampler than what it was prior to 9/11. This has created intense legal debates and conflicts at the domestic level where lawyers and human rights activists have denounced the abuses committed at Guantanamo Bay. Similarly these debates feature in the use of torture either by the US or its allies who detained and interrogated prisoners in the hopes of acquiring critical information for the US. Legal claims have been made using American domestic law, human rights and international humanitarian law. The status of Guantanamo has been challenged according to US domestic law. Claims against unjust measures of imprisonment have been supported by human rights law.[34] There have been major disputes over the condition of "unlawful combatant" and the refusal of the US to grant POW status to the Taliban. As these soldiers were fighting in a state army and were carrying arms openly, they should be granted such a status, argue those who criticize America. This legal dispute has an ethical dimension. America is being accused of behaving unjustly and contradicting the principles of the just war tradition. It creates tensions internationally even between the US and its allies. The UK, which has ratified the International Criminal Court treaty, has disagreed with the US on certain decisions on the ground in Iraq. Such was the case, when the US wanted to use its Diego Garcia base situated in the Indian Ocean on a British atoll in order for its planes to take off to Iraq and bomb a building in Baghdad where Saddam Hussein was supposed to reside.[35] According to the UK, "military necessity" could not be invoked to justify this decision.

The legal and moral debates on torture clearly reflect these tensions. Torture is illegal in term of human rights law. When used in times of war, it is illegal according to international humanitarian law. International law and the Convention against Torture also prohibit its use. Activists, intellectuals and politicians have been involved in intense debates in the public arena and in the media. This has led to a number of tensions and has created new divisions within civil society. Allan Dershowitz, a leading legal scholar and a public intellectual, has argued that torture warrants ought to be issued. Times have changed and it is the task of security forces to prevent the "ticking bomb." Since states commit torture, Dershowitz argues, its use ought to be regulated. This legal reasoning and this harsh utilitarianism radically put into question a principled ethics according to which a man shall not be used as a means to an end, or an ethics that would consider such treatment inhumane. Politically and militarily, the use of torture has also severe negative consequences. Politically it isolates the US accused of wrongdoings by "moral entrepreneurs." From a military standpoint, torture is also questioned to the extent that information obtained through the use of such measures is said to be often unreliable.

Dershowitz's reasoning can also be made when referring to preventive war. Since there is hardly a state leader who "would commit suicide in order to respect international law," preventive war will remain a possibility and will take place even in the absence of an authorization of the UN Security Council, even if this act were to be deemed illegal. There would therefore be a moral urge to reform the law (to avoid being hypocritical) and prevent it from becoming obsolete. Such an argument of course creates fierce opposition on the part of the representatives of the states who support a strict and traditional interpretation of international law.

The politics of prevention have not only created tensions in bilateral relations where international law has been used as an argument of confrontation, as has been the case when the US met the opposition of France and Germany. It has also created tensions within the UN and contributed to polarization in the organization, thus effectively weakening it. One interesting example of this phenomenon is the difficulty of the UN to find a proper and specific definition of terrorism. The tensions of its members are so exacerbated that there is no consensus over crucial aspects of what might constitute terrorism as found by the Ad Hoc Committee on Terrorism, for example whether certain state decisions could be considered forms of terrorism.

Another aspect of the law is worrisome for certain politicians and has altered interstate and diplomatic relations: namely targeted, or preventive, killings. While this phenomenon has not yet affected the United States,[36] it is not beyond the stretch of the imagination that some US officials might one day be affected by similar claims. In 2000 Israel initiated a policy of targeted killings grounded on the rationale of prevention. Israeli leaders decide over the killing of individuals who are considered to be future terrorist threats. Although these eliminations are fairly precise,[37] fifteen civilians were killed during an operation in July 2002 when a leader of the combatant branch of Hamas was eliminated. Palestinian and Israeli human rights activists and lawyers have succeeded in filing a claim in the

UK using laws of universal jurisdiction. In 2006, two Israeli generals were about to be arrested on their arrival in London, when they decided not to exit the plane and returned to Israel. Universal jurisdiction has been a venue chosen by transnational activists. Such lawsuits do not necessarily succeed in indicting the person who is accused of crimes,[38] yet they create moral shaming, one of the major goals pursued by these activists.

Targeted killings are one of the most interesting examples of this knot where politics, law and ethics are tied together. Politically, Israel decides to act unilaterally and grounds its decision on the duty to protect its citizens and soldiers, even if the price of its actions are to be paid by Palestinian civilians (collateral damage is low, but so far 150 civilians have been unintentionally killed). The military efficiency of this policy is amply questioned and several analysts make the case that targeted killing is not efficient and is rather the symptom of an "ethos of the offensive" (the wall, a defensive measure, is efficient in stopping potential terrorists from entering Israel or making it for them more difficult to do so). This policy places Israel outside the boundaries of international law. Yet, a normative debate on the ethics of targeted killings remains open and several ethicists have found that targeted killings might be, in certain conditions, acceptable. Even a jurist such as Antonio Cassese has found that targeted killings could be acceptable if they were pre-emptive, following the norm of proportionality and force being the last resort.[39]

Different moral visions orient different policy guidelines or are used to justify them. The "lesser evil"[40]—a concept chosen by many practitioners who are also able to refer to a Weberian "ethic of responsibility"—is rooted in consequentialism. It gives political and military leaders an ample range of maneuver when it decides which option to pursue in times of crisis when information is limited. The "lesser evil" is traditionally used to designate an exceptional measure taken in order to give the most appropriate response to an exceptional situation. For obvious reasons, especially when there are great concerns over security issues within their constituency, decision makers are drawn to embrace this consequentialist vision. Tensions with legal constraints, both at the domestic and international level, will follow. Utilitarian approaches will lead to a new balance between 'security and liberty"[41] which affects fields of politics, morality and rights. The lesser evil option is a global vision that includes both domestic and international issues and contributes to the blurring of the line between the two.

On the other hand, patriotism is another possible grounding for morality. The responsibility of the state to protect its citizens is a priority that could override other concerns. Yet strong moral critiques of this basic framework can easily be made. It can be disappointing if not doubtful to adopt such a vision. Such an ethic would serve as a justification for "national security," yet by no means would it be an ethics of "international affairs." Were it to be universalized (an important test when considering the validity of moral frameworks) the world would be—what some consider it "really" is—a world of suspicion where the war of all against all is the natural horizon of human relations. It is not a simple matter of egoism. This approach could justify, if not encourage, the confrontation between nationalisms and favor major wars. It demonstrates one of the traditional problems at the core

of the "security dilemma." Moreover, it displays a series of contradictions with regard to international law, emerging out of the vision of international cosmopolitanism. It is precisely for this reason that the United States is being criticized at the international level, in particular, within the larger international community. American opposition to certain treaties, such as in the case of cluster bombing, is motivated by concerns of national security that are alien to the spirit of legal and multilateral visions. It is also essentially why Israel's approach to security and warfare is being so vehemently denounced both by state leaders of many Southern and European countries as well as by representatives of the human rights community. Targeted killings are justified on the basis of the prevention of terrorism. According to Israeli political and military leaders, potential threats to the lives of their citizens ought to be eliminated. The preference given to the lives of Israeli citizens (primarily civilians as well as soldiers) would justify going one step further than self-defense. A national concern which gives absolute priority to the lives of the members of the national community and which contradicts the principles of international law is at the root of the justification of this policy (which does not mean that it is the political reason why it is being implemented). Prevention, as this case amply shows, is an anticipatory calculus of a decision aimed at providing maximum security to the citizens of the preventer. This affects a system based on rights—the right to self-defense which is restricted to cases where the attack has already occurred—and which, when applied, sometimes implies to bear some costs.

There are possible consequences over the system of rules that might be affected by one breach of its order or even more so by a series of breaches. There are at least two possibilities. These measures are considered to be exceptional and they might affect a system of rules that falls into obsolescence. *De facto,* these measures become a new rule—a norm based on their regularity and their social acceptance—and they might foster the creation of a counter normative system. It is likely that political leaders and some jurists (usually who serve as advisers to those leaders) would ask for a reform of the current system of international law.

Untying the knot: possible scenarios for the future

Though the situation is now stalled in a deadlock, it is very likely that given the pressures exerted on the US and the need for states to find new rules that will facilitate the relations between governments a way out will be found. Recent moves made by the US attest to its willingness to come to more cooperative relations with its European allies. Such evolution of course very much depends on different variables that influence the nature of the relations between states, international organizations and non-state actors. Such a perspective brings into light the relative contingency of norms and reflects, I argue, the role of "luck" in morality. I want here to make the case that international players can be "morally lucky"[42] and that the international society of states as such and its normative system can be lucky or unlucky when the whole normative framework transforms itself and a choice is made between different alternatives.

Philosophers have discussed moral luck at the individual level. Yet, war and international relations are ideal settings when considering the role of luck. Indeed, there are so many unexpected and sometimes unpredictable variables that are beyond the control of leaders who can turn out to be lucky or unlucky when making a decision. Moral luck plays at two levels. A leader can be morally lucky when he makes a decision that turns out to be successful because of events that he or she has not predicted and that are beyond his reach. A leader can be lucky when he criticizes another state for being unjust and when the tribunal of history punishes his opponent for reasons that are different from what were his own reasons.

Moral luck also plays at another level, very much relevant when studying norms. Introducing a new rule that will create an expectation in a given social order can transform the normative system in which it is introduced. The long-term consequences of this innovation are not necessarily foreseeable. Will these consequences be positive? International law and to some extent international ethics have some share of contingency. Historical change can have positive or negative effects; revolutionists who want to change the world or "just" want to change international norms might as well be lucky or unlucky. In a decade or so, history will judge the attempt by neoconservative lawyers to break the consensus over the traditional interpretations of international law.

Different variables are likely to influence the evolution of the system. The future of the situation in Iraq is one of them. It is difficult to know how long it will take for the violence to decrease and for the well-being of the population to increase. The US administration hoped that a 'successful" imposition of democracy would have made it easier for its leaders to justify *ex post facto* the intervention and that the various measures would show an improvement of the situation as compared to what it was during the regime of Saddam Hussein. The US would have been morally lucky had this happened without having taken the necessary precautions for this to happen. Indeed, it is today common knowledge that the military personnel were under-prepared for the post-conflict situation once Saddam Hussein's army was defeated. As for now, the situation in Iraq is worrisome on numerous grounds. Assuming that the US would have been morally lucky had the situation been more satisfying than what it was before the intervention, does that now make the US morally unlucky and therefore less responsible than what is commonly said? It is easy to challenge this view since it is plausible that the US *should* have known that the difficulties were greater than what they thought (or said) there were. Therefore, the critique addressed at the preventer when he is considered to be an irresponsible gambler seems in this case well grounded. Luck in one case—moral (good) luck—is easier to accept than in the other, moral bad luck. There is no symmetry between the two.

Whether Iran is going to be bombed or not is also an important question. All the different conditions except one are met for a preventive strike to happen. A strong superpower anticipates a change in its disfavor in the evolution of balance of power. Iranian leaders have made public their hostile intensions vis-à-vis

America and most of all one of its closest allies, Israel. Some Iranian leaders, the President notably (as of 2008), take a very provocative stand vis-à-vis the US and its allies. Iran is building up its nuclear capacities. Traditional security discourses show how with the acquisition of a nuclear weapon, it would be very difficult for the United States to intervene in the affairs of Iran. Similarly, with the development of nuclear technology Iran is well positioned to send offensive signals.[43] From a historical standpoint, whether in terms of military history or from the perspective of the just war tradition, these are the different conditions at the political, strategic and normative levels for a preventive war to be justified. However, for an offensive war to be just, as Suarez has pointed out, it must have good chances of success. This does not seem evident in an eventual strike against the Iranian sites.

If, however, these variables were to change generating better intelligence, on the part of the Americans, the British or the Israelis, or there was an improvement in aerial warfare technology, the likelihood of preventive action would change and the possibility of such conflict would increase. Were this intervention to be successful, prevention would be susceptible to gain the approval of a growing number of supporters. The US and its allies would be morally lucky. Luck would play a key role in driving the eventual changes in the actual normative system, albeit a role supported by a variety of different agents in international politics. In such a situation a particular role for international lawyers would emerge, as their interpretation of self-defense in international politics would eventually move toward one of "anticipatory self-defense." The potential then exists for new members of the international community to support this emerging trend.

Future scenarios not only depend on specific decisions and situations. They also rely on some more structural variables such as the level of cooperation or defiance between states, the level of approval of international law as a guideline for policy-making, and the intensity of transnational violence. Prior to the war in Iraq the relationship enjoyed by the US and the UK was plagued by antagonism, as was its relationship with its European allies such as France and Germany. While rapprochement now prevails, the different positions vis-à-vis Iran will provide an interesting test for the short-term foreign policy relations. The degree of approval of international law and the consensus that surrounds it depends on the success or the failures of US policy. The outcome of the Iraqi conflict will play a determining role convincing other states that its position of defiance of the traditional international legal order is viable in the future. The long-term appeal of a preventive security doctrine rests, to a certain extent, on the moral luck of the United States and its leaders and the unfolding of future events. Were transnational terrorist activities affecting Western societies to resume, this would pave the way for more transgressions of the current legal order on the part of the Western states that would want to take retaliatory and preventive measures to fight the groups considered to be responsible for these attacks.

Future scenarios

In light of the contingent nature of moral luck and the unpredictable nature of future international events I envision four different types of international scenarios, listed starting from the least plausible but not impossible to the less implausible.

First, a world without international law. Given the attacks the traditional international legal order has had to suffer since 9/11, in particular the war against Iraq and the possibility of an Iranian intervention, some argue that international law has become obsolete. Is it possible to imagine a world without international law? It is commonly accepted that states act outside the law. In this scenario the UN will be considerably weakened (that is plausible). Most of all, the *jus ad bellum* framework would have shown its limits (not implausible) and prevention will have eclipsed self-defense as the pillar of the moral justification of warfare (much less certain). If this normative shift occurred, the following scenario might plausibly unfold: Violence in Iraq will be controlled by the year 2015. A strike against nuclear sites in Iran has diminished its ability to produce the bomb although not all of the installations have been destroyed. The Iranian government was rendered incapable of retaliating against the American aggression, and hard-line leaders are replaced by more pragmatic ones. Governmental and military leaders continue to refer to norms that are for the most part embodied in the *jus in bello* model. The US Law of Armed Conflict (LOAC) prevails as the basic guideline for the behavior of American troops, rules of engagements are more specific and legal responses are be found to issues such as the use of human shields (a more strict procedure to indict combatants and those responsible for the presence of the shields is introduced). Cooperation between Western states increases. European states decide to increase their cooperation with US police forces and terrorism will be more and more considered a matter of transnational crime. Terrorism prevention becomes one of the areas where bureaucracies, police forces and eventually armies focus their action. International relations tend to be more and more depoliticized and an "ethics of security" supersedes the ethics of war. As international law and just war models are jeopardized, the line between international security and domestic security becomes more and more blurred. As a result, normative security issues are framed into a national ethical framework aimed at discussing global challenges.

Second, a world in which prevention disappears as a legitimate option. In twenty years from now, prevention will be considered an epiphenomenon in the history of international relations. By 2015, violence in Iraq is still not controlled, US troops have left and this war is by now considered the most terrible mistake in the history of US foreign policy-making. It has become the paradigm of inconsiderate behavior and some reports indicate that terrorists use Iraq as a site to train combatants who perform attacks killing Western civilians. The US moves back to a cautious realist approach which ignores international law if it creates conflicts with states' interests yet there is a formal (and hypocritical) consensus around international law, a pro forma attitude of diplomats who want to keep in place this normative status quo. Western leaders welcome such a move.

Prevention is considered a catastrophic attempt to modify the system of rules at the strategic, political, legal and moral level. The ambiguities of international law and of the just war tradition are not resolved; politics, as in the realist framework, becomes the dominant paradigm for international action.

Third, the balance of power shifts, leading to normative shifts. In the third scenario Europe, China and Russia benefit from the weight that deploying forces in Iraq has imposed on US shoulders. In 2020, US power declines: its military credibility is diminished, recession and the deficit created by the huge expenses of the war affect its political power, anti-Americanism has not diminished over the years and new terrorist attacks on American soil and against American citizens abroad show the world its vulnerability. The American-led operation in Iran fails and only a few sites are destroyed by aerial bombing that reveals itself to be less precise than what many assumed. Prevention is ruled out as an option in a hegemon free multipolar world. Self-defense is congruent with multipolarity and remains the pillar of international law. There still is a strict separation between *jus ad bellum* and *jus in bello* concerns.

Fourth, international law is reformed and strengthened as the central normative structure. NGOs continue to argue in favor of more precise weaponry. They also realize the need to take a stand on *jus ad bellum.* They focus their efforts on the training of international lawyers and a wide transnational debate on prevention emerges as the threat of Iran creates more and more concern. The effectiveness of targeted killings is still being debated, yet the case for their ineffectiveness does not prevail. A growing number of lawyers follow the steps of ethicists and consider pre-emptive action to be legitimate or less unacceptable than they thought it was. The case for pre-emption is now clearly made in international law, a new discussion starts on prevention. Two categories of prevention are discussed: *aggressive prevention,* an offensive war where there are good reasons to believe that the threat in the name of which the war has been launched has been deliberately misread and overestimated; and, *cautious prevention,* a preventive war motivated by the best information available and that reflects concerns of fear widely shared within a population that has not been indoctrinated and where experts have participated in ample public debates on the opportunity to make use of available force. The UN inevitably suffers from a decline in its power, yet alternative instances that embody international law emerge and their capacity to attract state and non-governmental actors considerably increases.

In light of my arguments thus far, I propose two different sets of conclusions. The first focuses on an explanation of the role of ideas in the emergence and success of the preventive framework in international politics. The second one is a normative discussion of prevention, which takes into account decisions that prevail in contemporary international politics.

The idea of preventive action originates in the ambiguities of the just war tradition, which is more a problem than a solution to the current dilemma about the legitimacy of preventive war. This idea is then reflected in international law and has a resonance in Western democracies that face terrorism. Indeed, in the presumed likelihood of a terrorist attack, an application of the precautionary

principle prevails. As the structure of international politics transforms—a strong power in a unipolar world is faced to transnational actors that challenge its domestic security—and as Western democracies show a high aversion to risk, the longstanding idea of preventive action emerges and is credited *ex ante* a certain degree of legitimacy. This explanation highlights the contingency of norms, which is a normative issue per se, which leads me to my second conclusion.

Normatively, a discussion has to be engaged over the validity of this norm. Normative assessments of preventive action are made *ex ante* and *ex post.* However, the most interesting aspect of these deliberations lies in the connection between *ex ante* and *ex post* considerations. I have referred to the idea of "moral luck." A person can be morally lucky. The final assessment of his decision will be overall positive because he has shown that he has succeeded in his action. However, this outcome is also dependant of external variables that he does not master. Moral luck, I argue, is also a reward of intuition. When faced with hard choices, one can have the intuition over the necessity of his decision, knowing that it will be hazardous.

There is a second aspect of moral luck, which is relevant sociologically and normatively. When individuals or organizations make a decision that has legal or doctrinal implications, they modify a body of established norms, without knowing what will be the outcome of such a decision. This second aspect is a "moral luck of rules" and is made explicit in the different scenarios where the equilibrium and the interconnection between politics, law and morality is being discussed. When waging war, the Prince plays with fire. There is another battlefield: gambling dice on the terrain of the law.

Notes

1 See both Bush administration National Security Strategy statements, 2002 and 2006, available at http://www.whitehouse.gov.
2 According to international law, pre-emption can be used whereas prevention cannot; pre-emption is the term used in both NSS statements. In the 2006 NSS statement, the verb prevent is also employed.
3 Ariel Colonomos, *Moralizing International Relations: Called to Account* (New York: Palgrave, 2008): 105–134; and John Torpey, *Making Whole What has been Smashed: On Reparations Politics* (Cambridge: Cambridge University Press, 2007).
4 Jack Gibbs, "Norms: The Problem of Definition and Classification," *The American Journal of Sociology* 70, 5, (March 1965): 586–594.
5 There are of course exceptions, some of which I draw on in this chapter.
6 Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977): 84.
7 See the historical analysis of Alfred Vagts, *Defense and Diplomacy: The Soldier and the Conduct of Foreign Relations* (New York: King Crown Press, 1956): 263–350.
8 Ibid., 278.
9 Marc Trachtenberg, "Preventive War and US Foreign Policy" *Security Studies* (January–March 2007): 1–31.
10 Bernard Brodie, *Strategy in the Missile Age* (Princeton: Princeton University Press, 1959): 147–172.
11 Prevention was not Wohlstetter's concern.

12 Franciso Suarez, *A Work on the Theological Virtues of Faith, Hope and Charity* (Oxford: Clarendon Press, 1944 [1621]): Disputation XIII, Section VI, "What Certitude as to the Just Cause of War is Required in Order that War May be Just?" p. 828ff.
13 Alberico Gentili, *De Jure Belli Libri Tres* (Oxford: Clarendon Press, 1934 [1621]): Book I, Ch. XIV, and 103, p.65. "it is better to provide that men should not aquire too great power, than to be obliged to seek a remedy later, when they have already become too powerful".
14 Emerich de Vattel, *Du Droit des Gens* (Buffalo: William S. Hein, 1995 [1758]): Livre I, Chap. XX, and 250.
15 Quincy Wright, *Problems of Stability and Progress in International Relations* (Berkeley: University of California Press, 1954): "International Justice and Preventive War" 68ff.
16 Hugo Grotius, *The Law of War and Peace* (Indianapolis: The Liberty Fund, 2005 [1625]): Book 2, Chapter 1, XVII.
17 Ibid. Book 2, Chapter 1, XVI.
18 Ibid. Book 2, Chapter 1, XVI.
19 Hugo Grotius, *De Iure Praede Commentarius – Commentary on the Law of Prize and Booty* (Oxford: Clarendon Press, 1950).
20 Chapter VIII "Concerning the forms to be followed in undertaking and waging war", p.85 et s.
21 Ibid., 96.
22 For instance, the US refuses to grant POW status to terrorists.
23 There are controversies among historians about the nature – either pre-emptive or preventive – of the war. Israelis have always claimed that it was a case of pre-emption, which has been supported by certain historians such as David Rodman or Michael Oren; see David Rodman, "Israel's National Security Doctrine: An Introductory Overview" *Middle East Review of Internationl Affairs* 5, 3 (September 2001): 71–86 and Michael Oren, *Six Days of War: June 1967 and the Making of the Modern Middle East* (Oxford: Oxford University Press, 2002). Other historians have challenged this interpretation and argued that the 1967 War was a preventive war; there was no immediate threat and the Israelis were aware of this fact. See Ronald Popp, "Stumbling Decidedly into the Six Days War" *Middle East Journal* 60, 2 (Spring 2006): 281–309.
24 Timothy McCormack, *Self-Defense in International Law: The Israeli Raid on the Nuclear Reactor* (New York: St Martin's Press, 1996): 140.
25 Helen Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge: Cambridge University Press, 2005): 156.
26 David Kennedy underlines this new aspect of warfare. David Kennedy, *Of War and Law* (Princeton: Princeton, University Press, 2006).
27 Personal interviews, Washington National Defense University, March 2006.
28 Tony Pfaff who serves as an ethicist in the US forces has been involved in the writing of one the recent field manuals. Headquarters, Department of the Army, Counter Insurgency Manual FM 3–24, FMFM 3–24, June 2006. www.fas.org/irp/doddir/army/fm3–24fd.pdf.
29 Colin Kahl, "In the crossfire or the crosshairs ? Norms, civilian casualties, and U.S. conduct in Iraq" *International Security* 32, 1 (Summer 2007): 7–46.
30 Personal interview Human Rights Watch, New York, March 2006.
31 For a detailed account of the strategies of the various neoconservative lawyers, see Alejandro Lorite Escorihuela, "Cultural Relativism the American Way: The Nationalist School of International Law in the United States," *Global Jurist Frontiers* 5, 1 (2005); http://www.bepress.com/gj/frontiers/vol5/iss1/art2/.
32 Ruth Wedgwood, "The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense" *American Journal of International Law* 97, 3 (2003): 576–585.

33 William Bradford, "'The Duty to Defend Them', a Natural Law Justification for the Bush Doctrine of Preventive War" *Notre Dame Law Review*, 79 (2004): 1365–1492.
34 On Guantanamo, among other sources, see: Lawyers Committee for Human Right, Assessing the New Normal Liberty and Security for the post-September 11 United States, September 2003, 52–55. Downloadable at: http://www.humanrightsfirst.org/us_law/us_law_06.htm.
35 Personal interview, Marc Garlasco, Human Rights Watch, New York, March 2006.
36 Although in 2003, the US fired a missile on a car killing presumed members of al-Qaeda. David Kretzmer, "Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?" *European Journal of International Law* 16 (2005): 171–212.
37 The ratio of collateral damage is an average of 0.5, much less than what is usually the case in battles during a war.
38 Ariel Colonomos, "Unilateral jurisdiction: Universal jurisdiction *à l'Américaine* in the age of post-realist power" *Human Rights Review* 5, 2 (Jan–Mar 2004): 22–47.
39 Expert Opinion: "On Whether Israel's Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law" Professor Antonio Cassese. http://www.stoptorture.org.il/eng/publications.asp?menu=7&submenu=1.
40 Michael Ignatieff, *The Lesser Evil: Politics in an Age of Terror* (Princeton: Princeton University Press, 2004).
41 Jeremy Waldron, 'Security and Liberty: the Image of Balance" *Journal of Political Philosophy* 11, 2 (June 2003): 191–210.
42 "Moral luck" is a theme that has attracted a lot of attention in philosophy circles. The two most influential authors in this area have been the late Bernard Williams and Thomas Nagel. When addressing the issue of luck, philosophers analysed ethics at the individual level. Moral luck needs also to be addressed at the collective level, such as in the case of international relations. The case of prevention is also specific to the extent that any "moral luck" in this area would affect the ethical nature of a whole normative system. The discussion here focuses on the ethical nature of a new legal and moral system where prevention would or would not be included into the legitimate policy framework. Bernard Williams, *Moral Luck* (Cambridge: Cambridge University Press, 1981). Bernard Williams, "Chapter II Moral Luck" in Daniel Statman (ed.), *Moral Luck* (Albany: State University of New York Press, 1993): 35–71. Thomas Nagel, "Chapter III Moral Luck" in Daniel Statman (ed.), op. cit., 57–71.
43 As in the case of the British sailors who were imprisoned during the month of April 2007.

Part III

Rules and regulation

6 Technology change, rule change, and the law of armed conflict

Michael E. Smith

Technological change poses a major challenge to the rules of war under the Law of Armed Conflict (LOAC) and related instruments of international humanitarian law. Weapons development often proceeds much faster than the rules of conflict can be negotiated during peacetime, while the pressures of combat lead states to bend if not completely break those rules during wartime. Yet there is little consensus in the academic literature on the role of technological change in furthering or undermining international cooperation on humanitarian issues.[1] We also lack a systematic analysis of how states attempt to balance the demands placed on them as chief rule-makers in international politics with the rapid pace of modern technological change. Most general theories of international relations do not systematically incorporate technology and technological change into their analysis, except perhaps as ad hoc idiosyncratic variables, as when discussing sources of uneven economic growth[2] or dramatically innovative military technologies, such as nuclear weapons.[3] The opposite problem of this tendency is to treat technology as so pervasive—as, for example, a fundamental component of globalization—that one finds it difficult to isolate any discrete cause and effect relationships based on it.

To help address this gap, this chapter advances a general analytical framework for understanding how specific aspects of technological innovations create pressures for rule-change at the global level, with special attention to the rules of armed conflict, an area of acute state concern. In general, the chapter frames the larger issue of rule-change as a recurring problem of *global governance.* Global governance can be viewed as a special type of international cooperation, or policy coordination, among a large community of actors.[4] As such governance typically involves complex processes of institutionalization or rule-making, a competent analysis of it must address three related sets of questions: 1) who has the overall authority or responsibility for making, prioritizing, and enforcing the rules;[5] 2) how such rules, if any, are generated to solve individual collective action problems, which often involves definition and measurement issues in terms of creating a new public space; and 3) how to prioritize and adjust rules among all of the competing individual problems regarding the governance of technology. Finally, to offer some empirical validation for my analysis, the chapter provides some examples derived from new weapons technologies, a major source of international controversy. As

we shall see, while radical new weapons often provoke global debates concerning their use in combat situations, they vary widely in terms of the political content of those debates and therefore the rules, if any, that result.

Technological revolutions and "governability"

The purpose of this section is to suggest a way to balance the two views of technology noted above: technology as a source of residual variance or as a structural feature of the international system. This task in turn involves three analytical components.

Technological revolutions and endogenous political change

It is first important to keep in mind that technological change is not only a recurring feature of international relations; modern capitalist states are explicitly organized to help bring about such change. However, to further narrow the empirical boundaries of this study for the purpose of rigorous analysis, we can concentrate on *modern technological revolutions.* Revolutions, of course, involve dramatic changes, and modern technological revolutions stimulate a wide range of such changes. In one sense, then, such revolutions are not unlike any other major crisis, for example, a natural disaster or war, as a source of global institutional change. Unlike these other 'shocks to the system," modern technological revolutions do not typically happen completely by surprise; instead, they gradually unfold through predictable stages and, in doing so, often begin to threaten the established international order. Rather than treat technological revolutions as an unexpected exogenous shock, then, this chapter views such revolutions as *regularly expected endogenous variables that explicitly provoke political changes, resulting in the creation or modification of governance mechanisms to manage those changes at the global level.* As we shall see below, the specific dynamics vary by technological revolution of course, but the international system has learned to cope with these over time, though in some areas more than others.

Such revolutions also typically create large sources of wealth and thus create strong competitiveness pressures among innovators, firms, and states. In addition, their development and application, intentional or otherwise, transcend national borders in a variety of ways. To the extent that governments prefer to control flows of goods, services, and ideas across their borders, they will be concerned with new technological developments that facilitate such movements. Innovations of this type can be linked to broader globalization processes, a phenomenon that stimulates intensive interest on the part of numerous political actors. Finally, these revolutions have an inherent capacity to remake or even destroy previous ways of thinking, living, producing, and working[6] as part of the overall process of capitalistic "creative destruction."[7] These dynamics typically provoke domestic and international pressures for placing greater controls on technology.

Finally, the notion of *revolution* implies a quick change, yet the truth is that the specific degree and scope of technological innovations actually may take years, if

not decades, to become fully apparent. However, and despite this lag time, there is often a major discovery or breakthrough, and an explicit, societal-wide realization that an important new threshold has been crossed as revolutionary technologies materialize in the public consciousness and diffuse throughout the system.[8] Also, once such a revolution has materialized, new improvements to it may be fairly rapid so that its use or diffusion often outpace new rules. Therefore my definition of technological revolutions requires an appreciation of the intensity, irreversibility, and pervasive nature of technological changes, rather than merely their sudden appearance in human communities.

Technological revolutions and market structure

As an initial attempt at organizing this variance into a single analytical framework, it may be helpful to classify new technologies based on a set of factors known to require or inspire governance. These factors are primarily related to *market structure;* such market-based factors influence the inherent "governability" of high technologies, in both positive and negative ways. By this I mean: 1) the *range* of political disputes generated by the technology; 2) the *intensity* of those disputes; and 3) the *willingness/ability* of states to resolve those disputes to enjoy common benefits. I shall return to the issue of governance below; here I confine myself to a discussion of general market factors, which apply to varying degrees to a range of modern technological revolutions. These factors involve, but are not limited to, the following:[9]

1 The extent to which a new technology can be *weaponized.* Given the complexity and scope of modern armed forces and industrial armaments production, applications derived from most technological revolutions are likely to find their way into common usage by armies, navies, air forces, and other military organizations, and therefore provoke at least some interest by modern governments. That is to say, they are all inherently "dual-use" technologies with civilian and military applications. This aspect of modern technology makes it very difficult for states to effectively distinguish between, and thus govern, their commercial and military applications. However, to narrow the analysis further, we might hypothesize that the greater the potential for a new technology to be weaponized, or used directly to deliver or develop weapons, the more difficult it will be for states to agree on ways to govern it at the global level.

   Moreover, new arms technologies can provoke arms races on a bilateral or even multilateral scale, so that the urgency to develop radically new weapon systems before one's enemies does often outweigh the ability of states or other actors to devise controls on them. When states are concerned about these questions it is virtually impossible to rely on market solutions alone. A final consideration is whether a new technology is considered a weapon of mass destruction by the international community. Such weapons might create *more pressures* for global governance. This facet of weaponization, however, cannot

be treated wholly separately from the other factors discussed in this chapter to explain the *actual choice,* if any, of governance mechanism that results. Three considerations behind this choice to govern new weapons involve: 1) the perceived utility of the weapon by military decision-makers based on the strategic environment they face; 2) the possibility of an enemy developing a similar capability and/or countermeasures against that weapon; and 3) the legality of the new weapon as perceived by states under the existing law of armed conflict (LOAC).

2 The presence of *increasing economies of scale* with new technologies, whether in terms of production or efficient use. Such increasing economies of scale encourage cooperation for at least two reasons: to maximize the most efficient use of technology by expanding markets and to reduce the risk of negative externalities that take advantage of highly networked or tightly coupled systems. Such economies are often found in industries with high fixed costs and undifferentiated characteristics, such as utilities or transport, which can either encourage "natural monopolies" to emerge, or instead devolve into so-called "destructive" competition.[10] However, states still often disagree on how such outcomes should be controlled: whether through the market, through government choice, or some combination of the two.

3 The presence of *barriers to entry* to new firms. The greater the ease of entry into any given technological field, the greater the number of firms whose activities must be coordinated and monitored. These factors may make it more difficult for states to cooperate. At the other end of the continuum, monopolized technologies can easily invite governmental intervention at the domestic and international levels to promote competition or to at least prevent monopolists from extracting excessive rents from their activities.[11] Another major barrier to entry in the case of modern technologies is the presence of key first-mover advantages that may make it difficult for later entrants to a market to attract customers from innovators. Brand loyalty is one of most important advantages,[12] but technologies that require a significant investment in either time or money may also convey first-mover advantages.[13]

The role of barriers to entry is further affected by whether the states involved are *technology innovators* or *technology followers* where a specific technological revolution is concerned. Innovators generally want to preserve the status quo to maintain their lead and capture rents generated by their technology, while followers are more likely to take risks, oppose innovators, and even violate common rules or standards in order to catch up.[14] New regulations often "freeze" the status quo and may favor innovators over followers. And improvements by followers will have to take into consideration the property rights, if any, of the initial innovators, which can be a complex, contentious, and time-consuming process. This is especially evident in the area of arms control but also applicable to other technologies, especially where first-mover advantages are possible.

4 The number and type of *primary end users* of the technology is also indicative. Similar to the discussion above about barriers to entry, technologies whose end users are vast will be more difficult to govern then those at the other end of the continuum. Technologies whose market consists of a single source of demand, for example, a state monopoly over certain military technologies, will face fewer challenges then those individuals seeking to regulate a problem such as software piracy. This factor is further related to the issue of dual-use technology: those that have civilian or consumer applications in addition to strictly military applications will dramatically expand the number of stakeholders in that technology, which then complicates the process of global governance.

5 The degree of *physical infrastructure* and *networking* required to make use of the technology. This factor involves the extent to which a new technology requires large-scale material investments on the part of states and/or major firms, whether in terms of dense, widely networked systems or major new facilities. Technologies that require such physical infrastructure: 1) are literally tied to a state and its legal jurisdiction, and thus are easier to identify/target for governance; 2) often require state/firm coordination to raise funds for construction/maintenance, which facilitates intergovernmental cooperation; and 3) are difficult if not impossible to move to another state due to the high sunk costs involved.

Where networked systems are involved, national networks for some technologies often must show both a linkage to, and compatibility with, foreign networks to function properly. For technologies with tightly coupled networks, so that changes in one part of the system rapidly cause changes throughout other components, network operators must pay even more attention to problems of overall coordination and access to prevent small local problems from quickly becoming larger regional or global problems (i.e., wide-scale power outages, computer viruses, or the Y2K problem).[15] Such factors make it more likely that states and firms, at the domestic and global levels, will need to organize cooperation on a regular basis to make effective use of the technology. The presence of many competing but incompatible network standards is the least desired outcome for all parties. Technology, in such a situation, never reaches its full potential. On the other hand, technologies that require no large-scale physical or networked infrastructure, and/or are loosely coupled, represent a far greater challenge for states to monitor and identify inappropriate activities or accidents.

These governance-influencing factors are summarized in Table 7.1.

Table 7.1 The governability of technology

	Easier to govern	*Harder to govern*
Weaponized	No	Yes
Economies of scale	High	Low
Barriers to entry	High	Low
Number of end users	One/few	Many
Degree of physical infrastructure	More	Less

Easier to govern			**Harder to govern**
Commercial satellites	IT	Biotechnology	Firearms

Figure 7.1 The governability of certain technologies

Thus, certain technologies, *by their inherent natures,* may make it difficult if not impossible for states to devise effective governance mechanisms at the global level. The more "ungovernable" the technology, the more global political resources must be devoted to it to make any headway on specific collective action problems. These factors can also be organized along a continuum as shown in Figure 7.1.

This inherent problem of governability, which ultimately is a question of *control,* has led some commentators to speculate about the decline of state power or autonomy in the face of major technological changes or globalization in general.[16] Yet herein lies a paradox: this very ungovernability may actually work, in the long term, to *dramatically enhance* state power and other forms of social control in ways unforeseen by both innovators and regulators. States can be no less creative than innovators in attempting to recapture their lost autonomy in the face of technological change; in some cases (such as the Internet and electronic communications) the very technology that supposedly liberates human beings can also be deployed against them by government authorities. And when states take an active role in the development of new technologies (as with funding or even hiring innovators), the potential for increased national control is that much greater, especially where technologies related to national security or surveillance are concerned.[17]

Global governance solutions

For the purpose of analyzing a range of technologies and their associated governance problems, it may be helpful to compare governance solutions across several dimensions. First, the *types of rules* involved. The possibility of which rules to adopt varies depending on where the technology is located on the above proposed continuum. The degree of binding legality depends on whether or not the technology is self-policing, requires informational guidelines, customs, or formal laws and regulations. Second, the *balance of roles between the market and the government/state.* The market is referred to herein as all material stakeholders involved in making, interpreting, enforcing, and revising the rules at both the domestic and international level; third, the *types of rationales* used to justify or legitimate such rules; fourth, *the specific target* of the rule in terms of technology-centered behaviors and their associated material or knowledge base; and fifth, the question of *burden of proof:* on whom does it fall and according to what standards are the actors to be held accountable? All of these dimensions condition the final governance result: the rules or other control mechanisms created to manage each technological problem. Moreover, each technological problem and its unique solutions to each major collective action problem can be further conceptualized, with reference to policy coordination, as shown in Table 7.2.

Table 7.2 Degrees of global governance solutions

Degrees of global governance	*Examples of solutions (rules and otherwise)*	*Key levels of jurisdiction*
None	Market incentives; self-policing; technological fixes	Innovators/firms/end users
Marginal	Shared best practices or private certification of compliance	Innovators/firms/end users
Low	Regulatory information-sharing	States
Medium	Policy harmonization of national regulations	States/international organizations/international law
High	Global regulations, monitoring, enforcement	International organizations and international law

The highest degree of global governance authority, therefore, involves collective rule-making at the international/regional level, with associated provisions for monitoring and enforcement. This typically involves the creation of a formal *international regime* for a certain problem, defined in terms of "principles, norms, rules, and decision-making procedures around which actors' expectations converge in an issue-area of international relations."[18] For optimal global governance, then, these regime elements would explicitly address each of the five dimensions as noted above: clear rule types in the form of binding regulations; an explicit and appropriate balance of state-market authority concerning the governance problem at hand; a consensus on the rationale(s) inspiring any new rules; clear regulatory targets; and consensus on where the burden of proof should fall when rule violations are suspected.

Finally, the collective action problems governed by these mechanisms can be organized under two headings: problems involving the *efficient or legitimate development, ownership, use, or diffusion* of the technology itself and problems involving the *reduction or elimination of negative externalities* created by the development, use, or diffusion of the technology. Or more simply, they can be conceived as direct and indirect problems generated by technological revolutions. In both cases, "use" also refers to "abuse" of a technology, which may or may not be legal in the views of global governance authorities. Indeed, determining the line between regular use and abuse, especially if "abuse" does not seem to harm anyone other than the abuser, is exceedingly difficult for regulators. This problem of course relates to the more general issue of interpreting rules once they are implemented, which raises the issue of incomplete contracting and again increases the pressures for rule clarification and change at the global level.[19] The result is a highly circular process of global governance, propelled by constant technological innovations and regular controversies over making, interpreting, and enforcing new rules.

The Hague and new weapons technologies: submarines in World War I

The relationship between the characteristics of modern technological revolutions and global rule-making can be illustrated through an examination of major changes in weapons technologies. Formal rules governing the use of new weapons technologies began to coalesce especially in the wake of the industrial revolution and have adapted to accommodate a number of modern technological revolutions. Warfare had been dramatically altered in the late 1800s by the magazine-loading small-bore rifle, the improved Maxim machine gun, smokeless powder, high explosives, the torpedo, the mine, the submarine, and early efforts at air warfare for reconnaissance and then bombing of both civilians and combatants. These innovations radically expanded the scope of, and destruction within, the battlefield, and were joined with mass armies to produce industrialized warfare and modern combined arms battle. In response, the 1868 St. Petersburg Declaration was the first major global governance instrument that attempted to place restrictions on new methods of warfare resulting from innovations in science and technology, particularly involving exploding and incendiary projectiles. Although the International Military Commission at St. Petersburg could not agree on a general principle regarding scientific applications to weapons development, it did succeed in establishing a more specific norm that the employment of arms which would "uselessly aggravate the sufferings of disabled men, or render their death inevitable" was contrary to the laws of humanity.[20]

This initial effort to govern new weapons technologies was followed by a slightly more ambitious effort in 1874 (the Brussels Conference), followed by the far more prominent and comprehensive Hague Peace Conferences of 1899 and 1907, which addressed a range of new technologies such as launching projectiles from balloons, the use of asphyxiating gases, and expanding bullets. Regarding the LOAC, the Hague Conventions (Art. 22) provide that "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited" in hopes of protecting humanitarian interests. Article 23(e) of the Hague II Regulations indicates that it is prohibited "[t]o employ arms, projectiles or material of a nature to cause superfluous injury," and Article 23(e) in Hague IV Regulations prohibits the employment of "arms, projectiles, or material calculated to cause unnecessary suffering."[21] Although some modest results were achieved in 1899, the 1907 Conference saw only 25 minutes of discussion on disarmament relating to arms limitation resulting in a resolution for further study of the matter. Given the state of competition between the UK and Germany, the most difficult discussions involved naval warfare. Britain wanted to uphold a right of blockade, leading Germany to press for the right to use submarines and underwater mines, which the UK naturally wanted to restrict. Yet they still agreed to no less than eight conventions on naval war, including one restricting the use of underwater contact mines. The delegates also were hopeful that these outstanding issues, plus the problem of chemical warfare, would receive a fuller hearing at the next conference in eight years (1915).

The Hague Conventions, however, had anticipated that innovations might outpace the specific technologies and acts covered within them. To address this problem, the so-called "Martens Clause" was included in their preambles. This clause states that:

> It has not, however, been possible to agree forthwith on provisions embracing all the circumstances which occur in practice. On the other hand, it could not be intended by the High Contracting Parties that the cases not provided for should, for want of a written provision, be left to the arbitrary judgment of the military commanders. 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 civilized nations, from the laws of humanity, and the requirements of the public conscience.

In addition, the preambles to the Hague Declarations also refer to the 1874 Brussels Declaration, which itself refers back to the 1868 St. Petersburg Declaration on exploding bullets, as sources of inspiration to "diminish the evils of war so far as military necessities permit." Although commentators continue to disagree on the precise justification and interpretation of the Martens Clause,[22] the point here is that it clearly reflects some degree of recognition about the need for general principles to govern the rules of war in the face of problems (such as weapons innovations) not explicitly covered in the Hague texts. In other words, it was a recognition of, and an attempt to mitigate, the problem of incomplete contracting in international agreements noted earlier in this chapter. Overall, then, these instruments served to both define an emerging norm of humanitarian warfare and justify possible constraints on any future weapons technologies that might violate that norm.

These constraints, as we know today, were directly violated during World War I, which exposed a wide gap between principles and practice regarding new technologies and the rules of war. The French term for the level of destruction experienced during WWI was simple, direct, and ominous: *total war*.[23] This approach to combat would put increasing pressures on the LOAC in the twentieth century. However, arguments about the need for new rules cannot be divorced from lessons about the military use of new technologies. Regarding land warfare, the stalemate and destruction on the Western front after 1914 have been attributed to a widely shared belief in the ideology or "cult," of the offensive, which involved an erroneous belief among military commanders that the country that attacks first will have an overwhelming advantage over its enemies. This view was to a large extent a result of Europeans "completely misconstruing military technologies that actually gave the defense an unprecedented advantage."[24] Importantly, both the declining hegemon (the UK) and the rising hegemon (the US) were very keen to invest in technological solutions rather than rely on soldiers; Britain especially eschewed a large mass army in favor of technology as a

force multiplier.[25] However, "the Western front was an intensely competitive environment, where the innovation of one side was emulated, improved upon or negated by the other. Ironically, it was this very cycle of action and reaction, designed to break the deadlock, which confirmed it."[26]

These cycles of innovation and competition, which intensified pressures to violate the agreed norms of the LOAC, were especially prevalent with the advent of submarine warfare. Unlike the norms involving chemical weapons, which were relatively new and untested by war until 1915, actors during the Great War initially thought that submarines fell under the well-developed, highly complex admiralty law regime and should be governed accordingly. The submarine was treated merely as a new type of warship, though one far inferior to the kings of the sea, Britain's *Dreadnought* class warships. But on September 9, 1914 an *Unterseebooten* (U-boat) sank a British warship, and only three weeks later a single sub, the U9, destroyed three British battle cruisers in a single day. From these successes came Germany's gradual escalation of unrestricted submarine warfare (USW) in hopes of stopping neutral party assistance to the Allies and thus starving the UK in particular into submission.[27] This raised legal and moral questions, but the Germans were able to rationalize them away in light of Britain's own attempts to stop neutral assistance to the Central Powers.

The simple fact was that international law could not be adapted to the new naval warfare as represented by the submarine, especially during a war where two primary belligerents—Germany and the UK—had different degrees of naval strength and different vulnerabilities. The old rules favored the British emphasis on surface ships; Germany by contrast could gain an edge at sea only by breaking those rules and allowing its submarines to do what they do best: approach and attack surface ships by stealth with little regard for innocent lives or even the venerable rule of visiting and searching, rather than destroying, non-warships.[28] Germany also argued that following the old rules would put submarines at risk of gunfire or ramming and thus put them at a disadvantage.[29] American officials made a valiant attempt to argue otherwise but were ultimately unable to convince the Germans to respect its neutral vessels throughout the war. In January of 1917 it was decided to maintain the USW policy in the hopes of bringing the war to an end. After February 1917 the German USW campaign resulted in massive Allied shipping losses: 520,412 tons in February, 564,497 in March, and 860,334 tons in April, by which time the US had entered the war.[30] This choice by Germany to employ new technology in direct contradiction to the rules of war was one of the primary reasons for American intervention in World War I, which ultimately led to the defeat of imperial Germany.[31]

To summarize, submarine technology can be seen as a medium-difficult case in terms of the analytical framework noted in the previous section. On the one hand, submarine technology involves high barriers to entry to the industry, very few end users, and a fairly high degree of physical infrastructure required, all of which should improve prospects for governance. However, subs have also been weaponized and involve relatively low economies of scale, factors that should make them difficult to govern. The case of submarines demonstrates repeated attempts by

the international community to devise rules regarding these weapons, yet also an immediate breakdown of those rules during wartime. After the war the international community attempted on another occasion to create such rules, through Article 22 of the 1930 First London Naval Treaty (re-affirmed in the Second London Naval Treaty of 1936). This measure sought to treat submarines as surface vessels despite their obvious novel technical features, tactical requirements, and special vulnerabilities. Yet, again, the major belligerents on both sides during World War II quickly violated those rules and launched another series of increasingly destructive unrestricted submarine warfare campaigns throughout the war.[32]

Conventional weapons and the LOAC: blinding laser weapons

After the difficulties regarding various arms controls measures during the interwar period, such as the Washington and London naval agreements, efforts reached a new level of intensity following the use of atomic weapons at the end of World War II. These resulted in two 'streams" of international legal restrictions regarding weapons of mass destruction (WMD) and conventional weapons (CW). Both discourses began at the Hague but later split into two sets of international regimes devoted to each type of weapon, whether WMD or CW.[33] These new weapons technologies also contributed to a related legal debate regarding the distinction between the *jus ad bellum* criteria regarding the decision to use force and the *jus in bello* criteria regarding the LOAC itself, which includes the principles of military necessity and proportionality when using military force.[34] Space considerations prevent a complete discussion of these categories; therefore in the rest of this chapter I will confine myself to the governance problems of CW and the *jus in bello* tradition for two reasons: first, CW obviously have been used, and are more likely to be used, in war than WMD, and used by a wider range of states in a wider range of conflicts; and second, CW are far more likely than modern WMD to involve problems of a dual-use nature given the range of technologies and applications involved. Both of these aspects of CW as compared to WMD should provide far more empirical variation for the purpose of theory development regarding the relationship between technological change and rule change.

The advent of non-lethal weapons provides a modern example of some of the governance problems raised by new technologies of war. As noted above, the Hague Conventions of 1899 and 1907 included the Martens Clause to extend the scope of the Conventions beyond their specific provisions. After World War II, Art. 1(2) of Protocol I of the 1949 Geneva Conventions restated and codified the Martens Clause as set forth in the Hague Conventions. In addition, Art. 35, paragraphs 1 and 2 of Additional Protocol I reinforced the basic principles of customary international law articulated in the St. Petersburg Declaration and the Hague Conventions. Art. 35(1) repeated the codification of the premise that "the right of the Parties to the conflict to choose the methods or means of warfare is not unlimited," while Art. 35(2) reaffirmed the prohibition of "weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering" contained in Art. 23(e) of the Hague Conventions of 1899 and 1907.[35]

In the 1970s the international community revisited the question of certain CW that may be deemed to be excessively injurious or to have indiscriminate effects. With the support of the United Nations (UN), the International Committee of the Red Cross (ICRC) convened an international Conference of Government Experts on the Use of Certain Conventional Weapons in two sessions in Lucerne (1974), and Lugano (1976). The ICRC Conferences at Lucerne and Lugano concentrated their discussions on specific weapons, such as small-caliber bullets, blast and fragmentation weapons, incendiary weapons, and future weapons. In 1977, after repeated attempts to reach a resolution failed, the Conference transmitted its unresolved business relating to conventional weapons to the UN. After two preparatory conferences, the UN Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects met in Geneva in 1979 and again in 1980. The 1980 UN Conference produced a Convention with three annexed protocols, providing for controls on three classes of CW: a total prohibition on non-detectable (by x-rays) fragments, plus restrictions on land-mines/booby traps and napalm and other incendiary weapons.[36]

However, these legal instruments, and the CCW Convention in particular, came under pressure almost immediately by rapid advancements in new CW technologies during the 1980s and beyond, often collectively referred to as the Revolution in Military Affairs (RMA).[37] Part of this technology-driven revolution involved weapons innovations such as fuel–air explosives (particularly for anti-personnel use, such as clearing deep bunkers), precision-guided munitions, white phosphorous rounds, and especially for our purposes, an increasingly large category of so-called non-lethal weapons (NLW). The US is the leading proponent of NLW and its Department of Defense (DOD) defines NLW as:

> Weapons that are explicitly designed and primarily employed so as to incapacitate personnel or materiel, while minimizing fatalities, permanent injury to personnel, and undesired damage to property and the environment. … Non-lethal weapons are intended to have one, or both, of the following characteristics: a) they have relatively reversible effects on personnel and material; and b) they affect objects differently within their area of influence.[38]

Given the nature of modern conflicts, which often put civilians at risk, US defense planners in particular have aggressively pursued the development of NLW since the Vietnam War. Perceived efficacy in warfare is important in explaining the appeal of these new weapons, but they have been further justified by a well-known claim by technology enthusiasts: that such "humane" weapons will make war less lethal for both combatants and non-combatants *yet still result in the outcome—capitulation—desired by the users of NLW.*[39]

More important for our purposes is the question of their legality under the current LOAC.[40] Under the 1977 Protocol I to the Geneva Conventions of 1949 Relating to the Protection of Victims of International Armed Conflicts, during any study, development, acquisition or adoption of a new weapon, means or method

of warfare, a High Contracting Party to the Conventions is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by the Protocol or by any other rule of international law applicable to the High Contracting Party. Article 36 therefore requires that

> in the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

While NLW have been advocated as the means to open a new era of more humane warfare, since they are by definition non-lethal, certain types of NLW may in fact violate the standard prohibition against weapons that cause superfluous injury or unnecessary suffering.

One NLW in particular has received a great deal of attention regarding this issue: those involving laser technologies, specifically portable, or battlefield, laser weapons. After the 1980 UN CCW Conference, the ICRC learned from technical and military publications that lasers were being developed for use as an anti-personnel weapon and that such weapons could permanently blind the person attacked. Given this type of weapons innovation after the 1980 UN Conference, the ICRC began to investigate the possible effects of such weapons and ultimately sponsored a series of expert meetings relating to new weapons development, specifically on battlefield laser weapons.[41] The First Round Table of Experts on Battlefield Laser Weapons was in 1989 and subsequent meetings in 1990 and 1991 ultimately resulted in the only international legal measure explicitly created to govern a NLW: the 1995 Protocol IV to the 1980 CCW, involving an outright ban on the use and transfer of laser weapons whose primary purpose is to permanently blind (the Blinding Laser Weapons Protocol).

This instrument represents a significant breakthrough in international humanitarian law because it is the first time since the 1868 St. Petersburg Declaration prohibited the use of exploding bullets that a weapon of military interest has been banned *before* its use on the battlefield. Article 1 of Protocol IV effectively prohibits the use of "laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision; that is, to the naked eye or to the eye with corrective eyesight devices." The Protocol distinguishes between intentional and unintentional blinding through its Article 3, which excludes "[b]linding as an incidental or collateral effect of the legitimate military employment of laser systems, including laser systems used against optical equipment." The protocol, however, was clearly intended only to prohibit a small class of laser weapons, whose primary purpose was to cause permanent blindness. Article 4 defines "permanent blindness" as an "irreversible and uncorrectable loss of vision which is seriously disabling with no prospect for recovery," thus allowing for the use of laser weapons intended to "dazzle" or *temporarily* blind an enemy combatant. Still, this is the first time that

both the *use and transfer* of a weapon have been entirely prohibited under international humanitarian law.[42] Moreover, the United States, the leading proponent of this new technology, leads the way in accepting such a ban.[43]

However, there are strong reasons to believe that the Blinding Laser Weapons Protocol, though a very respectable initial effort, may ultimately fall short of restricting the full use of laser weapons in war. Based on Table 1 as presented earlier in this chapter, laser technology is even more difficult to regulate than submarine warfare, as it possesses *all five characteristics* that undermine the global governance of a new technology: it can be and has been easily weaponized; it does not require or depend on economies of scale either for effectiveness or affordability; the barriers to entry for new firms are not especially high; the number of end users of basic laser technology is extremely high; and it does not require a large physical infrastructure for either production or use. In addition, laser technology possesses other features that make it especially difficult to govern on the battlefield. Unlike ordinary light, the laser beam can travel long distances with minimum radiation dispersion, and can be made into a parallel beam for wider dispersion. Laser light obviously travels at the speed of light, making it a zero time-of-flight weapon and rendering physical ordnance extremely slow by comparison; the beam also may be continuous or pulsed with an extremely high degree of accuracy. Finally, continuous laser beams may be finely calibrated in power from one one-thousandth of a watt to many thousands of watts per second, while pulsed lasers may reach energy levels of up to millions of watts per fraction of a second.

These factors increase the utility of laser technology for a wide range of military applications while also expanding the range of potential governance issues, particularly related to the prohibition against causing "unnecessary suffering" or 'superfluous injuries" under the current LOAC.[44] However, making such a determination regarding the use of battlefield laser weapons is extremely difficult. One approach is to ask whether there are other weapons, for example, lethal weapons, which offer the same, or greater, military advantages but cause less suffering or injury. Lasers may be less likely to cause death than gunfire or artillery rounds but a permanent disability may result, so which is a worse form of injury or suffering? Also, laser technology may eventually improve so that only temporary blindness is caused, which would then be permissible under the current Convention. If so, the limits on "temporary" will then need clarification: how long is "temporary" and does it mean victims will heal naturally or might they require corrective lenses, medications, or surgery? And if life-long disability is worse than death, then is it worse than other types of disabilities (for example, the loss of limbs), caused by "ordinary" lethal weapons? Moreover, a total ban on all battlefield lasers would not be workable for reasons already mentioned. Indeed, the fact that lasers can be used to make lethal weapons more accurate thereby reducing civilian casualties means that the international community must balance very carefully the benefits and risks of lasers in battle before attempting an outright ban or similar prohibition.[45]

Conclusion

Technological revolutions are important recurring phenomena in the story of human progress, and scholars have attempted to make sense of such revolutions from a variety of perspectives. As these revolutions are global in nature, and as they contribute so much to national wealth and power, as well as to political conflict and cooperation, analysts of international relations and law must pay particular attention to defining, measuring, and explaining the role of such revolutions in modern world politics. Many scholars are in fact doing just that, yet their efforts are often isolated from each other: they often focus on single revolutions, single applications within a revolution, or single collective action problems, and associated solutions, generated by those applications.

In this chapter, I have attempted to impose some analytical discipline on this topic by advancing a framework that explains the interactions between changes in technology and changes in the demand for global governance, a key problematique in the study of international relations. The basic approach can be summarized fairly simply. To begin, we must consider the ways new technological revolutions emerge and progress at the domestic level and directly impact the various actors involved in terms of their changing interests, power resources, and political activities. The behaviors of these actors, as well as follow-on technology-generated problems, simultaneously 'spill over" to the international system level and threaten its existing structures of power/security, economics/markets, norms/institutions, and consensual knowledge. This technology-generated change in unit-level and system-level processes in turn may create a demand for cooperation, usually in the form of global governance mechanisms. Once established and institutionalized over time, these mechanisms can become an additional causal factor in explaining the performance or maintenance of international technology organizations or regimes. Finally, all of this change is further contingent on the specifics of each technological revolution, its main applications, and their unique collective action problems.

My examination of new weapons technologies and the LOAC offered some further refinements to this general argument. In substantive terms, the relationship between how new technologies are "sold" to their owners/users and their actual application in warfare is highly problematic; so too is the relationship between changes in military doctrine and changes in the LOAC as a result of a new weapons technology. Owners/users of a new technology, especially as innovators, invariably justify it in different ways as compared to "targets" or other non-owners/users. This is especially true for weapons technologies that become institutionalized as new military roles, or even military services, within states. In procedural terms, I stressed the role of leading powers in stimulating both technological changes and rule changes, the legal/institutional discourse surrounding a specific technology and collective action problem, and the role of key supporting players, such as the UN and the ICRC, in placing a new problem on the international agenda. In the post-Cold War era, the US is especially crucial in

determining whether such problems will be addressed through formal legal measures, and the specific content of those measures. In the case of blinding laser weapons, the US did support an unprecedented ban on such weapons but also required several loopholes to allow continued use of lasers on the battlefield.[46] Technological changes and future uses of laser weapons will inevitably place new stresses on the LOAC and other legal regimes, resulting in a new set of dynamics as argued in this chapter.

This key role of the US in the area of NLW based on its military-technical edge should not, however, lead us to conclude a similar role for America across the full range of technologies and collective action problems discussed earlier in this chapter. In fact, a superficial examination of recent technology-related disputes strongly suggests that there are clear limits to America's hegemony in governing new technologies, and that other players can offer alternative models for making new rules in this area.[47] Even where the US is able to offer some initial leadership on the questions of interest to this study, we must also be open to the possibility of hegemonic decline, either in a structural sense or as related to specific issue-areas. In fact, one of the early proponents of hegemonic leadership theory[48] specifically mentions technological diffusion as one of three major sources of hegemonic decline.[49] These facts suggest a need for alternative explanations of global governance such as the technology-centered approach taken in this chapter. Only by first considering a full range of modern technological problems can we then consider synthesizing them into a coherent procedural analysis, or even a general theory of global technology governance. Such a general theory, in essence, would encapsulate most of what the international community has already learned about cooperating in the face of modern technological revolutions, some of which now have the capacity to fundamentally change that community.

Notes

1 For a general examination of this issue, see Thomas W. Smith, "The New Law of War: Legitimating Hi-Tech and Infrastructural Violence," *International Studies Quarterly* 46 (2002): 355–374.

2 Robert Gilpin, *War and Change in World Politics* (New York: Cambridge University Press, 1981).

3 Robert Jervis, *The Meaning of Nuclear Revolution: Statecraft and the Prospect of Armageddon* (Ithaca: Cornell University Press, 1989). For more extensive (though descriptive) overviews of new weapons technologies, see William H. McNeill, *The Pursuit of Power: Technology, Armed Force, and Society Since A.D. 1000* (Chicago: University of Chicago Press, 1982); and Ernest Volkman, *Science Goes to War: The Search for the Ultimate Weapon, From Greek Fire to Star Wars* (New York: John Wiley & Sons, 2002).

4 James Rosenau and Ernst-Otto Czempiel (eds), *Governance Without Government: Order and Change in World Politics* (New York: Cambridge University Press, 1992); and Liesbet Hooghe and Gary Marks, "Unraveling the Central State, But How? Types of Multi-level Governance" *American Political Science Review* (2003) 97: 233–43.

5 I use "rules" as a generic term here to refer to specific behavioral prescriptions or proscriptions shared by a set of actors. Obviously such rules can vary across several dimensions, ranging from unwritten customs and traditions to informal norms to legal rights and responsibilities. For a more extensive discussion, see Friedrich V. Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1989).

6 Thomas Kuhn, *The Structure of Scientific Revolution* (Chicago: University of Chicago Press, 1970); and Michael Talalay, Chris Farrands, and Roger Tooze, "Technology, Culture, and Competitiveness: Change and the World Political Economy" in *Technology, Culture and Competitiveness*, (eds) Michael Talalay, Chris Farrands, and Roger Tooze (London: Routledge, 1997).

7 Joseph A. Schumpeter, *Capitalism*, *Socialism and Democracy* (New York: Harper & Row, 1975): 81–86.

8 James R. Kurth, "The Political Consequences of the Product Cycle: Industrial History and Political Outcomes" *International Organization* (1979) 33: 1–34; and Deborah L. Spar, *Ruling the Waves: From the Compass to the Internet, A History of Business and Politics along the Technological Frontier* (New York: Harcourt, 2001).

9 Naturally, the assumption of *ceteris paribus* holds for each factor.

10 Mark Zacher and Brent Sutton, *Governing Global Networks: International Regimes for Transportation and Communications* (New York: Cambridge University Press, 1996): 25.

11 Richard Posner, "Natural Monopoly and Its Regulation" *Stanford Law Review* (1969) 21: 548–649; and W.J. Baumol, J.C. Panzer, and R.D. Willig, *Contestable Markets and the Theory of Industry Structure* (San Diego: Harcourt Brace Jovanovich, 1982).

12 J.S. Bain, *Barriers to New Competition* (Cambridge: Harvard University Press, 1956).

13 Jean Gabszewicz, Lynne Pepall, and Jacques-François Thisse, 'Sequential Entry with Brand Loyalty Caused by Consumer Learning-by-Using" *The Journal of Industrial Economics* XL (1992): 397–416.

14 David J. Teece, 'Strategies for Capturing the Financial Benefits from Technological Innovation" in *Technology and the Wealth of Nations* (eds) Nathan Rosenberg, Ralph Landau, and David C. Mowery (Stanford: Stanford University Press, 1992); and Glenn R. Fong, "Follower at the Frontier: International Competition and Japanese Industrial Policy" *International Studies Quarterly* (1998) 42: 339–366.

15 Charles Perrow, *Normal Accidents: Living with High-Risk Technologies* (Princeton: Princeton University Press, 1999).

16 James N. Rosenau, *Turbulence in World Politics: A Theory of Change and Continuity* (Princeton: Princeton University Press, 1990); and Daniele Archibugi and Jonathan Michie (eds) *Technology, Globalisation, and Economic Performance* (Cambridge: Cambridge University Press,1997).

17 The CIA's creation in 1999 of a venture capital group, In-Q-Tel, to explicitly develop or support innovations related to its intelligence mission, is instructive here, as is the US Department of Defense's involvement in developing the Internet through its Defense Advanced Research Projects Agency (DARPA).

18 Stephen D. Krasner, *International Regimes* (Ithaca: Cornell University Press, 1983); also see Ernst B. Haas, "Is There a Hole in the Whole? Knowledge, Technology, Interdependence, and the Construction of International Regimes" *International Organization* (1975) 29: 827–76; Oran Young, *International Cooperation: Building Regimes for Natural Resources and the Environment* (Ithaca: Cornell University Press, 1989); Ernst B. Haas, *When Knowledge is Power: Three Models of Change in International Organizations* (Berkeley: University of California Press, 1991); Helen Milner, "International Theories of Cooperation Among Nations: Strengths and Weaknesses" *World Politics* (1992) 44: 466–96; and Volker Rittberger (ed.) *Regime Theory and International Relations* (Oxford: Oxford University Press, 1993).

19 For a more extensive discussion of incomplete contracting and international cooperation, see Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton: Princeton University Press, 1984).
20 D. Schindler and J. Toman, *The Laws of Armed Conflicts* (Leiden: Martinus Nijhoff Publishers, 1988): 102. An earlier effort, the Lieber Code (or "Instructions") of 1863, involved America's attempt to set down rules to govern its own armed forces during a conflict. Some of these rules involved the use of poisons and bombardment, as well as more general prohibitions against assassinations, cruelty, and torture.
21 Unless otherwise noted, this and all subsequent citations of international humanitarian law are taken from the website of the International Committee of the Red Cross: http://www.icrc.org/eng/ihl (last accessed 18 February 2008).
22 For a more extensive discussions see Rupert Ticehurst, "The Martens Clause and the Laws of Armed Conflict," *International Review of the Red Cross*, No. 317 (30 April 1997): 125–134; and Vladimir V. Pustogarov, "The Martens Clause in International Law," *Journal of the History of International Law* (1999) 1: 125–135.
23 Hew Strachan, *The First World War* (New York: Penguin, 2003): 259.
24 Stephen Van Evera, "Why Cooperation Failed in 1914" in *Cooperation Under Anarchy* (ed.) Kenneth A. Oye (Princeton: Princeton University Press,1986): 84; also see Stephen Van Evera, "The Cult of the Offensive and the Origins of the First World War" *International Security* (1984) 9: 58–107; Jack Snyder, *The Ideology of the Offensive: Military Decision Making and the Disasters of 1914* (Ithaca: Cornell University Press, 1984); and Jack Snyder, "Civil-Military Relations and the Cult of the Offensive, 1914 and 1984" *International Security* (1984) 9: 108–146.
25 A strategy later perfected by the US during the Cold War and beyond; see Russell F. Weigley, *The American Way of War: A History of United States Military Strategy and Policy* (Bloomington: Indiana University Press, 1973), especially Part V.
26 Hew Strachan, op. cit. 173.
27 Though of course it is highly questionable whether the US was actually "neutral" given its extensive trade with and loans to the Allies relative to the Central Powers. The US also failed to protest when the UK declared the North Sea a war zone in November 1914. This was probably illegal; the British claimed they were retaliating for Germany's earlier indiscriminate use of mines. Ross Gregory, *The Origins of American Intervention in the First World War* (New York: W.W. Norton, 1971): 42.
28 Specifically, the naval code required commerce raiders of any type to stop merchant ships, allow the crew to take lifeboats, and provide them with food/water and assist their passage to the nearest landfall before destroying the vessel.
29 A risk very effectively demonstrated in August 1915 when a German U-boat was sunk by an American-flagged (i.e., supposedly neutral) British decoy vessel, the *Baralong*, while the U-boat was obediently allowing passengers to safely disembark from a British merchantman it was preparing to sink. The British also killed the boarding party the Germans had put on a captured merchant vessel. When made public in Germany in January 1916, the incident gave more rhetorical ammunition to the proponents of USW (Gregory op. cit. 93; Strachan op. cit. 225).
30 Keegan op. cit. 351–55.
31 As President Wilson noted in his war message to Congress, "Property can be paid for; the lives of peaceful and innocent people can not be. The present German submarine warfare against commerce is a warfare against mankind. It is a war against all nations." He then argued that it was impossible to use "armed neutrality" to defend against "outlaw" submarine attacks and that the new USW policy of Imperial Germany was "nothing less than war" against the US (*Foreign Relations of the United States, 1917: World War Supplement I* (Washington DC: US Govermenment Printing Office, 1926): 195–203.
32 Jeffrey W. Legro, *Cooperation Under Fire: Anglo-German Restraint During World War II* (Ithaca: Cornell University Press, 1995).

33 Such as the 1977 Protocol I to the Geneva Conventions of 1949 codifying the principle of customary international law that the methods or means of warfare are not "unlimited," and the 1980 UN Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (hereafter the "CCW Convention").

34 Anthony F. Lang, Jr. "Introduction" in *Ethics and the Future of Conflict: Lessons from the 1990s* (eds) Anthony F. Lang, Jr, Albert C. Pierce, and Joel H. Rosenthal (Upper Saddle River: Pearson Education, 2004).

35 For a more extensive discussion, see Louise Doswald-Beck, "The Civilian in the Crossfire," *Journal of Peace Research* (1987) 24: 251–262.

36 Sea-mines are covered under the 1907 Hague Convention.

37 Ove Bring, "Regulating Conventional Weapons in the Future: Humanitarian Law or Arms Control?" *Journal of Peace Research* (1987) 24: 275–286; Charles J. Dunlap, Jr. "Technology and War: Moral Dilemmas on the Battlefield" in *Ethics and the Future of Conflict: Lessons from the 1990s* (eds) Anthony F. Lang, Jr., Albert C. Pierce, and Joel H. Rosenthal (Upper Saddle River: Pearson Education, 2004).

38 US Department of Defense, *Policy for Non-Lethal Weapons* (Washington, DC: US DoD Directive, 9 July 1996).

39 Note the similarity here to an earlier boast regarding the promise of new weapons technologies: to create a weapon so devastating that war becomes obsolete (i.e., WMD). For example, Alfred Nobel, the inventor of dynamite, wanted to "produce a substance or machine of such frightful efficacy for wholesale devastation that wars should thereby become altogether impossible." Barbara W. Tuchman, *The Proud Tower* (New York: Bantam Books, 1972) (first published 1962): 270. This debate was revisited in Scott D. Sagan and Kenneth N. Waltz, *The Spread of Nuclear Weapons: A Debate Renewed* (New York: W.W. Norton, 2003).

40 For an overview see V.J. Wallace "Non-Lethal Weapons: R^2IPE for Arms Control Measures," *Defence Studies* (2001) 1: 83–108.

41 Bengt Anderberg, Ove E. Bring and Myron L. Wolbarsht, "Blinding Laser Weapons and International Humanitarian Law," *Journal of Peace Research* (August 1992) 29: 287–297.

42 Burrus M. Carnahan and Marjorie Robertson, "The Protocol on 'Blinding Laser Weapons': A New Direction for International Humanitarian Law," *The American Journal of International Law* (July 1996) 90: 484–490; Lisa Small, *Blinding Laser Weapons* (Typescript: The International Center for Law, Trade and Diplomacy, n.d).

43 Although the US did earlier abandon some technologies on its own for fear of adverse publicity over human blinding issues and cost/weight requirements. One example is the US Close-Combat Laser Assault Weapons (code named "Roadrunner"), an early 1980s Army tactical laser weapon designed to attack the optics of enemy armoured fighting vehicles. The program was cancelled in 1984. David C. Morrison, "When Eyes Become the Targets," *National Journal* (1987) 19: 822–823.

44 Also note that Article 2 of the Blinding Laser Weapons Convention makes a High Contracting Party accountable for any *incidental* combat blindings, which may result from the use of target-markers or range-finders (for example), by requiring that the Party "take all feasible precautions." Obviously the determination of what is "feasible" on the battlefield is left to individual Parties and could vary widely in practice.

45 For more detailed discussion of these issues, see Jeffrey S. Morton, "The Legal Status of Weapons That Blind," *Journal of Peace Research* (November 1998) 35: 697–705; Margaret-Anne Coppernoll, "The Nonlethal Weapons Debate," *Naval College War Review* (1998); Robin Coupland, "Armed Violence," *Medicine & Global Survival* (April 2001) 7: 33–37; and Robert Mandel, "Nonlethal Weaponry and Post-Cold War Deterrence," *Armed Forces & Society* (2004) 30: 511–537.

46 America's approach to the ban on anti-personnel landmines reveals a similar reluctance to bind itself with global legal instruments; see Richard Price, "Reversing the Gun Sights: Transnational Civil Society Targets Landmines," *International Organization* (1998) 52: 613–644.
47 Michael E. Smith, "American Hegemony and the Global Governance of High Technology" Paper delivered at the International Studies Association conference (Montreal, Canada, March 2004).
48 Gilpin, op. cit.
49 The other two sources are increasing costs of system maintenance and increasing internal consumption vis à vis domestic investment. Considering the current state of US budgetary discipline and its expanded military empire (not to mention China's spectacular economic growth), the possibility of US hegemonic decline must be taken seriously in any study of global governance.

7 Rules and the evolution of international nuclear order

William Walker

The nuclear weapon has existed for over six decades. It is a familiar technology which has generated a now familiar set of political responses. Yet its capacity to disturb, in every sense of the word, seems undiminished. This is due partly to political and military predicaments that have found no resolution. It is also due to the technology's diffusion which, at each stage and in whichever context, has given rise to new fears, created new instabilities, and generated demands for action which have seldom satisfied.

Throughout most of this history, states have sought to establish a rule-based environment to ensure their survival, and indeed human survival given the weapon's extraordinary character. The basic dilemma is that nuclear technology is both a boon and a curse. It provides states with an unequalled ability to deter wars and influence the behavior of opponents, and nuclear fission is the only source of primary energy useful to large-scale economic development that has been discovered since the industrial revolution.[1] Set against this is the technology's immense destructive power and the dread and insecurity attached to it. The result has been an inescapable political and moral agony.

In this chapter, I wish to describe how the nuclear weapon's emergence disturbed norms and rules in not one but three social systems that had developed universal pretensions in modern times – the science system, the production system, and the state system. It led, at many levels, to a struggle to establish a distinctive international order to which all states could owe allegiance. That order has recently become deeply troubled after a period of strong development and consolidation. Confidence has been sapped inter alia by rule-breaking behavior and difficulties in responding to it, by perceptions in some places that its rules and norms are outmoded, and by weakening of what amounted to a grand political settlement – expressed in the Nuclear Non-Proliferation Treaty (NPT) – upon which the order was heavily reliant.

This deterioration at the interstate level happened just as the need emerged for even greater cooperation and regulation to limit dangers that nuclear proliferation would accelerate, arms racing would return and weapons of mass destruction could become instruments of irregular warfare. The central question is whether, after a period of discord and misjudgement bequeathing a legacy of mistrust, there can again be convergence on a conception of rule-based nuclear order that delivers security in a manner that is unifying rather than divisive.

The science and production systems

The bombing of Hiroshima and Nagasaki in August 1945 is usually taken to mark the beginning of 'the nuclear age'. However, the scientific revolution that made the nuclear weapon and many other contemporary technologies (including electronics) possible began in the mid to late nineteenth century. It involved fresh understandings of physical phenomena at microscopic and macroscopic levels and of the nuclear, electromagnetic and gravitational energy forms that underpinned them.

These developments arose from the efforts of a small number of exceptionally talented individuals – a scientific aristocracy – and their assistants working mainly in Europe. Although exhibiting the usual rivalries, it was an open international society committed to free inquiry and publication of results.

During the 1930s, the right of all European scientists to engage freely in scientific research was challenged by fascist governments who gradually stripped Jewish scientists of their academic positions.[2] The result was a diaspora of many of Europe's most brilliant scientists to the UK and US, opening the way for the latter's domination of the physical sciences in the second half of the twentieth century. It was nevertheless in Germany that the paper was published, by German scientists, in December 1938 announcing the fissioning of uranium atoms and observing that a large release of energy might result from a neutron-induced chain reaction. The possibility that a new kind of bomb could be manufactured was immediately recognized. After a theoretical breakthrough and government-led inquiry in the UK in 1940, and after initial American hesitation had been overcome, the Manhattan District Project to develop the atomic bomb was launched in 1942.[3]

In just three years, a field of science then changed from being an apparently innocent playground of pure inquiry into part of the battleground of states seeking strategic advantage.[4] There were three immediate consequences. First, it became a secret science under political and military control, segments of whose output could no longer be published, and whose practitioners were removed to specially constructed laboratories and cities whose existence was often kept secret. Second, it quickly became an industrialized science. Along with radar in the US and rocketry in Germany, the Manhattan Project became the first 'crash programme' in which massive resources were committed by states to the contemporaneous development of a science and a technology. Great facilities were built, capital goods suppliers were recruited and the foundations of large-scale production were laid. Third, it became a nationalized science. Although the Manhattan Project was jointly sponsored by the British, Canadian and US governments, the nuclear weapon programme was financed and led by the United States which evicted its partners after 1945.

All of this sat uncomfortably with a scientific culture committed to the free flow of ideas within and across borders. Ramparts were nevertheless built around the science of nuclear explosives as the East–West conflict intensified and as the missile-launched nuclear weapon became the main instrument of

strategic engagement between the superpowers and their alliances. Through the Atomic Energy Act of 1946 (the McMahon Act), the US barred transfers of relevant knowledge to other states, criminalized actions involving such transfers, and derogated to itself sole rights to develop and possess nuclear arms. A science and technology was thereby subjected to restrictive rules devised to protect the national interest of the United States in its emergence as a global power after 1945 committed to the 'defence of the free world' against Soviet and communist expansion.

The difficulty of limiting the spread of knowledge, as opposed to relevant materials and artefacts, was demonstrated when the Soviet Union tested its first nuclear weapon just a few years later. None of the international regulations that have since developed to curtail the acquisition of nuclear weapons has involved defining, and placing limitations on, the scientific and technical knowledge related to nuclear explosions. In part, states had to look elsewhere because the very act of defining that knowledge in the detail required for effective regulation risks revealing too much about bomb design. Rather, states with nuclear weapon programmes have individually decided where to place boundaries around the applied science of warhead design, and have policed them mainly by vetting staff and binding them and their organizations to the maintenance of absolute secrecy. Even so, much knowledge of how to design a nuclear weapon has leaked into the open literature and now on to the internet (the bare bones are even taught to children in high school) with the result that, sixty years on, there is not much that a competent group of scientists and technicians has to learn afresh unless it is aiming for high levels of sophistication.[5]

The lesson is that science is, as always, exceedingly difficult to regulate. It is intangible by nature, its boundaries are porous, scientists dislike being gagged, and any attempt to inhibit the march of scientific discovery quickly encounters resistance. There is also an engrained reluctance among scientists to accept responsibility for unanticipated harms, even if many nuclear scientists came to regret their activities after Hiroshima and became lifelong opponents of nuclear armament. The strong rules of science relate to the integrity of its methods, not to the directions of inquiry except that it should remain free from external or internal inhibition.[6]

Rather than address the threat of nuclear weaponry through extensive constraints of scientific activity, involving a much deeper revision of scientific norms and practices, regulatory attention focused on the physical materials used in nuclear weapons and the technologies for producing them. With exceptions that have not been troubling so far, nuclear weapons can only be constructed from fissile isotopes of two elements – uranium and plutonium – that are difficult and expensive to acquire, and whose production, processing and storage are capable of being closely monitored by direct and indirect methods. Unfortunately, these happen to be the same materials used in civil nuclear industries, since it is their fissioning that produces the heat used to raise steam which drives turbine-generators and generates electricity (nuclear power is a sophisticated way of boiling water). Any state establishing enrichment and reprocessing industries to supply

these materials, or acquiring stocks of plutonium or enriched uranium from elsewhere, would attain the option to arm itself with nuclear weapons. A persistent question has therefore been whether these technologies and materials should be allowed to diffuse, and if so under which conditions and forms of international governance?

An early proposal, espoused in the Acheson-Lilienthal Report of April 1946, was to place all nuclear materials and technologies, wherever they may be located, under common international ownership and control. However, this proposal could only be realized if states agreed to the total rule-bound elimination of nuclear weapons, which did not happen, and if states and industries agreed to establish a global monopolistic market structure in the civil domain, which was unacceptable outside the communist bloc. The well established power plant industry which produced capital goods used in electricity supply would not be denied the opportunity to compete worldwide for the expected large market for the new technology. The dominant firms in this industry, such as Siemens in Germany and General Electric in the US, had also long been regarded as 'national champions'. As such, they were political and economic flag-bearers for their states, politicizing their fields of commerce.[7] Furthermore, initial attempts by the US to deny access to nuclear technology were widely regarded as infringing the developmental norm which became entrenched as newly founded states sought to industrialize after decolonization.

A means of regulating production and trade had therefore to be established so that technology could diffuse and competitive markets could function, with reasonable freedom, without facilitating the acquisition of nuclear weapons. Two approaches were adopted and a third was explored:

1 Fissile materials would be submitted to international accounting and inspection to ensure that they were not diverted from civil to military usage. This was achieved through the safeguards system founded in the 1950s and developed mainly under the auspices of the International Atomic Energy Agency (IAEA) in Vienna;[8]
2 Standard rules would be adopted by the main supplier countries both to prevent transfers to states bent on acquiring nuclear weapons and to avoid exporters gaining competitive advantage through offers to transfer weapon-related technologies. The outcome, negotiated in the second half of the 1970s, was the Nuclear Suppliers Guidelines which, although not international law, would henceforth become the main point of reference for supplier states;[9]
3 Enrichment and reprocessing industries would be submitted to some form of multinational governance, diminishing states' abilities to adapt them to serve national military ends.

In any event, concerns that the diffusion of materials and technologies for civil purposes would spawn weapon programmes turned out to be exaggerated. The cooperative regulation of civil nuclear trade discouraged its military exploitation,

and the market for nuclear power reactors shrank after the accidents at Three Mile Island and Chernobyl. As we shall see, the clandestine acquisition of military capabilities by 'rogue states' would pose a more formidable challenge to the international nuclear order.

The state system and nuclear deterrence

The nuclear weapon was the child of the industrialized state system. The resources to manufacture it could only be mobilized by states. Moreover it came to be regarded as the ultimate expression and vehicle of total war. Hiroshima and Nagasaki brought widespread if not universal recognition that the nuclear weapon was not a 'conventional weapon'. Its use could never become routine on the battlefield. The UN's designation in 1946 of atomic bombs as unconventional weapons – and its referring to them as weapons of mass destruction – established, one might say, the first constitutive rule of the international nuclear order. This rule rested on moral rather than military grounds, namely that indiscriminate killing on such a massive scale could not be condoned. However 'realist' nuclear politics and strategy might become, they could not free themselves from moral judgement.

In the decade after Hiroshima and Nagasaki, US military strategists proposed using nuclear weapons on a number of occasions, for instance to launch a preventive war against the Soviet Union and to end the Korean War.[10] By the mid to late 1950s, however, it was accepted that the harm done would be too great to bear for the perpetrators as well as the victims of nuclear attack. The Soviet Union also recoiled against using such mass violence when it considered a preventive nuclear war against China in the 1960s to destroy an emerging rival in Asia. Despite periodic military flirtations with tactical uses of nuclear weapons, it came to be understood that they too would be confined to instruments of deterrence. The limitation of nuclear weapons' usage to deterrence has been one of the primary rules of the nuclear age. Yet it is a rule that has not been expressed formally in any international treaty or agreement. The main reason is that nuclear deterrence can only have effect if the prospect of war-fighting is kept alive. For deterrence to be meaningful, rival states have to believe that it will be abandoned and war will commence beyond some point.

Once nuclear weapons began to be deployed, various novel problems had to be addressed: how to develop 'deterrence relations' that, while enabling protagonists to exercise influence over one another, were sufficiently stable to avoid outbreak of war; how to avoid accidental wars and submit decisions to reasoned argument in face of the unprecedented shortness of time between launch and delivery of ballistic missiles; how to create confidence in extended deterrence, the holding of nuclear umbrellas over allies; how to temper an arms race driven by technological opportunity, worst-case analysis and threat inflation; and how to limit the influence of R&D laboratories and arms industries that were parasitic on the East–West rivalry and were often shielded from public scrutiny.

Throughout the Cold War, states and their leaders struggled to find satisfying answers to these questions. It would be going too far to claim that deterrence relations became rule-based; indeed the very nature of deterrence required a certain freedom from rules since it depended on uncertainty for its effect. Nevertheless, the exercise of nuclear deterrence did gradually become more *controlled,* especially after the shock of the Cuban missile crisis in 1962. First, the techniques of command and control over nuclear forces became increasingly reliable. They entailed the development by both sides of routines, entailing an habitual organizational discipline and practice, that went beyond simple rules. Second, agreed limits were placed on the numbers and types of delivery systems that could be deployed by either side, supported by bans on the further development and deployment of missile defences, the limits and bans being codified in bilateral treaties (notably the SALT and ABM Treaties). Third, Moscow and Washington came to respect their rights to coexistence, whatever their political and ideological differences, and to accept that overthrow of their leaderships, empires or socioeconomic systems was no longer a reasonable objective of policy. Once this was acknowledged (it would briefly be cast aside during the Reagan presidency), they could set about negotiating treaties and agreements to moderate their rivalry and reduce the risks of war. As always, the emergence of international rules and institutions was founded on acceptance, despite continuation of a highly competitive relationship, of cooperation as a way of life.

The Nuclear Non-Proliferation Treaty

The spread of nuclear weapons was the other pressing issue. Besides the practical difficulties of limiting the diffusion of nuclear technologies discussed above, how could the constraint of nuclear proliferation and, in effect, the restriction of states' access to nuclear deterrence be justified? After all, the UN Charter asserts that self-defence is an inherent right of sovereign states. How could the non-proliferation norm attain a universalized legitimacy, and proliferation become formally illegitimate? A legal framework was needed to buttress efforts to constrain the spread of nuclear weapons whilst allowing for the diffusion of technological capabilities for civil purposes and the alleviation of traditional security concerns.

The Nuclear Non-Proliferation Treaty (NPT) became the central political and legal instrument of non-proliferation policy and the 'cornerstone' (a word often used) of an inclusive international nuclear order. It was more than a body of rules constituting international law: it entailed – and *had* to entail – a political settlement and contract among states with widely different power resources, and a decision to seek survival and order mainly through pursuit of cooperative diplomacy and problem solving, albeit supported by the judicious exercise of coercive power.

The NPT's negotiation between 1965 and 1968 was facilitated by two pragmatic shifts: acceptance by most states, expressed in the UN General Assembly's adoption of the 'Irish Resolution' in 1961, that nuclear disarmament was not a practical goal, (for the time being at least) and that states should focus efforts on

limiting rather than eliminating nuclear arms; and acceptance by the US, USSR and their allies among other states that they had to cooperate in achieving this end. Exceptionally in international law, the Treaty creates two classes of state – the nuclear and non-nuclear weapon states (NWS and NNWS) – and ascribes different rules and responsibilities to them. Furthermore, the Treaty's verification through international safeguards requires intrusions, in the form of on-site inspections, on the sovereignty of member states from which the NWS are exempt. How to define those rules and responsibilities, and how to reconcile the non-nuclear weapon states to the legalized discrimination created thereby, was the challenge faced by its negotiators. A consequence of distinguishing classes of state was that the Treaty's discourses were marked from the outset by exceptional sensitivity to states' rights and to the limits placed on sovereignty.

Compared to many other multilateral treaties, the NPT is brief and elegant, comprising a preamble and eleven articles requiring just a few pages of print. It is essentially a framework treaty expressing the primary rules and norms which, as subsequently happened, needed elaboration to give it effect. The Treaty's main rules are set out in six articles. Article I commits the NWS Parties not to aid another state's acquisition of nuclear arms and Article II commits the NNWS Parties not to seek and acquire such arms. Article III requires the NNWS Parties to accept safeguards on all of their nuclear activities, sets some conditions, and places responsibility for applying those safeguards on the IAEA. Articles IV and VI contain the Treaty's essential bargains. In return for renouncing rights to acquire nuclear weapons, Article IV asserts the 'inalienable right' of NNWS to 'develop research, production and use of nuclear energy for peaceful purposes' if they honour their other treaty undertakings.[11] Article VI commits Parties 'to pursue negotiations in good faith relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control'. Although vaguely expressed and impossible to implement fully, since it implied the laying down of all arms, including conventional arms, this Article's commitment of all NPT Parties to the achievement of nuclear arms control and disarmament was clearly understood.

Between 1970 and 2000, the NPT and its associated regime expanded and deepened: membership grew substantially, only India, Israel and Pakistan remaining outside the Treaty by the period's end; the safeguards and export control systems were elaborated through international agreements on strengthening their rules and procedures; and the arms control agenda pursued through the Treaty, and through multilateral diplomacy, became more ambitious. Its greatest development occurred between 1986 and 1997. The first of these dates marked the end of the 'second Cold War' when Presidents Gorbachev and Reagan agreed to move the Soviet Union and United States from a confrontational to a cooperative relationship, to end their technological competition, and to reduce armaments through a raft of treaties, notably the Intermediate Nuclear Forces (INF) Treaty, the Treaty on Conventional Armed Forces in Europe (CFE) and the Strategic Arms Reduction Treaty (START). The last multilateral treaty agreement of note

occurred in 1997 when the so-called Additional Protocol was concluded, reforming the IAEA safeguards system's rules and procedures after their weaknesses had been revealed by Iraq's evasions.

Three particular features of this period can be noted which lent it such a progressive character. First, cooperative problem-solving through international institutions was in the ascendancy. It was pushed strongly by the US, Russia and the UK, by the now enlarged community of NNWS, and by the UN Security Council in its initially well coordinated response to Iraq's violation of the NPT. Although unilateralist voices were already being heard in Washington, they were drowned out in the nuclear context by the pressing needs to bring the states emerging out of the Soviet Union's disintegration into the NPT and to secure agreement on the extension of the Treaty's lifetime in 1995, without which it would have lapsed.[12]

Second, cooperative actions were taken simultaneously on a number of fronts, strengthening perceptions that this was a shared endeavour serving the NPT's common purposes. In regard to nuclear arsenals, numbers of deployed weapons were reduced, retired weapons were dismantled, and development programmes were cancelled. Although nuclear deterrence was not abandoned, its role in mediating relations among great powers was diminished. In regard to non-proliferation, new members were recruited (including the once 'threshold states' of Argentina, Brazil and South Africa) and the non-proliferation regimes instruments of verification and export control were strengthened in various ways. In regard to disarmament, South Africa's nuclear weapon programme was dismantled, and only the Russian Federation retained nuclear weapons among the states constructed out of the former Soviet Union. In these ways, the Article VI bargain and agenda appeared to be embraced in earnest for the first time, with expectations raised by agreement on the 'Principles and Objectives on Nuclear Non-Proliferation and Disarmament' which, among other developments, enabled the decision to extend the NPT's lifetime.

Third, NPT Parties appeared, at least as represented by their diplomats in multilateral gatherings, to be forming a true international society in Hedley Bull's sense of the term.[13] Indeed, this could be aptly termed a *global* society insofar as very few states now excluded themselves from it. Furthermore, a plan of action to achieve the irreversible marginalization of nuclear weapons, if not their complete elimination, was beginning to be sketched out in various capitals, including Washington. It included a progression of arms reduction treaties (from START I and II to III and beyond) which would make deeper and more stringently verified cuts in weaponry, gradually including all nuclear armed states; negotiation of universal treaties banning explosive nuclear testing and the production of fissile materials for weapons; drawing the last 'hold-out' states into the NPT; and fully implementing the Additional Protocol. The mid 1990s also brought a flurry of published reports advocating complete nuclear disarmament, including the Canberra Commission's Report of 1996.[14] In the same year, the International Court of Justice issued an advisory opinion emphasizing the nuclear weapon states' legal responsibilities to negotiate on nuclear disarmament.

The decay of international nuclear order after 1997

A decade of substantial development of a rule-bound international nuclear order therefore culminated in the extension of the NPT's lifetime in 1995 and conclusion of the Comprehensive Nuclear Test-Ban Treaty (CTBT) in 1996. Rather than continue down this track, the project to marginalize and eliminate nuclear weapons then came off the rails. One often hears talk today of the NPT's irrelevance or demise, and of a 'tipping point' being approached beyond which nuclear weapons will become a common currency of power politics.[15] Between 1997 and 2007, the number of nuclear-armed states rose from five to nine; a state (North Korea) withdrew from the NPT for the first time; no significant international treaties – bilateral or multilateral – relating to nuclear weapons were concluded; while continuing to reduce the size of their arsenals (China being a possible exception), the five NWS took steps to modernize their armaments, two of them going so far as to abrogate or threaten to abrogate longstanding arms control treaties (the US and Russia and the ABM and INF Treaties respectively); and governments took fright over the possibility that a non-state actor might use a weapon of mass destruction in a terrorist attack.

Although its ailments can be exaggerated, the international nuclear order has undoubtedly become more unruly and conflictual, less coherent, and more prone to arms racing. This development cannot be explained simply. It is however incorrect to ascribe blame just to the complexities and insecurities that followed the Cold War's end, and on the inappropriateness of applying Cold War remedies to sicknesses that were revealing themselves. After all, the first decade or so after the nuclear Cold War ended was marked by a cumulative institutionalization of order, increasing coherence and cooperation, and substantial reductions in arms spending.

Instead, the post-1997 decay is better attributed to difficulties of responding effectively to Iraq, North Korea and Iran's clandestine weapon programmes and to the non-proliferation regime's shortcomings that they had revealed; and to the revisionist behavior of a nascent great power, India, and especially of the hegemon, the United States. Pessimism has also been encouraged by trends in technology and production which, accompanied by the emergence of criminal supply networks, appeared to be reducing barriers to the attainment of weapon capabilities, including possible attainment by non-state actors.

The 'rogue states'

With rather different motivations, Iran, Iraq and North Korea set out to acquire nuclear weapon capabilities despite having renounced, through membership of the NPT, their rights to acquire nuclear arms under international law. They blatantly broke the rules. The IAEA was fooled because it was only entitled, according to the safeguards rules and procedures elaborated after the NPT came into force, to inspect facilities that an NPT party had itself declared. The export control system was fooled because clandestine networks were established involving front companies in various advanced countries which purchased items needed to assemble complete enrichment and reprocessing plants.

The revelations of the early 1990s triggered substantial reform of the safeguards and export control systems.[16] The Nuclear Suppliers Guidelines were extended to encompass an identified range of dual-purpose technologies such as precision machine-tools, pumps, valves and bearings which could be disguised as 'civilian'. Member states also took steps to strengthen their export-licensing bureaucracies and criminalize evasion. The innovations in international safeguards introduced by the Additional Protocol were more fundamental. The safeguard system had been designed to alert states to the diversion of nuclear materials from civil into military programmes, the route to nuclear weapons that states were expected to follow when safeguards were designed in the 1950s and 1960s. The IAEA now had to accept the added and much more difficult task of detecting clandestine R&D and production activities within a state, usually involving small and scattered facilities. Besides broadening the IAEA's rights of access, entailing a more extensive waiving of national sovereignty, safeguarding would henceforth require a tricky but necessary engagement with the subterranean and largely national worlds of intelligence gathering. Experience in Iraq and Iran would show, however, that information gained through the IAEA's painstaking safeguards processes was often more reliable – and more reliably interpreted – than that acquired by intelligence agencies.

The non-proliferation regime's institutions were found wanting in another very significant respect. There were no rules governing states' responses to treaty non-compliance beyond a commitment to report transgressions to the UN Security Council (UNSC), a commitment expressed in the IAEA's statute but not in the NPT.[17] In any event, Iraq's misdemeanours brought an immediate response from the UNSC since the Council had itself authorized the military eviction of Iraq from Kuwait in 1991 and took responsibility for disarming Iraq in the war's aftermath. Under the terms of Security Council Resolution 687, Iraq's full sovereignty would be returned only after its capabilities to produce weapons of mass destruction had been verifiably eliminated and after it had demonstrated full compliance with relevant security treaties. Despite strides made by the United Nations Special Commission (UNSCOM) and the IAEA in fulfilling the disarmament mission given them by the UNSC, Iraq cooperated grudgingly, drawing members of the Security Council into increasingly fractious debates about appropriate responses, including the threat of military attack if the Iraqi government continued to be obstructive. In December 1998, the US and UK sidestepped the Security Council when they bombed a range of Iraqi facilities in Operation Desert Fox, a move that presaged their launch of the Iraq war of 2003 without the Security Council's consent.

In the case of Iran, matters have been complicated by Iran's claim that its only interest lies in the civil application of nuclear energy and that its rights under the NPT's Article IV have been violated in consequence, a claim that has not been easy to counter owing to the dual-purpose nature of uranium enrichment; by the non-aligned movement's hesitant support for sanctions against Iran due to its desire to uphold the rights enshrined in that same Article; by Iran's charge of discrimination against the United States given its favourable treatment of Israel and

India; by the European Union, China and Russia's determination to avoid a repeat of the 2003 Gulf War; and by the constraints increasingly placed on the Bush administration's belligerency towards Iran by the debacle in Iraq. As a result, Iran appears to have concluded that it can persevere with its nuclear weapon programme without, if it plays its hand deftly, fear of military retribution. Through its defiance and obvious deceptions, Iran has nevertheless provoked the formation of a strong international alliance against it leading, after 2006, to the imposition of sanctions by the UN Security Council.

For many years, North Korea's non-compliance could not be addressed through the UN Security Council due to China's threat of veto. Attempts to disarm North Korea were instead pursued, after 1994, through the Agreed Framework negotiated by the US and North Korean governments. It entailed rewarding North Korea for phasing out its nuclear weapon programme by withdrawing US nuclear weapons from South Korea, and by offering economic benefits in the shape of two large civil reactors and supplies of fuel oil. However, the Bush administration preferred confrontation to a policy that it regarded as tantamount to appeasement, helping to precipitate North Korea's withdrawal from the NPT, formal announcement of its nuclear weapon programme, and its explosive testing of a nuclear device. Only when China had joined Russia and the US in the Six-Party Talks, and when the US had reverted to cooperative diplomacy, could the Security Council take up the issue.[18] Through the Six-Party Talks, North Korea agreed in February 2007 to abandon its nuclear weapon programme, beginning with closure of its main plutonium production reactor. Although it is still too early to declare success, it appears that the North Korean government has been persuaded, especially by China and the US now acting in concert, to pursue development through engagement with the outside world (a China-style open door policy), in return for economic aid and the lifting of external threats.

The problems of 'rogue states' have turned out to be enormously complicated, giving rise to a large and still growing literature.[19] The above observations have necessarily been brief. It is nevertheless apparent that the enforcement of rules involves a very different and often more perilous international politics than the development of rules. In addition, it is apparent that, while the three states had similarly violated the NPT and their safeguards undertakings, the manner and the regional and global implications of their violations, and the scope for responding effectively – especially through the UN Security Council's coordinated actions – varied greatly. In several respects, it was a mistake to group these states into the single category 'rogue state', a mistake compounded by the Bush administration's claim that they comprised an intolerable 'axis of evil' which could only be countered through threats of preventive war and 'regime change'.

Indian and US revisionism

The behavior of the 'rogue states' severely tested the non-proliferation regime and the UN Security Council. Their rule-breaking behavior also encouraged, and internally legitimized, a revisionist turn in the United States against the institutions of

arms control which aggravated the difficulties that had emerged within the international nuclear order. Coincidentally, India mounted its own challenge by conducting a series of explosive tests in 1998, thereby bidding for membership of the club of nuclear weapon states – and of global powers – from its position outside the NPT.

A common Indian justification for its weapon tests and decision to deploy nuclear arms, after a long period of restraint following the single explosive test in 1974, has been the deterioration of its security environment after the end of the Cold War. However, the tests were arguably propelled more by the growth of Indian nationalism in the 1990s, India's increasing determination to gain recognition as a great power *primus inter pares,* and realization that its 'window of opportunity' was being closed by the non-proliferation regime's expansion and reinforcement.[20] Prior to the 1995 NPT Conference, India had vigorously campaigned against extension of the Treaty's lifetime. Its failure to influence the outcome was regarded as a serious setback by New Delhi, as was the conclusion of the Comprehensive Test Ban Treaty in 1996 and the heavy pressure exerted on India to accede to it by the phalanx of NPT Parties. The Indian government therefore became increasingly anxious in the mid 1990s that its weapon programme would succumb to an enveloping international legal order, while China and the other NWS would keep their nuclear advantages, if it did not strike out against the NPT.

The NPT does not provide means by which an aspiring great power can be absorbed into the ranks of NWS. It provides no legal room for power transitions involving nuclear arms. The unambiguous rule in Article IX.3 is that 'a nuclear weapon state is one which has manufactured and exploded a nuclear weapon or other explosive device prior to January 1, 1967'. A state doing the same after this date cannot join the NPT as, and thereafter enjoy the legalized privileges of, a nuclear weapon state. Otherwise, the NPT would have provided an incentive to states to bid for membership on these terms, pulling the rug from under the non-proliferation norm. By gate-crashing the club of nuclear-armed states, however, India (and Pakistan) created an insoluble problem for the NPT, given that Article IX.3 was politically unamendable. In July 2006, the US government nevertheless announced that it had reached agreement with the Indian government on ending India's nuclear isolation. This proposal immediately sparked controversy. Critics complained that, by accepting India into their ranks, the US and other NWS would deliver the message that 'proliferation pays' and that the NPT's rules did not bar entry to the club after all. What is more, their decisions would require renegotiation of the Nuclear Suppliers Guidelines which contained the hard-won rule that NPT Parties may not engage in civil nuclear trade with states outside the Treaty unless all of their nuclear facilities were safeguarded by the IAEA, which did not apply in India's case. In 2008, the issues have still not been settled.

India had long held back from deploying nuclear weapons partly out of fear of the costs to its foreign relations that might follow. After the 1998 tests, India and Pakistan were castigated by the UN Security Council and economic sanctions

were inflicted on them by the US, Japan and several other states. However, because the Indian and Pakistani actions were not illegal (they had not joined the NPT), the collectivity of NPT Parties had no inherent right or compulsion to use strong-arm tactics to change their behavior. What India did not anticipate, but was delighted to discover, was that the US would itself turn against the multilateral institutions of arms control, especially insofar as their development impinged on its own weapon programmes and exercise of power. The tide of institutional restraint, represented by the CTBT, the Fissile Material Cutoff Treaty (FMCT) and START ebbed away as the US made its own revisionist turn.

The United States had been the main architect and driver of a rule-based international nuclear order. This approach to order had long been criticized for its ineffectiveness, but mainly from the margins of US politics other than during the Reagan administration when the proponents of an alternative strategy briefly seized the high ground. During the 1990s, however, they became influential after the Republican Party gained control in Congress. They were sceptical of the trustworthiness of international laws and treaties; antagonistic towards arms control measures which constrained the US (the Anti-Ballistic Missile (ABM) Treaty being a particular target); keen to focus political attention on states' non-compliance and to advance counter-proliferation strategies and detach non-proliferation from arms control and disarmament; and inclined towards using US power aggressively to 'roll back' weapon programmes – by overthrowing governments if need be – rather than relying on diplomacy and the regulative authority of the non-proliferation regime. The shift in US policy and behavior showed itself in 1999 after the US Senate's rejection of the CTBT, and in the US Congress's mandating construction of a national missile defence in defiance of the ABM Treaty. After 2001, the shift was endorsed by the Bush administration and expressed forthrightly in the National Security Strategy of September 2002. The Bush administration did not hesitate to abrogate the ABM Treaty, disavow the START process, downplay the agreements on disarmament reached at the 1995 and 2000 NPT Review Conferences, and cast doubt on the feasibility of verifying arms control treaties (thereby negating their value), whether in the nuclear or other contexts.

These developments in US policies have been much debated. I shall limit myself here to four observations involving attitudes towards the role, interpretation and usage of rules in the nuclear context. First, although concerns about non-compliance were widely shared internationally, the US was perceived abroad as taking unilateral steps to confine the problem of nuclear weapons to the problem of weapon proliferation and, within that, to the problem of proliferation by a nominated group of states; and as militarizing the response to weapon proliferation, overturning decades of giving primacy to diplomacy and consensus-building. In so doing, the US appeared to turn its back on the contract and settlement that most states had come to regard as fundamental to the NPT's authority and prestige. It was moving away from the notion of reciprocal obligation upon which rested the legitimacy of the Treaty and of the non-proliferation norm.

Second, after 2001 the US largely abandoned its prior regard for the NPT as the indispensable politico-legal framework through which greater order could be constructed. Instead, it viewed the NPT as having utility primarily, even solely, as a regulatory instrument serving national interests and no longer as a vessel of rules, practices and political attitudes that were constitutive of order. Furthermore, it considered that the successful intimidation of states that violated the NPT's regulation would be more constitutive of global and regional order than the development of international legal processes that dominated discourses at NPT conferences. On the contrary, that institutional development was a harmful distraction. Rules were regarded as ultimately less constitutive of order than the hegemon's coercive power.

Third, whilst the US government understandably sought to uphold the rules of the NPT and its safeguards system, the Bush administration also saw opportunity to base its justification of war with Iraq upon those very rules and their violation (together with the violation of connected Security Council Resolutions) when its main reasons for going to war lay elsewhere and could not be used to win international support. In seeking to justify its military actions in this way, the US government was drawn into making a damaging attack on the UN Security Council and on the processes by which the UN had sought to disarm Iraq. More serious still, it called into question the *integrity* of the rules and of the manner in which they were being interpreted. The authority of rules developed for specific purposes, and the authority of implementing organizations, depend on their not being invoked dishonestly by states in service of national interests. If that integrity is disrespected, especially by great powers, it will accentuate mistrust of their motivations. Among other things, it will make states wary of supporting future coercive actions, for instance against Iran, for fear that other national agendas are again being pursued.

Fourth, by seeking to optimize its military power and use it more habitually to achieve its political ends, and by loosening the grip of arms control, the US both increased the value that other states attached to nuclear deterrence and created political space for them to modernize and expand their armaments. The Bush administration assumed that China and Russia would not react to its arms build-up, but would instead choose to bandwagon given the enormous gap that had opened in military capabilities (hegemony would quash the security dilemma, obviating the need for arms control treaties – again, power was more constitutive of order than rules). It did not anticipate the rapid growth of Chinese and Russian economic strength which has enabled them to contemplate strategic challenges to the US involving, in the Russian case, taking leaves out of the American book by abrogating the CFE Treaty and threatening to withdraw from the INF Treaty, and by deploying new multiple-warhead missiles aimed at defeating any missile defence system that the US might deploy.

Without wishing to underestimate the difficulties that the US faced in the post-Cold War environment, its revisionist turn has inflicted a heavy cost in terms of squandered institutional opportunities, weakened international attachment to rules and norms, and loss of trust in and respect for the US government and its

agencies. If it had instead sought to deepen and extend the international rule of law, and to build on the non-proliferation, arms control and disarmament achievements of the previous decade, it would have enhanced its authority and established a much stronger platform from which to address the various challenges that arose, including that of international terrorism.

'The crossroads of radicalism and technology'

The emergence of 'rogue states' alongside US and Indian revisionism became mixed up with the threat of international terrorism which the 9/11 attacks on the World Trade Center had brought into sharp focus. President Bush referred in his introduction to the National Security Strategy of 2002 to threats emerging at 'the crossroads of radicalism and technology'. There were growing worries that a criminalization of nuclear trade was taking place, facilitated by advances in production technologies and the globalization of trade and finance.

Access to weapon technologies and materials was happening particularly through the centrifuge enrichment of uranium, potentially opening doors to supplies of weapon-grade material that had previously been held firmly closed. Design blueprints had been stolen by A.Q. Khan when working as a student with Urenco in Holland in the 1970s. Smuggled to Pakistan, industrial-scale plants were built upon the designs and used to produce highly enriched uranium (HEU) for its weapon programme. Pakistan out-sourced the supply of components and equipment to various firms around the world, thereby creating a covert supply chain which A.Q. Khan (then head of the Pakistani weapon programme) used to export centrifuges to Libya, Iran and North Korea (and possibly some others) for private profit.[21]

At the same time, there was concern that acquisition of a nuclear weapon of some type might soon be within the reach of a terrorist group. While nuclear weapons had hitherto only been regarded as instruments of inter state rivalry, governments now had to face the possibility that terrorist groups might acquire a 'dirty bomb'. Furthermore, the nature and goals of terrorist organizations might encourage rather than discourage the actual detonation of a nuclear device in a surprise attack. The rule among states that nuclear weapons can only be used to deter would be largely meaningless in the domain of irregular warfare, just as their deterrent value would be minimal against a dispersed terrorist network.

Fears of terrorist attack coincided with fears that the regulative capacities of states to control the diffusion of weapon technology were inadequate. Various attempts were made to strengthen them, and to enjoin states of all kinds and sizes to take their responsibilities seriously. Notable examples were UN Security Council Resolution 1540 of 2004 which, drawing on Chapter VII powers, required all states to establish competent export control systems and impose tough legal penalties on criminal traders; and the International Convention for the Suppression of Acts of Nuclear Terrorism of December 2006 which identified inter alia a set of offences, including the acquisition of materials and devices, requiring criminal prosecution by its members, and which marked out the responsibilities of states to

prevent and punish terrorist acts. The text of this Convention is complex. It was developed in recognition that, faced with increasingly lethal terrorist threats, security depends on the quality of states' *internal* governance. However, drawing appropriate and acceptable boundaries around domestic and international law and regulation proved difficult, causing the Convention's rules to be hedged around with caveats.

At the same time, the reawakening of commercial interest in nuclear power – encouraged by the rising prices of fossil fuels and the desire to reduce carbon emissions – revived concerns (exemplified by Iran) that states would develop weapon capabilities in civil disguise. These concerns were now accentuated by fears that weak or corrupt governments might not exercise effective control over nuclear materials and technologies on their territories. The 1970s debates about nuclear trade were rejoined in response, especially regarding the prospects for developing 'proliferation-resistant' technologies (i.e. technologies that do not rely upon separation of weapons-usable materials) and for placing enrichment and reprocessing facilities under some form of multinational governance.[22] Unfortunately, agreement on institutional innovations is proving elusive. Non-nuclear weapon states are understandably reluctant to accept ever greater controls on nuclear trade and production if the nuclear weapon states, and the United States in particular, refuse to re-engage in nuclear arms control. This demonstrates, yet again, the interconnectedness of rule-based restraints in the civil and military domains, and the costs of disregarding the bargains struck in the NPT. A broad embrace of multinational governance in the nuclear fuel-cycle is unlikely to happen without a parallel engagement with arms control.

Conclusion

Since the advent of nuclear weapons, the problem of order associated with them has both changed and not changed. It has not changed insofar as the construction of order still entails achieving stable relations among nuclear-armed states, reconciling the interests of the 'haves' and 'have-nots', and preventing – effectively and legitimately – the acquisition of nuclear weapons by additional states without unduly curbing the use of nuclear power for civil energy production. It has, however, changed insofar as the number of states possessing nuclear weapons has increased and become more diverse, knowledge of weapon design and the means of production have diffused, weapons of mass destruction have entered the politics of highly unstable regions, and there are justifiable fears that a non-state actor will use a nuclear device at some unpredictable time and place. Henceforth, the achievement of international nuclear order will require governmental action and cooperation along and at the intersection of two axes: the traditional axis of interstate relations and international commerce, and the axis involving the combating of irregular warfare and criminality within and across state boundaries.

Throughout this history, states have struggled to reconcile the universal interest in justice and survival with their particular interests in national security and aggrandizement. They have done so partly by developing a constitutional order,

centred on the NPT, which has defined the primary norms, rules, rights and obligations, an order that had attained remarkable scope and authority by the mid 1990s. Unfortunately, it then fell into disarray for complicated and perplexing reasons. Although a reaction to setbacks and revealed deficiencies in the established order, the United States' unilateral and aggressive behavior played a large part in the destabilization of an order that it had laboured so hard to create. Influential groups turned the US government against constitutionalism and instead tried to use the United States' commanding military and economic power to pacify.

Although there have been some useful developments (such as UN Security Council Resolution 1540), the constitutional approach to international nuclear order has therefore stagnated over the past decade, while the use or threat of violence has become more prominent, often with very negative consequences as in Iraq and the wider Middle East. Writing in early 2008, it appears that the tide is turning again. The United States is pragmatically if not yet enthusiastically re-embracing constitutionalism, there is much cooperation over Iran and North Korea, and there is a rather desperate international effort afoot to restore the NPT's authority as the 2010 NPT Review Conference approaches. Furthermore, a strong movement has emerged in the United States, spearheaded by articles in the *Wall Street Journal* by a group of former American statesmen, calling for realization of Gorbachev and Reagan's vision at Reykjavik in 1986 of a nuclear weapon-free world. The main justification for nuclear disarmament is the same today as then and in 1946 when the Acheson-Lilienthal Report was issued: the existence of nuclear weapons is too dangerous and destabilizing in the competitive, conflict-ridden international system.

Where this movement, which is gathering substantial support outside the US, will lead remains to be seen.[23] Central questions are whether, given the volatility of its behavior in recent years, proposals emanating from the United States will be trusted by other states especially if nuclear disarmament comes to be regarded at home and abroad as a means of augmenting US relative power; whether, in the absence of nuclear deterrence, there could be confidence in the avoidance of great wars given the power transitions that are now underway involving China, India and other states; whether the several and diverse nuclear powers could coordinate their actions; and whether a sufficiently robust regulatory system could be established to police a weapon-free world.

The pursuit of complete nuclear disarmament has to remain the central objective, if only as a means of anchoring and advancing restraint. However, I cannot bring myself to believe that there will be universally satisfying answers to the above questions. Unhappily, the elimination of nuclear weapons is unlikely to happen without the stimulus of a major catastrophe or the emergence of technologies that surpass the nuclear weapon in their political and strategic effects. My expectation is that states will remain locked in a perennial struggle to establish, and re-establish, an effective and legitimate nuclear order. This need not be too dismal a prospect if they can again unite around an approach to international nuclear order that carries a genuine commitment to mutual restraint and reciprocal obligation.

Notes

1 Electricity has been the most substantial development in energy technology in the past century and a half. However, it is a secondary energy form since it results from the conversion of primary energy supplies including fossil fuels (coal, oil and natural gas), water and wind power, and nuclear energy.
2 In the 1930s, the Soviet government under Stalin curtailed research in the Darwinian evolutionary sciences (the Lysenko affair), on grounds that they were incompatible with dialectical materialism, and was preparing to do the same in some fields of physics (notably quantum mechanics) when it was awakened to the strategic importance of nuclear science. See David Holloway, *Stalin and the Bomb: the Soviet Union and Atomic Energy, 1939–56* (Newhaven: Yale University Press, 1996).
3 Working at the University of Birmingham, Otto Frisch and Rudolf Peierls concluded that a much smaller amount of highly enriched uranium would be required to construct a usable atomic bomb than had previously been realized. This finding was confirmed by the MAUD Committee which reported in secret to the UK government in late 1940.
4 For an account of these developments, see Richard Rhodes, *The Making of the Atomic Bomb* (New York: Simon & Schuster, 1998).
5 A basic understanding can be gleaned from the five lectures delivered by Robert Serber in 1942 to initiates to the Manhattan Project, now published in *The Los Alamos Primer: The First Lessons on How to Build an Atomic Bomb* (Berkeley: University of California Press, 1992).
6 It is only in the last two to three decades that the legitimacy of pursuing certain lines of scientific inquiry has become the subject of extensive public debate, for example in regard to stem cell research. However, the inhibition of scientific research remains rare and may be contrasted with the furore among scientists whenever cases of fraud occur.
7 On this political and industrial rivalry and its international consequences, see William Walker and Måns Lönnroth, *Nuclear Power Struggles: Industrial Competition and Proliferation Control* (London: George Allen & Unwin, 1983).
8 A regional safeguards system applying to member states in the European Communities (now Union) was founded by the Euratom Treaty of 1957. Although Euratom safeguards are still applied, the IAEA system has precedence in Europe as elsewhere.
9 The Guidelines drew on the Zangger Committee's 'trigger list', dating from the early 1970s, which identified components and equipment that should be subject to export licences when traded by NPT member states.
10 The US debates about preventive war in the 1950s are discussed in Marc Trachtenberg, *History and Strategy* (Princeton: Princeton University Press, 1992).
11 Article V gave member states rights to conduct 'peaceful nuclear explosions' (presumably for mining and other purposes). It became a 'dead letter' when the utility of such explosions was rejected. The conduct of all nuclear explosions was later prohibited under the Comprehensive Nuclear Test-Ban Treaty, a rule that was deemed to override the NPT's Article V.
12 The NPT's Article X granted it an initial 25-year lifetime which could only be extended (indefinitely, for a period, or for periods) with the Parties' agreement.
13 'A group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions.' Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 2nd Edition (London: Macmillan, 1995): 13.
14 Report of the Canberra Commission on the Elimination of Nuclear Weapons, Canberra, August 1996. The Commission was sponsored by the Australian government.
15 See, for instance, Kurt M. Campbell, Robert Einhorn and Mitchell Reiss (eds), *The Nuclear Tipping Point: Why States Reconsider their Nuclear Choices* (Washington, DC: Brookings Institution Press, 2004).

16 On these and other contemporary developments, see William Walker, *Weapons of Mass Destruction and International Order*, Adelphi Paper 370 (Oxford: Oxford University Press, 2004).
17 On non-compliance, see Harald Müller, 'Compliance politics: a critical analysis of multilateral arms control treaty enforcement', *Nonproliferation Review*, 7:2, (Summer 2000).
18 Besides North Korea, the other participating countries were Japan and South Korea.
19 For a general treatment, see Robert Litwak, *Rogue States and US Foreign Policy: Containment after the Cold* War (Baltimore, MD: Johns Hopkins University Press, 2000). On specific states, see for instance Hans Blix, *Disarming Iraq* (New York: Random House, 2004); George Perkovich, *Dealing with Iran's Nuclear Challenge* (Washington, DC: Carnegie Endowment for International Peace, April 2003); and Seung-Ho Joo and Tae-Hwan Kwak, *North Korea's Second Nuclear Crisis and Northeast Asian Security* (Aldershot: Ashgate, 2007).
20 On Indian and Pakistani behaviour, see George Perkovich, *India's Nuclear Bomb* (Berkeley: University of California Press, 1999); and Bhumitra Chakma, *Strategic Dynamics and Nuclear Weapons Proliferation in South Asia* (Bern: Peter Lang, 2004).
21 On the A.Q. Khan network, see Gordon Carrera, *Shopping for Bombs: Nuclear Proliferation, Global Insecurity, and the Rise and Fall of the A.Q. Khan Network* (New York: C. Hurst & Co, 2006).
22 See 'Multilateral Approaches to the Nuclear Fuel-Cycle: Expert Group Report submitted to the Director General of the International Atomic Energy Agency', INFCIRC/640, IAEA, Vienna, February 2005.
23 Non-nuclear weapon states have, of course, long campaigned for complete nuclear disarmament. Among the NWS, the British government has been particularly prominent in advocating multilateral nuclear disarmament and conducting research on its achievement.

Part IV

Rules and responsibility

8 International rules, custom, and the crime of aggression

Larry May

> International law is not statutory. It is in part defined by and described in treaties and covenants among the powers of the world. Nevertheless, much of it consists in practices, principles, and standards which have become developed over the years and have found general acceptance among the civilized powers of the world. It has grown and expanded as the concepts of international right and wrong have grown. It has never been suggested that it has been codified, or that its boundaries have been specifically defined, or that specific sanctions have been prescribed for violations of it.
>
> "The Ministries Case Judgment."[1]

Introduction

There are currently no prosecutions of individuals for having committed the crime of aggression or what is sometimes called the crime against peace. One fairly good reason for this fact is that there is no treaty or international statute that defines this crime and sets out the elements that a prosecutor would have to prove to convict someone of violating this international crime. There were prosecutions by the International Military Tribunal at Nuremberg, and the subsequent trials just after World War II, but, for various reasons that I will rehearse in this chapter, the Nuremberg prosecutions for crimes against peace have not been seen as establishing a "precedent."[2] I will be interested to examine what the basis of such trials was said to be and why there has been such reluctance to use similar rationales today. I will also ask whether it makes sense to hold individuals responsible for aggressive war even if there was a consensus about the normative basis for such trials. Given that aggression is a crime committed by a State, what is the rationale for holding individuals responsible for this crime?

For several thousand years, waging aggressive war against one's neighbors has been thought to be one of the worst of crimes a State can commit. States that engaged in aggression were often punished, chiefly by military or economic means, such as military subjugation or economic boycott. It is only in the last century that individuals have been prosecuted and punished for having led a State into aggressive war. At the Nuremberg trial, the crime against peace was said to

be "the supreme international crime," deserving the most severe punishment for those individuals who perpetrated it. In any attempt to understand how it might come to be that the International Criminal Court starts prosecutions for such crimes, we will need to learn from the example of Nuremberg, to understand the formation of international rules for holding individuals responsible for State aggression.

The structure of the chapter is relatively straightforward. First, I will begin at the abstract level and ask about what sort of rules one can expect at the international level that could ground international trials for the crime of aggression. Second, I will look at several ideas from the Just War tradition on whether and why individuals should be held responsible for State aggression. Third, I will look at the Nuremberg "precedent" to see what went right in that trial and why it is that it has not been followed. Fourth, I will address the question of what sources could be drawn on, other than an explicit treaty, to authorize such trials. I will investigate the interplay of international customary norms and explicit rules concerning the crime of aggression, about which I will draw some conclusions in the final section. Throughout, I will use the example of the crime of aggression as a lens through which to examine the role of custom in international rules, ultimately offering some criticisms of international customary norms.

Rules in international law

How should we think about rules and norms in international law? One interesting place to start is with H.L.A. Hart's famous treatment of international law in the final chapter of his seminal work, *The Concept of Law.* Hart regards international law as not conforming to his model, where law is understood as the intersection of primary and secondary rules, largely because there are no clear-cut secondary rules in international law. There certainly is no master rule, or rule of recognition, and there are barely even rudimentary rules concerning how to interpret and change international law. In this respect, international law and what Hart called primitive legal systems are quite similar. But Hart argued that there is little lost by employing a wider conception of law in these cases, and then he tried to explain what features of international law are most like regular legal systems.

One of the central questions Hart addresses is how international law can be binding if there are no clear sanctioning institutions. Hart had earlier mounted one of the most significant challenges to the general idea that law's bindingness comes from fear of sanctions alone. He described this view as the "gunman" model and argued that one might be obliged to do something because of fear of sanctions, but obligations do not arise merely from fear of sanctions. Rather, what is crucial is the internal sense of feeling obligated by rules as a member of a society where these rules define significant practices. In this respect, Hart argues that international law can be seen as strongly analogous to domestic law.

> [W]hat these rules require is thought and spoken of as obligatory; there is general pressure for conformity to the rules; claims and admissions are based on them and their breach is held to justify not only demands for compensation, but reprisals and counter-measures. When the rules are disregarded, it is not only on the footing that they are not binding; instead efforts are made to conceal the fact.[3]

In my view, this is consistent with the way that international lawyers talk about their field of law. For all practical purposes, they say, international law can be practiced and studied in the same way as municipal law; all of the same techniques for discovering what are the rules and how they have been interpreted apply to both domains.

Hart also takes the surprising position that it is not crucial that international law seems to lack a rule of recognition, or master rule, that would allow us to identify conclusively which are the rules of the system. He says:

> if the rules are in fact accepted as standards of conduct, and supported with appropriate forms of social pressure distinctive of obligatory rules, nothing more is required to show that they are binding rules, even though … we have not … a way of demonstrating the validity of individual rules by reference to some ultimate rule of the system.[4]

Indeed, Hart says that there is no "mystery as to why such rules of such a simple social structure are binding, which a basic rule, if only we could find it, would resolve." The rules are "binding if they are accepted and function as such."[5]

Hart then resets this debate in the following terms that will also be the point of departure for the rest of this chapter.

> once we emancipate ourselves from the assumption that international law *must* contain a basic rule, the question to be faced is one of fact. What is the actual character of the rules as they function in the relations between states?[6]

Hart's preliminary answer is that "the rules which are in fact operative" in international law "constitute not a system but a set of rules, among which are the rules providing for the binding force of treaties."[7] But, Hart argues, this set of rules still manages to operate analogously to municipal law, in content and function if not in form. As he says, "in this analogy of content, no other social rules are so close to municipal law as those of international law."[8]

There remains the question of whether states are only bound by treaty law or also bound by customary law. Customary law is indeed often said to be the hallmark of the law concerning war, and hence an important subject for our main issue in this chapter, liability for States and their leaders that wage aggressive war. But despite the near consensus among international law scholars that customary law is binding on States, few have argued that State leaders can be prosecuted

simply on the basis of customary international law. This is at least in part because of the concern about *ex post facto* prosecutions. In the United States, criminal law is almost solely based on statute rather than common law out of concern for the rights of defendants. Today, while there is still a major role for customary humanitarian law as providing background for the rules of war that are being enforced in international tribunals, the statutes that have codified much of that custom, rather than the customs themselves, are key in these prosecutions.

The Geneva and Hague Conventions have codified much of customary international law, and the trials that have gone forward in the last 10 years have referred to these "statutes" rather than to customary law.[9] While there is a serious question of whether all of the people on this earth can be held accountable for statutes that do not clearly proscribe individual behavior, the more serious question is whether custom alone could be sufficient to ground prosecutions of individuals.[10] Customary norms are often slippery and unclear. For an individual to be prosecutable for violating a customary international norm, that norm would have to be shown to be transparent and public, in a way that people in distant parts of the globe could come to understand. For without such transparency and publicity, it is not clear why we would think that these norms constitute binding rules the violation of which would be subject to punishment.[11]

In the end, I agree with Hart that this question is mainly a question of fact: namely, do states act as if there are binding rules against aggression and do individual military and political leaders act as if they believe there are rules against planning or initiating aggressive war? I will later offer an answer to the question of whether there is a clear set of international rules concerning what counts as state aggression and what elements must be proved by a prosecutor to convict individuals for the crime of aggression. I am especially interested in the question of whether certain customs, as well as certain treaties, could come to constitute *jus cogens* norms in international law, that is, nonderogable international rules.[12]

Just war theory and aggression

Grotius, writing in 1625, is one of the first in the modern age to speak of the responsibility of individuals for state aggression. In *De Jure Belli ac Pacis,* Grotius writes:

> those who order a wicked act, or who grant to it the necessary consent, or who aid it, or who furnish asylum, or those who in any way share in the crime itself … all these may be punished, if there is in them evil intent sufficient to deserve punishment.[13]

But like many in the Just War tradition, Grotius believes in State sovereignty and is especially leery of States that "cross their borders with an armed force for the purpose of exacting punishment." Indeed, Grotius urges that "the crimes of individuals, in so far as they properly concern the community to which they belong, should be left to the States themselves and their ruler, to be punished or condoned

with discretion." And even when it is the ruler who has done wrong, Grotius equivocates saying only that a people may not "suffer for the crimes of its king or its ruler."[14]

Grotius does not commit himself to punishing subjects for what the rulers have done despite the fact that "the most grievous punishment of kings who have sinned is the punishment inflicted on their people."[15] And Grotius never expressly addresses whether there are other punishments that could legitimately be meted out against rulers for their acts of initiating aggressive war. So, we are left wondering whether or not Grotius believes that kings and other rulers should be punished for their wrongs even as he admits that they are in some sense responsible and punishable for them.

Grotius also provides a reason why he is not sure that kings and other rulers should be punished for their crimes by other States, or in some other manner, outside of the borders of their own State. He writes that it is unclear exactly when it is that custom becomes law.[16] So, while it may be that there is a longstanding custom that rulers are to be held responsible for such acts as initiating aggressive war, punishment follows from the violation of a specific law. The problem at Grotius's time was that there were no treaties or other specific laws rendering State aggression illegal and criminalizing the acts of those individuals who initiated or perpetrated the war.

It is also true today that the "black letter" international law is inconclusive on this topic, even as there is by now a very longstanding custom against State acts of aggression and against those rulers who lead their States into aggressive war. Indeed, it remains quite controversial what is the relationship between custom and international law. Custom will often be enough if we are talking of moral responsibility, but criminal liability requires some violation of a law, among other things. And while customs often become the basis of law, the transition between custom and law is as difficult to ascertain, as is the transition from a primitive legal system to a developed one. I will explore the contemporary debate on this topic in more detail in subsequent sections of this essay.

Later writers in the Just War tradition also struggled with the issue that I am concerned with in this paper. Pufendorf, echoing sentiments he shared with Hobbes, argues that princes cannot be punished. In order to be subject to punishment, says Pufendorf, there must be "a court and judge that can render and execute a judgment." Yet, the courts that exist within sovereign states "concern only subjects" not rulers. And if any court outside a state should issue punishments of a prince, the prince would cease to be sovereign altogether. Judges must inflict punishment "as a superior" says Pufendorf.[17] Like Grotius, Pufendorf says that the various customs that speak of the responsibility of kings and princes address only the obligations that involve moral punishment or the punishment of God, not that recognized by courts. The difficulty is that only courts can properly administer punishment and there are no international courts.

Vattel, writing in the eighteenth century, marks a watershed in our historical narrative. For Vattel is forthright in saying that the sovereign "is answerable for all the evils and all the disasters of war."[18] Indeed, Vattel says that the sovereign who

wages an unjust war "is guilty towards all mankind, whose peace he disturbs and to whom he sets so pernicious an example." The ruler is bound to repair the damage that has been done. Vattel says:

> the sovereign alone is guilty, and he alone is under an obligation to repair the wrong done. The subjects, and especially the military, are innocent; they have done no more than obey, as was their duty; and they are only called upon to give up what they have taken in such a war, since they hold it without lawful title. That, I believe, is the almost unanimous opinion of honest men and of officers of the highest honor and integrity.[19]

In this way, Vattel sets the stage for holding the sovereign legally liable for waging aggressive war, but he can do no more than call for the sovereign to choose to pay reparations since there is no court to which the sovereign must answer. And Vattel does not address what is today the crucial question, namely, whether a ruler can be held criminally liable for waging aggressive war if there is an international criminal court.

By the nineteenth century, Wheaton could claim that there was such a thing as "international responsibility" that in some limited cases could give grounding for international tribunals.[20] Wheaton was thinking of "boards of arbitration and courts of prizes," established by the joint consent of the States who sought a resolution of a conflict. But the idea that, on any ground at all, there could be international tribunals was relatively new to the nineteenth century. The problem was that such an international tribunal, like the contemporary International Court of Justice, relied for its legitimacy on the consent of the parties before it and hence was not a good basis for criminal prosecution, which must be non-consensual. Indeed, the very idea that criminal punishment could only be meted out if the defendant agreed to it goes against the very idea of criminality and perpetuates impunity.

The best known contemporary Just War theorist, Michael Walzer, coined the phrase "the war convention" to stand for "the set of articulated norms, customs, professional codes, legal precepts, religious and philosophical principles, and reciprocal arrangements that shape our judgments of military conduct."[21] Walzer, though, recognizes that the war convention is mainly social and moral, even though his own method is to look to the law first to try to ascertain the contours of the war convention. And because the war convention is social and moral, it is unclear in what sense the convention is binding in a way that would be the basis for criminal trials for those who violate the convention.

The Just War theorists from Grotius to Wheaton and then to Walzer, came to the understanding that rulers could be held responsible for waging aggressive war, but they did not have a clear sense of what if anything followed from this in terms of punitive measures. Legal rules were emerging out of the customary norms over the centuries, but corresponding legal institutions did not come on the scene until the middle of the twentieth century, and then only fleetingly until emerging perhaps permanently at the end of the twentieth century. Yet, the question remained what

value these emerging legal rules had without corresponding legal institutions. Can legal rules truly exist, and be violated, even though there are no institutions to affirm the breach and set penalties or punishments? In the next section I turn to twentieth century developments, especially to the "precedent" of Nuremberg.

The Nuremberg "precedent"

The problem addressed in this chapter is well illustrated by the debate about the legitimacy of the International Military Tribunal at Nuremberg. Robert Jackson, one of the chief prosecutors at Nuremberg said: "It is high time that we act on the juridical principle that aggressive war-making is illegal and criminal."[22] The problem was to identify the source of this seemingly uncontroversial claim. The principal source of the supposed crime against peace was the Kellogg-Briand Pact, a multilateral treaty signed in 1928 by 65 states including Germany and Japan. Here is Article I of that treaty:

> The high contracting parties solemnly declare in the name of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.[23]

This is often cited as the central source of the norm against the waging of aggressive war. But notice that the language is hardly that of a criminal statute telling States, let alone individuals, what specifically they are proscribed from doing and what will be the penalties or punishments for breach.

The major problem is that not all States ratified this treaty, and some states such as Nazi Germany had seemingly "unsigned" it.[24] So it is not clear that Germany should be held liable for violating a treaty that Germany had rejected. There has been an enormous amount of controversy about this issue and I will not here take a side.[25] Throughout history there had been many declarations against war, and at least as many major wars that seemingly disregarded those declarations. It is undeniable, though, that a kind of normative consensus against the waging of aggressive war was arising in the early part of the twentieth century and that the Axis powers flagrantly violated this normative consensus.

The much more difficult issue is that it was not Nazi Germany in the dock at Nuremberg, but individual political and military leaders. And there had been nothing equivalent to the Kellogg-Briand's condemnation of states for aggression that was directed at those individuals who were the leaders of these states. In addition, there had never been major international trials in which individual political or military leaders had been prosecuted for their roles in the waging of aggressive war.[26] So there is a serious question of what was the basis for the trials at Nuremberg against Nazi leaders. Here is how one strong supporter of these trials, Cherif Bassiouni, defends their legitimacy:

> The IMT [International Military Tribunal] made reference to many treaties which had outlawed war and cited many public declarations that aggressive war was an international crime. Although aggression had never been universally defined, it was clear to the court that the leaders of a state that deliberately and wantonly attacked its neutral neighbors without warning or just cause could not be exculpated. It would be a travesty of justice to allow them to escape merely because no one had previously been convicted of the crime against peace … The time had come, as Jackson said, for the law to take a step forward.[27]

The question is: when the law takes a step forward should people be held liable for acts taken only after the announcement of this step? Or, before the change is announced, are individuals liable for what the changing standard requires of them?

The difficulty of trying to make sure that the principle against *ex post facto* legal proceedings, the so-called principle of legality, is upheld has haunted international criminal law since the trials at Nuremberg and perhaps has brought us a greater appreciation of the rights of the defendants before international tribunals. The International Criminal Court has dealt with this issue by not prosecuting anyone for acts committed prior to the Court's Rome Charter coming into force. And in the area of international criminal law that concerns us in this essay, there will be no prosecutions for the crime of aggression until there is an international agreement on what aggression means, and then only for those acts committed after that part of the Rome treaty comes into force.

In some respects all of these recent developments are surprising since there was a far simpler way to deal with the *ex post facto* problem, namely to regard the trials at Nuremberg as having set a precedent both for what it means to wage aggressive war and for the idea that individuals could be held liable for planning or initiating such wars. I will address this issue in the remainder of this section. Let me begin by noting that there was also a kind of counter-precedent in that 60 years have gone by without there being any other trials of this sort. So, one would initially wonder which was the precedent: that it was an international crime for a person to plan or initiate aggressive war, or not a crime to do so.

Another thing to worry about is whether the trials at Nuremberg were a "precedent" for all aggressive wars or just for those that were waged on the scope and intensity of World War II. Many of the remarks by Justice Jackson and others at the time of the Nuremberg trials focused on these unique factors, not on the more general point of whether leaders of States who wage aggressive war on far smaller scale than that waged by the Germans and Japanese would be prosecutable. Indeed, in striving hard to garner international acceptance of the Nuremberg and Tokyo verdicts, it was repeatedly stressed that it would be a travesty to let Nazi and Japanese leaders off the hook for the extraordinary horrors that they perpetrated. And in the German case in particular, there were many references to the concentration camps and the attempts to annihilate the Jewish people, issues that had little to do with the idea that State leaders should be prosecuted for waging aggressive war. What made the Nazi case stand out was the scale and viciousness

with which it was fought, not that it was a case of aggression. So, the value of Nuremberg as a "precedent" for future trials of leaders for aggressive wars is here also unclear.

In defense of the "precedent," it could be said that the very fact that there were trials at Nuremberg for the crime of aggression should have put leaders on notice that they could indeed be prosecuted for waging aggressive war—after all, it only takes one trial to show that such trials could occur again. For this reason it can be said that the political and military leaders of States should realize that they also could be put on trial when their States wage aggressive war. The difficulty is that what counts as aggressive war was not well spelled out at Nuremberg. And who exactly is prosecutable for the crime of aggression was also muddied by the fact that leaders who planned or initiated aggressive acts of Allied States were not also prosecuted for similar acts to those committed by German leaders. This is why some people claim that the "precedent" is only that if you lose a war your leaders will be subject to prosecution. Of course, even this much could be "precedent," except that its deterrence value is unclear since when one decides to go to war it is normally very unclear whether one will be on the winning or losing side, and hence unclear whether one will ultimately be prosecutable or not, as vanquished rather than victor.

Jus cogens norms and the crime of aggression

The Vienna Convention on the Law of Treaties discusses what are called *jus cogens* norms, norms that cannot be overridden even by express treaty. Given their place in international law, *jus cogens* norms are sometimes equated with constitutional principles in a domestic legal system. Article 53 of the Vienna Convention provides that "a norm of *jus cogens* must satisfy three tests: the norm must be (a) 'accepted and recognized by the international community of States as a whole' as a norm from which (b) 'no derogation is permitted,' and which (c) 'can be modified only by a subsequent norm of general international law having the same character.'"[28] *Jus cogens* norms are norms from which no derogation is permitted, and hence seemingly norms that sit at the apogee of international norms, and for which there are obligations *erga omnes,* that is, obligation on everyone.

In the Barcelona Traction case, a case decided by the International Court of Justice in 1970, the first example of obligation *erga omnes* is the "outlawing of acts of aggression."[29] Some of the other *jus cogens* crimes include genocide and apartheid. So, one question to ask is why the crime of aggression is thought to be in this relatively uncontroversial category with other crimes that nearly everyone would recognize as wrong regardless of statute or treaty. One possible answer is similar to that given by the Nuremberg tribunal when it declared that the crime of aggression was the worst because it contained all of the others. Since this literally cannot be true, what is most likely is that the tribunal meant that States that engage in aggression are likely also to engage in other crimes, or to have these other crimes as ancillary parts of the larger project of aggression.

One of the chief difficulties in using the idea of *jus cogens* norms to establish the criminality of acts of aggression is that there is another nonderogable principle that seems to be opposed to this, namely the principle of legality, the principle against retroactive prosecutions.[30] For no matter how obvious it is that certain acts should be criminalized, this does not make them criminal acts until there has been some clearly articulated rule that so criminalizes them. In a previous work I suggested that *jus cogens* norms were the backbone of international criminal law, insofar as *jus cogens* norms connected minimal principles of how people should behave toward each other with rudimentary legal norms.[31] But even in that situation, it now seems to me, there are problems with prosecutions on the basis of uncodified *jus cogens* norms, of the same sort that affected criminal norms that are based solely on customs.

One might argue that there are some customs that anyone can be assumed to know, such as that genocide and apartheid are wrong and proscribed. But one wonders whether the social norms of a given community may not so blunt the obviousness of such norms that we still need explicit rules. Some theorists have argued that you could have customary norms alone constituting a set of primary rules for a given society.[32] But even here this makes sense, it seems to me, only if the customary norms or rules were well known and widely disseminated. Even the proscription of apartheid and genocide cannot merely be assumed, since we know that some societies have seemingly found such practices acceptable.

Rules in international law take on a special importance when we are thinking of criminal liability. The reason for this has to do with the principle of legality. For it is thought to be the hallmark of an unfair system of criminal jurisprudence for defendants to be held liable under a set of rules that were not promulgated or even widely known at the time that the defendant's putatively illicit behavior took place. We expect that the rules will be very clear and the conduct that is proscribed will be well known before it is fair to hold a person potentially subject to punishment for violating those rules. When loss of liberty is at stake, the rules have to be very clear, and not merely norms that are in some sense "in the air."

Of course, violations of customary international law, especially those customs that are controversial, could trigger other sorts of reactions than criminal proceedings, which would be less problematical. Norm violators could be subject to shame or required to explain their behavior publicly, as is true of various so-called truth and reconciliation commissions. Or people could be required to contribute to a victim compensation fund as has also been attempted in the recent past.[33] But criminal punishments are different. They require a higher standard of publicity for the rules if the prosecutions are to be considered fair. In general this is because of the value placed on individual liberty that is put in jeopardy in such prosecutions. In what remains of this section, I wish to investigate reasons for thinking that criminal prosecutions for such things as the crime of aggression need to have quite explicit and public rules concerning what counts as aggression, and such rules must be applied only prospectively not retrospectively.

Lon Fuller once said that a system of rules that were all retrospective was absurd since people would be required to conform to standards on Tuesday that

were only articulated on Wednesday.[34] The same could be said about holding someone liable for violating rules that were unclear and only made clear after the person acted. In these cases, the problem is that it seems patently unfair to hold someone to a standard that the person could not have known about, or where it was unclear what exactly the person was required to do. When criminal penalties, including loss of liberty and even loss of life, are at stake, it is unfair to subject people to such jeopardy concerning standards that are anything other than crystal clear. Of course, we do not require that people actually know of these rules, but only that they could have found out about them and conformed their behavior accordingly. This is what is meant by requiring clear "notice" of what is illegal, but still saying that ignorance of the law is no excuse.

Customary norms can be crystal clear, I suppose, although they are rarely so. This is because customs normally develop and change over time, and since they are not codified it is often unclear at any given time what precisely they proscribe. Let us return to the crime of aggression. While it may be true that there was a clear customary norm against waging aggressive war, what constituted aggressive war was not sufficiently clear, and this is still true today.[35] In addition, while it makes some sense to think that those individuals who plan and initiate State aggression could commit a crime, this is merely a possible inference rather than a clear implication of the customary prohibition on waging aggressive war. As I have indicated above, in part the problem develops because of the fact that in the not too distant past, that is the early part of the twentieth century, it was relatively clear that only States, not individuals, could commit this crime. So, if the custom is said to have changed, there would have to be very clear indications for thinking so, and yet there were few if any such indications and quite a few counter indications, such as that there had been no prosecutions of individuals for this crime until Nuremberg and Tokyo, and none after.

So, if a political or military leader is trying to figure out what is required of him or her, and the custom seems to have been that he or she will not be held liable, then there really is a strong reason for a codification or other public statement that the rule has changed and these leaders will henceforth be held liable where they were not before. For there to be universal norms, the code must be one that is ratified by all States. One could claim that it should have been obvious that if States were proscribed from doing certain things their leaders, who after all are the ones who act for the State, could not do them either. But here is where the counter indication is so important. It would not be obvious if other leaders were not held liable even as the States themselves were condemned for committing aggression.

As I have argued elsewhere, longstanding custom may be a very good *sign* that there is a *jus cogens* norm, but this custom does not itself *establish* such a *jus cogens* norm.[36] And in any event, *jus cogens* norms often do not themselves provide sufficient notice for criminal prosecution. For there is a kind of counter-norm at play here, namely the principle of legality, which is itself on the same level as *jus cogens* norms. Let me just mention one reason for thinking that the principle of legality is the kind of principle that should not be breached. As

Fuller has indicated, in minor matters where no penalties attach, the principle is not indefeasible. But in matters where punishments are at stake, even when the morality is clear-cut, we need a clear legal rule in place at the time the defendant supposedly committed a crime for that defendant to be treated as a fully mature person who will be held accountable for what he has chosen to do. If there is no sense that doing a certain thing is punishable, then there is no sense that the person chose to do what was legally proscribed and now deserves punishment. One might, though, try to take a conservative approach to what counts as custom, only recognizing customary norms or rules that appeared crystal clear. In another work, I argue that this approach also will not work.[37]

The rules of the international community

There are three main sources of rules in the international community. In this final section I will explore each of these sources of rule and say something about problems that are raised with each type in prosecuting the crime of aggression. Let us begin with one of the oldest and most explicit sources of international rules or norms, namely, treaties especially of the multilateral variety. Treaties are often said to be the statutes of international law. This is because once they are ratified then they operate much like black-letter law in that there are explicit proscriptions and sanctions for those who break the rules. There also is an explicit enforcement regimen that the ratifiers of the treaty agree to. For example, in recent times, most multilateral treaties concerning international criminal law or human rights law have the provision that ratifying States agree either to prosecute violators in their domestic courts or to extradite the violators to States that are willing to prosecute them. This is captured in the Latin phrase, *aut dedere aut judicare.*[38]

The major difficulty with treaties as a source of international rules is that they are only binding on those States that have ratified the treaties. Unless every State ratifies a given treaty it will not set rules for the entire international community, but only for those States that so ratify. There has also been the problem that even ratifying States have later "unsigned" certain important treaties, thereby undermining the stability that is normally achieved by getting States to ratify, and thereby self-bind, themselves in international law. So, there are at least two problems with using treaties to ground international rules, and the second is the most important, since even if it were possible to get all States in the world to ratify a given treaty, there is nothing to prevent States from later "unsigning" the treaty whenever it suited their purposes and as a way to avoid sanctions.

The proposed solution to the problem of treaties has to do with the second main source of international rules, custom. Some have proposed that certain widespread multilateral treaties be considered binding on all States when those treaties have been in existence for a certain lengthy period of time and there has been a seeming acceptance of the treaty as having binding force on the non-ratifying States. This is a very complex issue and I do not have the space to explore it fully here. But it may be that multilateral treaties could be a strong basis for establishing a customary norm or rule, and that such a practice could solve one of the

main infirmities of treaty-based international rules. And even if treaties are not a good source here, it may be that there are other sources of custom, especially longstanding and common practice among States and very little if any countervailing practice.

I have earlier rehearsed various objections to custom as establishing rules in international *criminal* law. Let me here remind the reader of three of these criticisms. First, custom rarely provides a clear rule that would tell a state leader what precisely are his or her obligations in international criminal law. Second, customs change over time, and so it is also for this reason often hard to predict whether a settled norm in one time period will remain so later, and hence hard to predict what rules one will be held to after one acts. Third, custom almost always exists along side of counter-customs, especially in international criminal law, and it is often hard to tell which customs are the ones that will be regarded as binding. For these and other reasons international criminal law does not have a firm footing in international custom.

Third, international rules could be grounded in international institutions that have themselves come to be accepted by the international community. If we ever find ourselves living under a world government then there will be a ready source of international rules. Short of this, there are institutions like the United Nations or the International Court of Justice (ICJ) that perform some of the functions of a world government and may be the source of international norms and rules. Institutions create their own norms and rules, especially if those institutions operate under the color of law, as is true of both the UN and the ICJ.

The trials at Nuremberg were established on the basis of treaties and customs. As we have seen, the treaties that these trials were said to be based on were rejected by the Axis States whose leaders were tried by the Nuremberg and Tokyo tribunals. So, the Judges in these tribunals tried to justify the trials in terms of custom. Yet it was hard to see exactly what the custom was, since so many States had engaged in aggressive war in the preceding decades. And the one attempt to create an international organization that could have legitimated these trials, the League of Nations, had foundered and died stillborn before the main crimes that the leaders of Germany and Japan were accused of committing. And unlike today, there was not a free-standing international criminal court, but only ad hoc tribunals, established quickly just for the purpose of trying the Nazi and Japanese leaders, and established by the powers that had won the war, thus fueling the charge that these tribunals constituted merely victor's justice.

Short of the institution of world government it is not clear what would be the normative grounding of international institutional rules, other than treaties or customs. And to see the problems here one need only think about the International Criminal Court, the institution that should be providing rules and meting out sanctions for violations of the rules, if any international institution does so. And yet several major States, such as the United States, refuse to recognize the legitimacy of this institution and hence claim that they are not indeed bound by its rulings. Until there is a world government, rules or norms created by international institutions will remain infirm, although they will be better than nothing. Yet, in

the field of international law, already heavily criticized for not being a proper field of law, such an infirm basis is disconcerting.

This discussion leads us back to our original topic, what to think of the source of prosecutions for violations of international rules in such areas as crimes against peace and the crime of aggression. In this chapter I have tried to indicate why there have been no significant international prosecutions for such crimes with the exception of the trials at Nuremberg and Tokyo 60 years ago. The inability for either multilateral treaty or international institutions to provide a codification of these crimes has been notorious. And many theorists, myself included, are very reluctant to rely on international customary rules to be the basis of such prosecutions. Such reluctance also opens a good window into the general problem of establishing and enforcing rules in international criminal law, where individuals rather than States are in the dock.

Notes

1 *Trials of War Criminals Before Nuremberg Military Tribunals under Control Council Law No*, *10*, 14: 317–318.
2 I will place the term Nuremberg "precedent" in scare quotes. This is done for several reasons. First, in contemporary international law, the idea that there are precedents is highly contested. Second, technically, the Nuremberg court was a Military Tribunal operating under the jurisdiction of the Allied Command's control over its occupied lands, not an international tribunal like the ICC. Third, there is a counter-custom that potentially upsets whatever precedent value Nuremberg could have created, as we will see.
3 H.L.A. Hart, *The Concept of Law*, 2nd edn, (Oxford: Clarendon Press, 1961, 1997) 220.
4 Ibid., 234.
5 Ibid., 235.
6 Ibid., 236.
7 Ibid.
8 Ibid., 237.
9 See the wonderful introduction to this issue written by Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Law*, *Vol. I: Rules* (Cambridge: Cambridge University Press, 2005) xxv–xlv.
10 John Tasioulas raises the question of whether I have painted the picture too starkly here. Surely, it is not an either-or conundrum. A norm can first come into existence by means of a treaty and then eventually also become a custom. I partially address this problem later in this chapter.
11 See Janne Haaland Matlary's chapter in this volume; also see her recent book *Values and Weapons: From Humanitarian Intervention to Regime Change?* (London: Palgrave Macmillan, 2006).
12 See Chapter 2 of my book, *Crimes Against Humanity: A Normative Account*, (Cambridge: Cambridge University Press, 2005).
13 Hugo Grotius, *De Jure Belli Ac Pacis* (*On the Law of War and Peace*) (1625), translated by Francis W. Kelsey (Oxford: Clarendon Press, 1925) 522–523.
14 Ibid., 527.
15 Ibid., 544.
16 Ibid., 223.

17 Samuel Pufendorf, *De Jure Naturae et Gentium*, (*On the Law of Nature and Nations*) (1688) translated by C.H. Oldfather and W.A. Oldfather (Oxford: Clarendon Press, 1934) 1056.
18 Emir de Vattel, *Le Droit des Gens, ou Principes de la Loi Naturelle* (*The Law of Nations or the Principles of Natural Law)* (1758), translated by Charles G. Fenwick (Washington: Carnegie Institution, 1916) 302.
19 Ibid., 303.
20 Henry Wheaton, *Elements of International Law* (Boston: Little Brown and Co., 1836) 22.
21 Michael Walzer, *Just and Unjust Wars*, 3rd edn, (NY: Basic Books, 1977, 2000) 44.
22 International Conference on Military Trials, London, 1945, quoted in Cherif Bassiouni, *International Criminal Law*, 2nd edn, vol. 3 (Ardsley, NY: Transaction Publishers, 1999).
23 Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy, August 27, 1928, art. 1, 46 Stat. 2343, 2345–46, 94 L.N.T.S. 59, 63 (1929).
24 I place the term "unsigned" in scare quotes for several reasons. First, the signing of a treaty is not the most important fact, rather ratification is the key. Second, it is highly contentious that a State can unsign a treaty, let alone withdraw from that treaty. Third, there is a treaty that addresses these matters, the Vienna Treaty on Treaties, Article 18, but as one can glean from its title, there is also a question, raised recently by the George W. Bush administration, about whether a State can withdraw from the Vienna Treaty on Treaties.
25 See the excellent article by Jan Klabbers, "How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Toward Manifest Intent," *Vanderbilt Journal of Transnational Law* 34, 2 (March 2001): 283–331.
26 One could debate whether the Leipzig trials after World War I were directed at States or their political and military leaders. But in any event, no prosecutions of individuals ensued. I thank Jan Klabbers for this point.
27 Bassiouni, ibid., p. 320.
28 Quoted in Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford: Clarendon Press, 1997) 51.
29 See ibid., 74.
30 See William Schabas, "Origins of the Criminalization of Aggression: How Crimes Against Peace Became the 'Supreme International Crime,'" in *The International Criminal Court and the Crime of Aggression*, edited by Mauro Politi and Giusseppe Nesi (Aldershot, England: Ashgate Publishing, 2004) 29–30.
31 See my *Crimes Against Humanity: A Normative Account*, Chapter 2.
32 See, for instance, H.L.A. Hart, *The Concept of Law*, Chapter 10.
33 See Trudy Govier, *Taking Wrongs Seriously: Acknowledgement, Reconciliation, and the Politics of Sustainable Peace*, (Amherst, NY: Humanity Books, 2006).
34 Lon Fuller, *The Morality of Law*, (New Haven, CT: Yale University Press, 1964, 1969).
35 For more reasons to think that even the case of Nazi aggression was not completely clear see Larry May, *Aggression and Crimes Against Peace* (Cambridge: Cambridge University Press, 2008): Chapters 8–9.
36 Larry May, *Crimes Against Humanity*, Chapter 2.
37 May, *Aggression and Crimes Against Peace*, Chapter 7.
38 See M. Cherif Bassiouni and Edward W. Wise, *Aut Dedere Aut Judicare: The Duty to Prosecute or Extradite in International Law*, (Ardsley, NY: Transnational Publishers, Inc., 1995).

9 Truth commissions and rules

Justice and peace

Mario I. Aguilar

Introduction

Despite agreements on national and international rules to keep societal cohesion and peace there are serious moments of social unrest in which groups attack other groups with the purpose of annihilation and with the final objective of excluding them from political life. Those violent exclusions acquire an ethnocentric justification due to racial prejudice, religious hatred or economic competition. The international recognition of those conflicts as genocide and internal strife has prompted the creation of United Nations-led peacekeeping forces or ad hoc international committees that try by diplomatic means to bring together parties that fundamentally disagree on rules of common living and provide national and international insecurity.

This chapter examines the social mechanisms and rules that are set after a period of extreme violence and exclusion within the nation-state and that in general have been labelled as truth and reconciliation commissions (TRCs). In examining the cases of South Africa and Chile this chapter argues that TRCs act as auditing mechanisms outside established rules; however, by the fact that TRCs ask questions about national and social identities and a State-controlled sociability they tend to provide new rules for preventing excessive force being used in the future by mediating social models and by mediating the actual memories of those who on the one hand want to remember a violent past and those who on the other hand want to forget it. Thus, by their very nature TRCs provide the possibility for a wider discussion on trust and the role of rules vis-à-vis the breakdown and creation of rules within particular contemporary States.

Truth commissions and state formation

The flourishing of TRCs during the 1990s can only be an indicator of rules broken, of an ongoing social and State violence and the need by post-violence States to negotiate a peaceful transition into more democratic systems.[1] Ideally, TRCs should negotiate justice and peace; however they only do so at the price of a State consensus, consensus that for some denies the just implementation of rules and for others provides only an international security without peace and

justice.[2] For as in the case of international law, sanctions do not provide the ultimate compliance by recipient States, and the sanctioned social memory of a nation does not provide truth or justice and peace for all at the same time.[3]

The TRCs arise out of the inability of citizens of a State to deal with the past, that is, with a past of racial discrimination (South Africa), of State-repression and violence (Chile) or the post-colonial created conditions for the elimination of a large part of the population on account of ethnicity (Rwanda). The common mechanisms of the TRC are a search for open and public interpretations of historical trends on oppression/victimization within a particular period of history. Those trying to outline certain common trends operate in the diachronic by looking at a historical progression of events and in the synchronic by examining a moment in the history of a victim(s), a perpetrator(s) and those around them. The outcome expected from those processes of commonality within victims and perpetrators is a new beginning, a moving on by which the State does not have to deal individually with all cases reported to the Courts or with all criminal investigations by allowing in a synchronic way a social analysis that becomes later normative and conclusive.

Those involved as commissioners within the TRCs are citizens that can be recognized as having social or moral authority, such as Archbishop Desmond Tutu, or citizens who have the necessary expertise to deal with data, with personal narratives, with counselling and with grief, such as social workers, lawyers, historians or politicians. The commissioners prepare a final report considering cases within their State mandate and report back to the State with their findings so that when findings as organized by the commissioners are compiled in volumes of data and reports, publicly launched, those narratives become part of the State social memory and a point of closure for discussing the past and the disagreements of the past. Those social and historical narratives come out of legal declarations by victims and their relatives as well as from perpetrators and their lawyers. Thus, the written narratives are mediated by oral narratives that are given at a later moment in time and that are dependant on the memory and impressions of those who were involved in a particular incident.

The differences between the different TRCs relate to the context in which they are trying to explore human rights abuses and the means of exploring contested social histories as well as the penal consequences of those actions when discussed years later and within a private/public domain. For example, in the case of South Africa 10 per cent of the legal testimonies were given and discussed in a public manner while after 2002 and with the creation of the indigenous courts in Rwanda (*gacaca*) all testimonies were made public and all sentences passed against perpetrators were given by local magistrates that could not verify the truth behind the personal testimonies of the perpetrators vis-à-vis the victims.[4] In the case of Chile all testimonies were given in private at an office of the TRC in the presence of an authorized delegate of the TRC and all written testimonies remained part of a secret of State to be revealed after a period of 30 years, thus written accounts of those testimonies have become ‘classified papers’ owned by the State.

I have chosen the TRCs of South Africa and Chile because they became well respected within the international community. For example, members of other TRCs visited South Africa in order to learn from the South African experience; lawyers involved within the Chilean TRC served in committees constituted by the United Nations in order to discuss international law vis-à-vis torture and forced disappearance. Chronologically the two TRCs examined represent two particular periods within international law and the preoccupations of United Nations committees. The TRC in Chile outlines all the violence and State control that took place in the climate of the Cold War within a variety of Latin American military regimes backed by the United States seeking security for the Southern Cone in the climate of strategic insecurity, distrust and instability. The South African TRC investigated ethnic discrimination to the extent that apartheid laws in South Africa resembled the past segregation of Afro-Americans in the United States and the persecution of a race because of the colour of their skin. The Chilean military regime and the South African one were very close in their aims, their military support and their ideological sense of a European paradigm of life against blacks, indigenous populations and others who did not conform to their ideas. Whereas one focused on a Western-styled form of legal justice, the other look to traditional tribal custom in order to achieve the same goals: namely, social cohesion in order to move forward in a peaceful manner.

The TRC in Chile

After his election in 1999 the Chilean President Patricio Aywin asked a group of jurists and lawyers led by Raúl Rettig Guissen to investigate human rights abuses that had taken place between 1973 and 1989, during the period of the military regime led by General Augusto Pinochet. As a result, the *Comisión de Verdad y Reconciliación* was legally constituted on 9 May 1990 and was given until 9 February 1991 to produce a report.[5] The Commission had four specific tasks:

1 To prepare a full picture of the extent of human rights violations, its details and circumstances.
2 To collect information concerning individual victims, their fate and location.
3 To recommend just reparation and necessary retribution for the victims.
4 To recommend legal and administrative measures in order to prevent future serious violations of human rights in Chile.[6]

The Commission examined 3,400 cases presented to them, so as to decide if there had been a violation of human rights that could be recorded. Organizations and associations submitted lists of their members who had died violently between 11 September 1973 and 11 March 1990.

On 4 March 1991 President Aylwin announced the results of the TRC's work in the form of a written report, the Rettig Report, as it was subsequently known, to the nation. The lengthy report included 2,279 cases that were accepted, divided

broadly into victims of political violence (164) and victims of violations of their human rights (2,115). Four categories of victims were described:

1 Those killed by State agents or those under their command (war tribunals 59, killed during public protests 93, executed after being accused of trying to escape 101, executed or killed under torture 815).
2 Those arrested by State agents and then made to disappear (957).
3 Those killed by civilians with political motives (90).
4 Those cases that were not concluded and their investigation continued (641).

The Rettig Report can be considered the results of a TRC that provided open information to the Chilean nation on abuses against citizens with their name and their stories, while the actual testimonies and legal documents remained part of State classified documentation.[7] The Report triggered further investigations and the submission of other cases by relatives and national organizations.[8]

In 1996 a further report was published by the Corporación Nacional de Reparación y Reconciliación, created in 1992 by the Chilean Government in order to continue the work of the National Commission of Truth and Reconciliation.[9] The Corporación made enormous progress on advising relatives of other cases of human rights abuses, influencing public opinion in Chile and abroad, cooperating with other TRCs and advising on payments and material reparations to relatives of the victims.[10] At the same time hundreds of legal cases were filed at the Chilean Courts in order to investigate the fate of the disappeared, to request the arrest and incarceration of the perpetrators of human rights abuses and to deal with human remains found at different locations all over the country.

By 1998 the fate of the disappeared and the impossibility of recovering bodies continued to impede a full closure to the Pinochet regime. President Aylwin provided the necessary mechanisms for an initial investigation. However, by the time that President Frei took over it was clear that a couple of thousand people were still unaccounted for, impeded by the continued political role of Pinochet. He had remained Army commander-in-chief and later had also become Senator for life. With the arrest of Pinochet in London in October 1998 the Chilean government and military, for the first time, began in earnest to negotiate an acceptable political formula.[11] With Pinochet in London and with the Chilean Army in need of support for bringing their 'military icon' home conversations about national unity, reconciliation, forgiving and forgetting started. A few months after Pinochet's detention the Chilean government was ready to move in order to try to bridge the national disunity created by the Pinochet affair and to try to be seen by militaries and human rights organizations as proactive and effective.

At the time of Pinochet's arrest, the armed forces had not been willing to cooperate with the government. Their singular agenda which envisioned the armed forces in a role 'saving Chile from Communism'[12] was matched by a variety of competing interested parties. Human rights lawyers on the other hand wanted to pursue the Rettig Report and the judicial cases filed by victims' relatives until they could find out what actually happened to those who disappeared and those

who were responsible for their disappearance. According to the human rights lawyers only after such investigations were carried out and guilt had been established could the Amnesty Law have been applied. Whereas the Church, represented by Bishop Valech, sought to support any social mechanism that could help to find the truth, offering blessings for any deliberations to come.

In summary, while the militaries saw such initiatives as providing a political end to the transition of military power to civilians (*transición*), human rights organizations perceived such fora as a fresh start for investigations and legal processes related to human rights abuses during the period of military government. The Chilean government suggested instead that there were too many political fora where the problem was being discussed and therefore a single political space would help prevent further 'disorder and indecision'.[13]

As a result of those different expectations the start of the *Mesa de Diálogo* was difficult. Edmundo Pérez Yoma presided over their first meeting at the Diego Portales Building on Saturday 21 August 1999.[14] The objectives of this endeavour were thus:

- To build up a confidential climate of trust.
- To generate dynamics of co-operation related to truth, justice, reparation and forgiveness; and,
- To avoid setting dates, conditions or particular circumstances to such groups' conversations.[15]

After that start in the presence of the journalists all other meetings were held in private, while limited information was given to the press. While this rule was challenged, the Chilean government made quite clear that open deliberations in public were not the norm in Chilean society as was the case for the South African TRC. At this point it was however clear that the initial work of the Chilean TRC presided by Rettig had been successful in auditing the past, providing the possibility for victims and perpetrators to discuss that contested past, and that the Chilean TRC had set demands for the State guarding of human rights for the future, a State project that was followed by President Lagos and President Bachelet into the twenty-first century.

The South African TRC

The South African TRC operated from 1995 to 2001 and following the mandate provided by the 1993 Constitution (Act Number 200) and the 1995 National Unity and Reconciliation Act (Number 34, 26 July 1995) it put a heavy emphasis on reconciliation, nation building and a culture of human rights. The TRC in South Africa had the same objectives as its precursor in Chile; however, with a legal framework that among other narratives and co-lateral statements was dominated by the African concept of reconciliation. With this in mind, the figure of Archbishop Desmond Tutu was central to such exercise because unlike the work of other TRCs less emphasis was given to legal retribution and punitive justice.[16]

The Archbishop thus exhibited the exact opposite function of Pinochet, acting as a motivating figure in the quest for social cohesion, balancing the needs of victim and aggressor in order to achieve communal harmony.

The following paragraph in Act 34 of 1995 sets up the mandate of the TRC in the following terms:

> To provide for the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed during the period from 1 March 1960 to the cut-off date contemplated in the Constitution,[17] within or outside the Republic, emanating from the conflicts of the past, and the fate or whereabouts of the victims of such violations; the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective committed in the course of the conflicts of the past during the said period; affording victims an opportunity to relate the violations they suffered; the taking of measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights; reporting to the Nation about such violations and victims; the making of recommendations aimed at the prevention of the commission of gross violations of human rights; and for the said purposes to provide for the establishment of a Truth and Reconciliation Commission, a Committee on Human Rights Violations, a Committee on Amnesty and a Committee on Reparation and Rehabilitation; and to confer certain powers on, assign certain functions to and impose certain duties upon that Commission and those Committees; and to provide for matters connected therewith.[18]

In practice and within the works of the South African TRC the idea of a national reconciliation and the centrality of a human being's justice through truth took over any idea of legal reparation or the accountability of the witnesses in a court of law; indeed some of the complaints about the public manipulation of personal narratives by the perpetrators of human rights abuses was that some of them adapted their narratives so that they would fall within the possibilities of a legal pardon for their crimes.[19] The numbers of those applications for amnesty were larger than anticipated and the Amnesty Committee was unprepared for the 7,046 applications it received by May 1997, the cut-off date for those applications.[20]

Unlike the total privacy granted by the Chilean TRC the South African 1995 Act required 'gross human rights violations' to be heard in public. The TRC classified 20 per cent of all applications within this realm as 'gross' and therefore 'public'. Among the 20,000 testimonies by victims of State repression, only some that involved large numbers of people were heard publicly, because most of the Commissioners' time would have been taken for public hearings, broadcasted by television, on human rights abuses. The public hearings had a cathartic national impact and the forceful but fatherly figure of an embracing Desmond Tutu dominated the proceedings so that it is possible to argue that without Tutu's moral authority and all-embracing attitude some of the proceedings would never have

had the impact they had on nation-building and reconciliation. For Archbishop Tutu was very blunt and clear in stating his sense of forgiveness and reconciliation when he wrote:

> True forgiveness deals with the past, all of the past, to make the future possible. We cannot go on nursing grudges even vicariously for those who cannot speak for themselves any longer. We have to accept that what we do we do for generations past, present, and yet to come. That is what makes a community a community or a people a people—for better or for worse.[21]

If the Chilean TRC had not had powers to take any legal action regarding the testimonies of victims and perpetrators, the South African TRC had powers to assert the social truth, to investigate testimonies and to act as a court of law by providing a legal closure and the application of amnesty, thus legal pardon to those who had been perpetrators of human rights abuses and had cooperated with the TRC. According to Graeme Simpson the danger inherent within this amnesty was clear: 'there is a real possibility that the TRC, by granting amnesty to confessed killers, may actually have contributed to the sense of impunity that fuels the burgeoning rate of violent crime'.[22] Nevertheless, the powers of prosecution/immunity were certainly indigenized by the fact that Archbishop Tutu insisted on the importance of an African sense of community, justice, retribution, truth and reconciliation recalling a concept used by several African groups: *ubuntu.*[23]

Ubuntu refers to 'an expression of community, representing a romanticized vision of "the rural African community" based upon reciprocity, respect for human dignity, community cohesion and solidarity'.[24] The concept was invoked in the 1993 Interim Constitution and in Constitutional Court judgements and challenged the patience of some trained barristers who were advocating and sustaining the application of a universal sense of human rights and the compliance by the South African State with international law and international treatises. Archbishop Tutu's presence at the public hearings prevailed and while the amnesty provisions of the 1995 Act were applied it was the reconciliation and nation building in the public sphere through Tutu's reflection on *ubuntu* that made the headlines and even questioned whether legal and criminal retribution was the answer to problems of justice, peace and State violence.[25]

The critics of the South African TRC were many; in reality South Africa was able to come out of a despicable period of institutional racism and State repression by the fact that the TRC, while unable to cope with all the tasks assigned to it, combined all legal, political and philosophical aspects of the past, the present and the future of the South African State.

It is possible to argue that the commonality of the Chilean TRC and the South African TRC provide a real possibility of common understanding in international law while respecting the more localized nature of truth-production: communal in the case of South Africa, individual in the case of Chile. Thus, the role of rules assumes a dualistic nature within a commonality of trust searching and trust building.

Trust and the role of rules

Martha Minow has argued that 'truth commissions are not a second-best alternative to prosecutions, but instead a form better suited to meet many of the goals', and that 'what prosecutions and truth commissions share, fundamentally, is the effort to cabin and channel through public, legal institutions the understandable and even justifiable desires for revenge by those who have been victimized'.[26] Indeed, she is correct. However, the role of the TRCs is also to restore social, national, international and personal trust by stating publicly that there is the possibility of engaging through common rules and that those rules are public not secret, and applicable to all; they constitute the rules to which all citizens are accountable to. It is possible to argue that the international horror and the national catharsis and need for healing after genocide or a period of systematic human rights violations create an intense interest on the synchronic, on the story being told and on the punishment or reparation expected. Thus, most of the literature deals with formation, proceedings and outcomes of TRCs work and focuses less on the impact that TRCs have on the formation of laws and their ongoing social and political understanding.

It is here that the axis trust-distrust rules allow us to think the processes of rule formation not in terms of sole functionality and applicability but in terms of trust collapse-trust formation and rule collapse-rule formation. The TRCs provide the opportunity to examine the political processes that allowed for the collapse of the rule of law but also for the collapse of trust in a particular period of time. Once trust is commonly restored rules could allow the State to function and citizens to be protected, included and supported. Thus, for example, the narrative of the Chilean military in taking over the democratic institutions declared publicly that their purpose was to restore law and order but also to restore public trust in laws that already existed but lacked implementation; their accusation against the government of Salvador Allende in 1973 was that it didn't respect the state of law and that the majority of Chileans didn't trust the upholding of law and order.[27] The Chilean TRC provided the opportunity not to discuss the realms of formal Constitutional Chilean Law, already changed and set in stone by the Chilean military, but the TRC allowed the possible examination of a legal framework in which trust in the role of the State could be restored and new conversations about the possibilities and impossibilities of a fresh democratic order could take place.[28]

Thus, the processes involved in developing rules for the return to democracy has less to do with a formalized legal framework but with the need to discuss trust/distrust and State/public relations that had been severely disrupted by a period of State orchestrated violence. It is here that the analysis or rule and custom by Larry May (see this volume) could be expanded if not problematized. May looks at the formal legal structures within international affairs utilizing the discourse of international law vis-à-vis international justice assuming that the difficulties with a crime of aggression and a crime against peace arise out of the impossibility to find a universal or at least a multilateral understanding of law and therefore punishment in this case. For aggression by a particular State against

another can be legally framed but the responsibility of particular individuals for that aggression is more difficult to accept so that International Tribunals are currently not recognized by all United Nations' Member States.

TRCs provide the possibility of discussing communal understandings of the rules of law by assuming that international laws and treatises are to be adhered to but do not have the community binding that religious rules have on a religious-symbolic community.[29] The process of discussing custom arises out of the TRCs as a process by which the rules of a State are re-discussed and the position of a State vis-à-vis the international rules is assessed within a framework of adherence to international rules but with a localized development of custom. In that sense I am less concerned with the universal/relative aspect of custom than Larry May, agreeing with him in that the rules of engagement within States and between States evolve out of practice rather than out of essences. However, I would argue that without the TRCs' work States such as South Africa and Chile would not have been able to restore some kind of trust in the rules that regulate the relation of the individual vis-à-vis the State and the social/ethnic groups in relation to the State.

Returning to Martha Minow's 'restorative power of truth-telling' it would be possible to argue that the need for victims to tell their stories and therefore to feel reintegrated into society applies to the larger social process of reintegration of social bodies into commonly agreed and therefore trusted systems of rules for the future.[30] The rebuilding of order within a post-traumatic State collapse such as that of South Africa and Chile requires the communal discussion of rules and trust as well as the implementation of a system of rules. One without the other could derive into a separation between rules and trust and therefore lead into further periods of State violence and gross violations of human rights within a State.

Conclusions: the validity of truth and reconciliation commissions

The TRCs constitute a valid mechanism of State arbitration of diversified social truths provided that: (i) they have a certain social authority that can be invoked after the TRCs have completed their work of reconstructing contested historical narratives by victims and perpetrators, and (ii) that they explore the possible causes for the disintegration and the death of a State that instead of looking after its citizens tries to kill any opposition in the name of difference be it ethnic, religious, social, economic or ideological. The TRCs cannot be expected to restore normality after intense periods of social malice and abnormality but to audit the aims and objectives of a State raison d'entrée in order to analyse the acts, norms and ideas of a dysfunctional institutional body that allowed some kind of physical elimination of its own citizens; therefore creating social and international security in addition to international law and the internationally agreed chart of human rights, universal, valid and mandatory for all human beings.

The TRCs aid the implementation of rules after violent periods that could aid the implementation of national and international security across borders. Thus, without the publicity given to the Chilean TRC by the School of Law of the

University of Notre Dame the relation between the School of the Americas, the implementation of US security and the systematic violation of human rights would have never been part of an ongoing discussion on law and US security.[31] Without the media frenzy about Archbishop Tutu and the South African TRC public hearings there would not have been further discussions on security and law in Africa as part of a twenty-first century integration of indigenous and universal law and the centrality of the African Union within the efforts for peace, justice and security within the international community.[32]

If TRCs have a place within the development of rules and security it is because they respond to dark moments of human and State violence; it would be better not to need them, but as many suspect, the TRCs will play a significant role in the auditing of current social malfunctions, such as Burma, Sudan, Somalia and even Iraq. The practice of TRCs healing social trauma provides a move forward in trying to understand the possibility of restoring humanity and sociability to societies in shock. The case of Rwanda comes to mind here as one of the nations that decided not to have a TRC. Bones of the victims of the 1994 genocide remain unburied and on display generating an ongoing hermeneutics of social tension. The practice of a TRC remains significant for the healing of a society's trauma and a mechanism of commonality not only for those involved in a particular post-genocidal period but also for those who remain outside the realms of a historical present. It is through moments of inhumanity that international law is developed; it is through the mandate and actions of TRCs that such international law is learned by victims and perpetrators alike.

Notes

1 For the TRCs proliferation before the South African TRC see Priscilla B. Hayner, 'Fifteen Truth Commissions – 1974 to 1994: A Comparative Study', *Human Rights Quarterly* 16, 4 November 1994, 597–655. For an overview of the Latin American TRCs see Iain S. Maclean (ed.), *Reconciliation, Nation and Churches in Latin America* (Aldershot and Burlington, VT: Ashgate, 2006).

2 See among others, Mark R. Amtutz, *The Healing of Nations: The Promise and Limits of Political Forgiveness* (Lanham, MD: Rowman & Littlefield, 2005), Teresa Godwin Phelps, *Shattered Voices: Language, Violence and the Work of Truth Commissions* (Philadelphia: University of Pennsylvania Press, 2004), and Chandra Lekha Sriram, *Confronting Past Human Rights Violations: Justice vs. Peace in Times of Transition* (London and New York: Frank Cass, 2004).

3 Richard Goldstone, 'Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals', *New York University Journal of International Law & Politics* 28 (3), 1996 485–504.

4 As it will become clear later in this chapter I am considering the creation of the *gacaca* as the creation of a Rwanda TRC, even when this process of indigenous justice was not given that name by the Rwanda state; in practice the social memory of a people was explored by the *gacaca* and by the public testimonies of events that took place within the period of the Rwanda genocide in 1994.

5 Decreto Supremo 335, Ministerio del Interior, 25/4/90, *Diario Oficial* 9/5/90.

6 *Informe de la Comisión de Verdad y Reconciliación*, Primera Parte, Capítulo I, 'Métodos de trabajo y labor desplegada por la Comisión Nacional de Verdad y Reconciliación para la elaboración de este informe', 'Los objetivos de la Comisión'.

7 While the Rettig Report was officially published as a bound volume, it was also available as a supplement with the daily official newspaper *La Nación.* English translation published as *Report of the Chilean National Commission on Truth and Reconciliation*, 2 volumes (Notre Dame, IN: Center for Civil and Human Rights, Notre Dame Law School and University of Notre Dame Press, 1993).
8 Agrupación de Detenidos Desaparecidos (AFDD), *20 años de historia de la Agrupación de Familiares de Detenidos Desaparecidos de Chile: Un camino de imágenes que revelan y se revelan contra una historia no contada* (Santiago: Corporación Agrupación de Familiares de Detenidos Desaparecidos, 1997).
9 Law 19123 published in the *Diario Oficial* 8/2/92.
10 *Informe sobre calificación de víctimas de violaciones de derechos humanos y de la violencia política* (Santiago: Corporación Nacional de Reparación y Reconciliación, 1996).
11 The arrest of Pinochet provided the space to negotiate political formulae between the government and the militaries, an unthinkable parameter of existence while Pinochet was in Chile. In the past and whenever the government had gone too far in cuts on military expenditure or had asked questions about army officers involvement in human rights abuses Pinochet had declared a red alert and had recalled all troops to barracks.
12 Decreto Ley 2,191 that covered the period between 11 September 1973 and 10 March 1978 and absolved those involved in crimes under the state of siege and those condemned by military courts after the military coup.
13 'Objetivos de la mesa de diálogo', http://www.tercera.cl/casos/mesa/datos/dato02.html.
14 Formerly known as the UNCTAD Building, it was built in order to host the 1972 international meeting of the UNCTAD in Santiago. After the military coup the building was renamed as Diego Portales and used by the military junta as its headquarters due to the destruction within the La Moneda Palace caused by fires on the military assault that took place on the 11 September 1973.
15 'Qué es la mesa de diálogo?', *La Tercera* at http://www.tercera.cl/casos/mesa/datos/dato01.html.
16 See different essays in Robert I. Rotberg and Dennis Thompson (eds), *Truth v. Justice: The Morality of Truth Commissions* (Princeton, NJ: Princeton University Press, 2000).
17 The cut-off dates were from 1960 to 1993, subsequently extended to May 1994; see Deborah Posel and Graeme Simpson, 'Introduction: The Power of Truth – South Africa's Truth and Reconciliation Commission in Context', in *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission* (Johannesburg: Witwatersrand University Press, 2002), 1–13 at p. 3.
18 http://www.doj.gov.za/trc/legal/act9534.htm.
19 John W. de Gruchy, *Reconciliation: Restoring Justice* (Cape Town: David Philip, 2002); cf. John Dugard, 'Dealing with Crimes of a Past Regime: Is Amnesty Still an Option?', *Leiden Journal of International Law* 12, 2000/4, 1001–1015.
20 Piers Pigou, 'False Promises and Wasted Opportunities? Inside South Africa's Truth and Reconciliation Commission', in Deborah Posel and Graeme Simpson, *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission*, p. 47.
21 Desmond Tutu, *No Future without Forgiveness* (New York: Doubleday, 1999), 279.
22 Graeme Simpson, 'Tell No Lies, Claim No Easy Victories': A Brief Evaluation of South Africa's Truth and Reconciliation Commission', in Deborah Posel and Graeme Simpson, *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission*, p. 247.
23 *Ubuntu* has also been used within the pastoral study of trans-cultural counselling in the context of Zambia, see Philip Baxter OFM Cap, 'From Ubuzungu to Ubuntu: Resources for Pastoral Counselling in a Bantu Context', Unpublished Ph.D. Thesis, Kimmage Mission Institute Dublin, 2006.

24 Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge: Cambridge University Press, 2001), 9.
25 Desmond Tutu, *No Future Without Forgiveness* (New York: Doubleday, 1999) and Michael Battle, *Reconciliation: The Ubuntu Theology of Desmond Tutu* (Cleveland, OH: Pilgrim Press, 1997).
26 Martha Minow, 'The Hope for Healing: What Can Truth Commissions Do?' in Robert I. Rotberg and Dennis Thompson (eds), *Truth v. Justice: The Morality of Truth Commissions* (Princeton: Princeton University Press, 2000), 235–260 at 253–254. Cf. Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Boston: Beacon Press, 1998).
27 *Report of the Chilean National Commission on Truth and Reconciliation*, vol. I, 54–57.
28 *Report of the Chilean National Commission on Truth and Reconciliation*, vol. I, 24–25.
29 Mario I. Aguilar, 'Sacred Rules and Secular Politics: Religion and Rules', *International Relations* 20, 2006/3, 315–320.
30 Martha Minow, 'The Hope for Healing: What Can Truth Commissions Do?', 245–247.
31 Ariel C. Armory, *Argentina, the United States and the Anti-Communist Crusade in Central America 1977–1984* (Athens, OH: Ohio University Press, 1997) and Thomas Carothers, *In the Name of Democracy: U.S. Policy toward Latin America in the Reagan Years* (Berkeley: University of California Press, 1991).
32 Russell Daye, *Political Forgiveness: Lessons from South Africa* (Maryknoll, NY: Orbis, 2004).

Part V

Questioning rules

10 Absolute ends and dynamic rules

Being political as human beings[1]

Amanda Russell Beattie

Introduction

In the opening chapter of this book Lang articulates a vision of international governance revolving around a realist constitutional world order.[2] Rules, he contends, play a particularly important role within this structure. They add a necessary degree of flexibility addressing the changing nature of security in the Global War on Terror (GWOT). Others have argued that rules play a significant role in not only structuring international affairs but also limiting conflict between nation-States.[3] Underlying the adoption of rules is the assumption that they will contribute to predictable outcomes lessening the consequences of anarchy in international politics.[4] Anarchy, on this account, stems from the lack of legitimate authority generating a climate of insecurity and fear. It is a standard series of assumptions, as Haaland Matlary[5] and Colonomos[6] demonstrate, which flow throughout contemporary security discourses. As their articles illustrate in different ways, insecurity and anarchy feed into the practice of violent conflict and the development of norms with which to challenge it.

This realist reading of international affairs emphasizes the primacy of States as actors seeking their survival in a power hungry atmosphere void of ethics and morals.[7] It is a series of assumptions which are evident in the rhetoric of policy advisors and key security analysts, in particular, those involved with the Bush administration and the GWOT. Through the use of traditional conflict discourses, President Bush and his security advisors have sought to identify, and pursue, a visible enemy and have, as a consequence of this mentality, invaded Afghanistan, and arguably Iraq, in search of a conquerable foe to present to the American public. Yet the Bush administration remains challenged by an elusive enemy rewriting the rules of the game in an innovative fashion, denying a particular place for a codified definition of the rules of political engagement, and in particular, war.[8] This chapter seeks to challenge this particular interpretation of the rules. It does not deny that rules are a necessary part of the political community. Rather, it demonstrates how when situated within a natural law framework rules are not necessarily stabilizing agents; instead, they can provide for the requisite autonomy in order to develop as persons in relations. Contrary to the static nature of rules envisioned in the constitutional order proposed by Lang, or the regulative

function they play in the discussions of torture, technology and war, rules, according to the morality of natural law, pave the way for an open-ended understanding of being political. They are, in other words, dynamic agents of change.

A static and settled understanding of rules emphasized the desire, and need, for a clear definition of the practice and its ensuing regulation. This chapter, however, argues that this elusive assumption of stability is in point of fact, not the solution, but rather, the problem. Rules, in other words, may seem to be a means to lessen anarchy and conflict, but they may actually create new sorts of conflicts. As illustrated by Nicholas Onuf[9] and Jill Harries[10] the rules defining and regulating the practice of torture generate a relationship between agents and structures that contributes to the continued use of the practice. With this in mind, Caroline Kennedy-Pipe and Andrew Mumford are perhaps right in suggesting a reactive, as opposed to proactive, rule-based order which punishes those who torture. In light of the investigation of aggression offered by Larry May[11] and the ideas of forgiveness investigated by Aguilar,[12] again one sees evidence of structures perpetuating armed conflict. These two different rule-guided issue areas, torture and conflict, highlight the desire for stability and the inherent human belief that clearly outlined rules and procedures will engender stability. It is an assumption echoing throughout the discourses of world order, and in particular, international constitutionalism. Yet it is this desire for stability, and the rules it sustains, I contend, which contribute to, rather then negate, insecurity in international politics.

If this description of the problem of rules is accurate, the nature of contemporary institutional design ought to be questioned.[13] Noting the dynamic nature of conflict in the twenty-first century, and the twentieth century approach guiding political engagement, Lang calls for flexibility in his realist constitutional order, a need which is illustrated in the chapters by Smith[14] and Walker[15]. These authors demonstrate how technology requires regulation, but explore how its evolutionary nature challenges the stability that rules ought to provide.[16] Both chapters reveal that technology, in and of itself is neutral; the problem thus rests not so much on the regulation of technology, but in an understanding of the motivating sources of human agency. The events of 9/11 provide a stark reminder of this fact. Using airplanes and well coordinated human action, al-Qaeda demonstrated, and continues to demonstrate, that regardless of rules, individuals, when sufficiently motivated can act contrary to ends of stability. Understanding what rules can and cannot do becomes increasingly important.

Do rules, acting as stabilizing agents, have a particular function within the contemporary discourses of security when any one agent disagrees with the form and function they provide? This raises a question of legitimacy. To be sure, not all individuals agree with the rules governing their actions in a community. Yet, for the most part, most individuals accept the legitimacy upon which they are based. But, what the GWOT reveals in a peculiar way is that legitimate political rules require an agreement of hearts and minds. The ability to achieve this legitimacy is proving to be equally, if not more difficult, then international stability itself. This chapter will argue that the dominant understanding of norms and rules flowing throughout this book represents a view of rules that reflects a modernist desire for

universally accepted patterns of action. An examination of the ends of modernity, and its desire for stability through hierarchical institutions and roles for agents demonstrates how this universality feeds one particular mode of "being political" rooted in a theoretical understanding of knowledge endorsing a technical approach to politics in lieu of artistry, flexibility, and adaptability. This technical description of *being political* revolves around sovereignty, the constitutive rule of international affairs, limiting the interactions of States through its derived norms of non-intervention and non-aggression.

By focusing on human non-instrumental relationships this chapter articulates an alternative understanding of a rule-governed international order. It develops an objective account of *being political* in which individuals are conceptualized as similarly constituted objective beings acting in communion with one another. In so doing it counters the subjective nature of being which characterizes current international politics. This subjectivity is the product of a political structure which stresses individual rights and self-interested agency to the detriment of the reciprocal bonds of duty and obligation.[17] By way of contrast, this chapter develops a natural law structure with which to counter the imbalance of international politics highlighting the reciprocal nature of rights and duties and the universal obligation to "do good and avoid evil". It challenges contemporary notions of morality and justice offering an alternative function of rules as they relate to individual agency. Drawing on the morality of natural law, this structuring of politics highlights the casuistic nature of the natural law tradition and reads into the contemporary discourses of security a method of achieving legitimate rules situated within a taxonomic structure of human development and well-being.

Natural law agents are aware of the self-same ontology which sustains each and every being; consequently a natural law account of agency reflects the mutuality of sought after ends distinguishing first order absolutes and second order normative claims. It provides an open ended account of the community organized around the particular ends of "being human" whereby all individuals are free to determine their own particular well-being aware that their own well-being is intimately related to the well-being and development of others. The function of rules, on this account, is not to limit the negative consequences of human interaction, as typified in a subjective account of being political, but rather to further develop human relationships. An objective account of being political, and the rules which outline its possibility, thus recognize that human non-instrumental relationships reveal an alternative model of political agency with which to develop trust in the community, challenging the pervasive assumptions of anarchy, insecurity, and the desire for stability.

International politics and modernity

The discipline of International Relations has long sought a scientific account of politics. It is a history which Stephen Toulmin notes is intimately tied to the development of a modern political thought.[18] Synthesizing the social and political problems of the sixteenth and seventeenth century, Toulmin demonstrates how a

desire for stability in society strengthened the ideal of theoretical knowledge, to the detriment of practical knowledge. He highlights how the pursuit of mathematical exactitude, intellectual certainty and moral purity, as evidenced in the works of Thomas Hobbes lead to a rational account of being political. Hobbes is particularly important, in his opinion, because located therein is the beginnings of the social contract tradition. It is this tradition which, as Charles Beitz points out, flows throughout the discipline of International Relations.[19] Moreover, it is a tradition of political thought closely associated with constitutionalism and a rule-based political order.

A brief foray into the variety of attempts at institutional design and world order demonstrates the continuing influence of the social contract in politics, both domestic and international.[20] Order, according to English School assumptions, constitutes the development of an international civil society.[21] States, on this account, remain the pre-eminent actors in international affairs tempered by an awareness of the rights held by individuals, the constitutive members of States.[22] Liberal scholars envision order as the sum total of the rules, laws, and institutions structuring a system of States.[23] Realist scholars endorse one of two main views: one, a systemic account of world order whereby power is balanced among leading States in the system; and two, the idea of a hegemon who tempers the desire for power in a system characterized by anarchy.[24] Finally, a critical interpretation of order is revealed to be that which produces and reinforces shared understandings in and among States at the international level.[25] With the exception of critical interpretations of order, each highlighted account, in its own particular way, exists within the outlined assumptions of modernity, whereby rules outline acceptable and unacceptable modes of agency.

The epistemological and ontological foundations of the societal and systemic understanding of world order reveal a highly subjective account of *being political*.[26] This subjectivity reduces the individual to a subject; the sum total of rights bestowed at the benevolence of a political authority. It is an account tied to modern ideas of liberty which, as Michael Walzer argues, has extended into international politics as well. He highlights for the reader a "domestic analogy" whereby the ends of the domestic social contract are reflected in the political ordering of international politics.[27] International sovereignty not only sustains the creation of the political State ordering international politics, it produces two pre-eminent norms; non-intervention and non-aggression paralleling the ends of negative liberty in domestic politics. Sovereignty, so understood, provides the constitutive and substantive rules of international politics. Its derived rules and norms function as a pseudo-authority in international politics outlining acceptable modes of State interaction seeking always the elusively sought after stability and predictability in international politics.

One approach to achieving this elusively sought after stability lies in the idea of an international constitutional order. As constitutionalism focuses on the idea of rules it is particularly relevant to the over-arching theme of this book. Its appeal rests in its endorsement of the rule of law coupled by its desire to balance power in and among a variety of political institutions in order to check and balance legitimate

political authority. A variety of constitutional designs exist within the discourses of International Relations, some which seek to explain international politics and some which seek to understand it. Buchanan and Koehane, for instance, envision a constitutional world order able to address the pervasive problem of human suffering. They present a normative account of morality and justice supporting the cosmopolitan ideals of global humanity and community.[28] On the other hand, G. John Ikenberry envisions a realist constitutional world order. He is aware of the need to balance power in international politics in a way which recalls the original assumptions of realist discourses. The functionality of constitutionalism, in his opinion, lies in its ability to reduce the returns to power providing in turn a measure of stability in international politics.[29] By entrenching the laws, rules and norms which structure international politics advocates of constitutionalism will provide a measure of equality and authority in international politics tempering the self-interested egoism of states and engendering in its own way stability; a stability, it ought to be pointed out, that is evident not only in the chapter by Lang, but also in the chapters discussing international security and technological regulation.

The contemporary allure of international constitutional orders rests on the continued use of laws and rules to control and manage political action. The tradition provides a clear-cut understanding of legitimate political authority established through the creation of international political institutions which mirror a domestic legislature, judiciary, and executive. These institutions, in and among other things, provide an outline of acceptable political behavior and the threat of punishment if it is contravened. If one accepts the arguments of Ikenberry constitutionalism also provides redress from the consequences of the security dilemma developing institutional restraints on any one State's desire for power. Yet the structure of international constitutionalism further entrenches a statist interpretation of international politics and re-affirms the distinction of inside and outside evident in the discourses of world order. Sovereignty remains the pre-eminent rule of international politics precluding the ability of the individual to act as an agent of justice. The dominant relationships within an international constitutional world order remain focused on authority and power to the detriment of the individual; however, the power to challenge this portrayal of politics also rests within the individual. As the ensuing section demonstrates, the individual, conceptualized as an objective being, is capable of generating an inclusive sense of the moral political community. Such a community is key to the establishment, and long-term development of genuine security; that is to say, security as a moral endeavor.

In order to establish a genuine sense of security, I argue, the static political structures, evident in a constitutional world order, need to be challenged. One way of mounting such a challenge begins with the development of an alternative account of *being political* which seeks to cultivate an atmosphere of trust. It is trust, and not rules, which ultimately will deny a place for insecurity and fear in international politics as it requires individuals to understand the values which shape the daily lives of others. This knowledge not only diminishes the vulnerability associated with power and anarchy it also displaces the pre-eminent value of stability in politics. This idea recalls the original claims of Arnold Wolfers who

reminds readers that insecurity stems from a threat to scarce values and security is achieved when they are protected.[30] It places a high degree of importance on knowledge on the self and other; a knowledge which distinguishes itself from that produced in a climate of fear. Fear, in and of itself, does not lend itself to honest revelations on the part of the agent, especially when one finds themselves in a position of inferior power. The task of agents is simple. They must construct political structures which deny a place for fear.

While constitutionalism proposes to address this fear through static political structures, the next section develops a political structure drawing on the morality of natural law.[31] It provides the necessary autonomy to develop an account of institutional design in stark contrast to the elusively sought-after stability. It is open-ended and dynamic. Upon first glace such a statement may face strong opposition; however, in light of the current challenges presented by the GWOT, in particular the chameleon-like nature of the enemy and al-Qaeda's ability to manipulate traditional security structures, the faith which is given to the ends of constitutionalism are failing the State and its citizens. If the challenge of international terrorism and the changing nature of violent conflict are to be addressed, the pillar of any plausible security agenda must be its flexibility. Flexible security agendas focus on the specifics of any conflict situation, demanding awareness that traditional standard operating procedures, characteristic of traditional military engagements, may not address. Returning to the morality of the natural law tradition provides one means to rethink the function of rules in light of this challenge.

Natural law and the "art" of politics

Natural law is simultaneously an historical tradition and a theory of morality.[32] It encapsulates the idea of law as an art and a science and represents the participation of the agent in the theoretical and practical principles of life. The idea of "the good" is first located in the individual will, the passive component of being, which becomes apparent to the individual as the intellect, the active component of being, is further developed. Together the will and the intellect represent the potential of the individual to develop as a moral being. Owing to this twofold distinction natural law is able to provide a normative account of right and wrong orienting human action derived from its absolute conception of "the good."[33] Its account of morality urges individuals always to "do good and avoid evil" and relies heavily on the individual's ability to reason as a practical individual producing along the way a normative moral taxonomy. This normative order is the product of human reason which, when combined with human experience, provides individuals with a greater understanding of "the good" orienting their own life and the life of the community. It is this same assumption of being which also posits that individuals are at once social, and as a consequence, political beings. There thus exists within the individual a twofold desire to develop as a moral being within a community of similarly constituted individuals. It is a teleological account of morality which reflects the inner desire of the individual to constantly

strive for knowledge, inventing and reinventing the normative frameworks which guide individual and community deliberations. It is this open-ended and teleological account of being which allows for a dynamic structuring of the individual and the moral community in which they are located and challenges the static nature of world order.

The morality of natural law is absolute. It asks of agents "to do good and avoid evil."[34] This absolute is the backbone of a natural law taxonomy highlighting the inherently moral nature of the individual. This natural moral ontology also assumes that individuals, as rational beings, are self-movers. The will, intellect, and the teleology of being sustain an individual who acts and interacts of their own accord. Consequently, a natural law framework does not distinguish between moral and amoral actions; rather, it notes how every opportunity is a chance to further understand "the good" and achieve a higher degree of being. Natural law morality is vaguely referred to as "the good" and is definable in any number of ways.[35] Contemporary natural law scholars refer to "the good" as integral human development and well-being.[36] Building on this idea, "the good" in this chapter represents the contemporary ideal of human development. It reflects the idea of individual potential flowing out of the original ontological assumptions. "The good" is mindful of the social nature of the individual endorsing laws and institutions which enhance individual autonomy. It models this structure upon the human non-instrumental relationships which sustain and constitute the individual. These relationships reflect the unique, and ultimately important, mutual ontology sustaining all individuals. It is mindful that all individuals share a desire to know "the good", yet that they seek this knowledge in multiple ways. The natural law community reflects this plurality providing the opportunity for agents to act within pre-existing institutional channels to develop as moral beings.

The teleology of being also sustains a casuistic mode of "being political." Casuistry challenges the methodology of the social contract and constitutional tradition as it supports practical arguments aligned with human action in order to resolve practical problems. Unlike traditional forms of argumentation, practical arguments are analogically associated with networks and webs, capable of incorporating a wide variety of possibilities in order to investigate, and determine, the best possible course of action. It is a moral methodology which supports individual agency in order to affect political, and moral, change. As such it places a high degree of importance on the agent's conscience. The conscience reflects the accumulated experiences of the will and intellect and exists in that self-same metaphysical space of "the good." It reflects the social component of being as it is only within the community that one is able to accrue the necessary experiences needed to sustain its development. These interactions are of primary importance for the natural law individual as they provide the means with which to develop a moral taxonomy informing the actions of the agent. This taxonomy combines a theoretical understanding of morality with practical experience which allows the agent to reason analogously through the problems of everyday life.[37] It takes as its primary ordering principle the absolute of human happiness motivating individuals to work within its institutions sustaining the values which unite its members.

As Germain Grisez and Russell Shaw demonstrate, a community represents the coming together of individuals who share an understanding of the values ordering their lives and the responsibility of each individual to protect and nurture them.[38] Its requirement for membership lies not in the race, ethnicity, or religion of the agent, but rather, rests on the mutuality of being sustaining the natural law individual. This foundation provides for an all-inclusive community whose structure reflects the ends of commutative justice. Since it is derived from the morality of natural law, commutative justice affirms the social and moral ontology of the individual. It highlights the equality of being sustaining human relationships and recognizes the mutuality of being generating a political structure which respects the freedom and autonomy of individuals as a member of the community. This community distinguishes itself from contemporary political societies. It openly endorses human interaction and the development of non-instrumental relationships facilitating an account of individual agency in order to determine the needs and desires of others.

Agency, as Onora O'Neill highlights, is evident in the interactions of the individual who displays not only the capacity to reason and deliberate, but the subsequent capability to act. Being a moral agent, means being able to deliberate and take heed of the requirements of morality within each and every action.[39] A genuine moral agent, or an agent of justice, as Alasdair MacIntyre points out, reveals him or herself when, aware of moral discord, s/he generates a series of actualities in line with the ends of "the good."[40] The outcome of moral agency then is represented as politics; namely the attempt to align the structure of the community with the values of the individual. Teleology of being sustains this activity which remains firmly oriented toward the unification, and not the isolation, of individuals. Their desire for unity prefaces the normative framework structuring the community itself: love. Love, as Jacques Maritain writes, is the reason to act, and the act itself.[41] It is the recognition of the self, in another; namely, the self-same ability to know "the good" and seek it out. Love sustains the primordial need for relationships which highlight the intertwined and ultimately dependent nature of being human. One loves because it is through loving that one comes to better understand the true nature of morality and develop as a moral being. Love stands in stark opposition to the fear associated with isolation and egoism as it reveals our inherent need for sociability. It understands well the vulnerability of self-revelation but provides recourse from its negative consequences drawing again on the mutuality of being. An ethic of love reflects the mutuality of human development which shows how moral development cannot be achieved in isolation. Instead, an ethic of love articulates the idea of mutual self-interest. In order to develop as a moral being, one must seek out the development of another; a task which, at the most basic level, requires human relationships.

These non-instrumental relations provide a model to better understand my vision of an objective account of "being political." The objectivity of a natural law structure challenges the either/or discourse of power, or morality noted by Joan C. Tronto typical of IR as a discipline.[42] As it advocates a discourse of reasonableness, tempered by an ethic of love, it incorporates both practical and theoretical

foundations of knowledge. The individual becomes a viable political agent whose actions can challenge the idea of an inside and outside in international politics. An objective account of being political understands that agents are domestic citizens and members of the global community. Unlike contemporary politics it sees little value in such categories as they limit the possibility of unity and deny a role for individual agency. Instead, it highlights the ability of the individual to act as an agent of justice within the community. While the scope and scale of these relationships may become further institutionalized as they seek to reach individuals beyond the local community they remain forever grounded by the morality of natural law and a derived account of commutative justice. An objective account of being political offers a proactive, agent-centered, account of being human in which the casuistry of natural law reveals a dynamic role for rules situated in a moral taxonomy guiding the mutual development of agents in common.

Objectivity, security and international affairs

The appeal of casuistry is nicely summarized by Richard B. Miller who demonstrates its value when the rules guiding the typical interactions of the agent are called into question. For instance, the investigations of torture in this book reveal a series of tensions relating to the means and ends of its institutional regulation and the individuals who engage in its practice. Similarly, the overt actions of one agent may conflict with the needs and desires of another, again calling into question the norms and values sustaining the customs and practices of violent conflict and the GWOT. The tension evident in the rules and practices reveal a similar argument to that of Miller. In the face of immoral inconsistencies, agency, guided by a strong account of morality and justice, may provide recourse to moral political structures.[43] Casuistry offers a flexibility and dynamism which can provide one means of addressing the lag time associated with the regulations of newly emerging technologies. The art of casuistry is no stranger to the discipline of International Relations. As Rengger argues, contemporary versions of the just war theory build on casuistry to elucidate the virtuous conduct of warfare.[44] It is the onset of legal positivism which has come to challenge the role of practical reasons, he argues, paving the way for the contemporary ideas of world order and international politics dominated by legal rules and norms.

The just war tradition is a moral tradition. It seeks out justice in the practice of war providing a moral criterion for those engaged in its practice. Like the morality of natural law, the morality of the just war experienced a wide series of changes during the Enlightenment. Modern accounts of the just war tradition begin to be articulated in the works of Vattel, Grotius, Pufendorf, and Wolfe. Generally speaking these authors, like Hobbes and other Enlightenment philosophers, offer a technical epistemology discounting a role for reasonable deliberations. Their focus, as Jacques Maritain discusses, was the idea of *jus gentium,* a law of nations and they used the categories of *jus ad bellum* to determine the morality of war. It was at this time that *jus in bello* began to take on increasing significance and the rules of formal warfare began to develop. Whereas previously *jus in bello* discourses focused

on habitual moral action, the focus has begun to shift to that of rules. It now reflects the assumptions of legal positivism outlining the rules and laws of war in international politics. One can see this influence in the Geneva Conventions and the Charter of the United Nations. The former documents outline the rules and practices of war which are considered acceptable practices in international politics and the latter document provides a structure to State engagement mediated by the General Assembly and the Security Council. It is this interpretation of the Just War which flows throughout this book as a whole and is particularly evident in the works of Colonomos, Haaland Matlary, and May. More importantly it is these static structures which this chapter is criticizing in order to demonstrate how the relativity and fluidity of a pre-modern morality are helpful in order to understand the current security problems with reference to the GWOT.

An examination of the parties to the GWOT and the current laws of armed conflict reveal a series of tensions. Al Qaeda is not a traditional enemy. It is not associated with State institutions and its operatives are not easily identified as traditional soldiers. As they fail to identify themselves with traditional uniforms or tactics they violate some of the laws of armed conflict outlined in the Geneva conventions. Similarly, the United States is pursuing a traditional military campaign in Afghanistan and Iraq; yet, when prisoners of war are contained they are instead labeled "enemy non-combatants". These individuals exist outside the law, consequently their rights and duties remain unclear. They are detained in military prisons with no recourse to legal protection, a clear violation of the rule of law. Whether or not it is intentional, both of these parties have unwittingly challenged the traditional rules of war contributing to heightened levels of insecurity. Both the manipulation of traditional rules by al-Qaeda and the disregard for the formal rules of engagement by the United States highlights the continued relevance and centrality of the prisoner's dilemma in international affairs. The United States adamantly maintains its pre-eminent right to security outside the traditional security institutions, in particular the United Nations, arguing for, as Colonomos demonstrates, a right to pre-emptive self-defense. Moreover, its continued realist approach to security and in the GWOT further alienates it from the myriad of States which structure international politics. The function of rules as stabilizing agents reveals itself to be a chimera and the ends of security remain elusive.

The value of the natural law framework, in its pre-modern form, provides an alternative framework with which to examine this situation. Its casuistic methodology and agent centered interpretation recalls the idea of habitual practice like that of pre-modern just war theories. Moreover, it provides an ordering principle, human development and well-being, which has faint echoes of the ends of the human security discourse, the United Nations Development Program and its associated survival index. It is an idea that is also reflected in The Responsibility to Protect, a document which Haaland Matlary shows can provide a legitimate structure for State intervention. In a similar way, her interpretation of these norms shares the transcendental aims of this chapter challenging the traditional State boundaries upheld by international sovereignty. However, these different interpretations of human development remain firmly oriented around the idea of one

over-arching universal theory endorsing along the way the ideals of stability and entrenched policies and procedures.

Human happiness is related to human development; however, it distinguishes itself by being related to the ends of an objective account of "being political." Happiness is thus an open-ended teleological pursuit. It originates in the will, is deliberated upon and agency ensues. Happiness is thus a three-phased process representing the desire of the agent to know and understand in its complete form, the morality of natural law representing the process of becoming, and not the ends of "the good" itself. Rules are a party to this process of "becoming" and are reflected in the taxonomy necessary for reasonable and moral agency. But this taxonomy is dynamic. It changes as individuals begin to know both themselves and others in greater depth. The model of institutional design is at odds with the idea of an international constitutional order. Instead of focusing on an international executive, judiciary and legislative assembly it places its faith instead on the abilities of individuals as agents of justice. If it is to be at all viable to the practice of international politics, however, it requires an alternative conceptualization of world order than those previously highlighted.

"The international," as I develop it, is a metaphysical concept. One step removed from the actions constituting the natural law agent, "the international" is ethereal. One cannot grasp it nor can one witness it in motion yet it remains that space whereby relationships develop. Sustained by the self-same ends motivating agency, the structure of "the international" relates to the ends of morality, aware of its absolute nature, yet offering informal processes arising from the capacity of the agent to reason and act outside traditional sites of power and authority. Similar to the ideas of critical theorists such as Richard Shapcott[45] and John Dryzek[46] who employ discourse to achieve political change across time and distance "the international" facilitates the natural law account of agency focusing on human non-instrumental relationship in order to promote a knowledge of the self and other. It continues to emphasize the open-ended account of the political community focusing on the abilities of individuals as reasonable agents to act within pre-existing institutional patterns affecting change. International politics are thus represented as a larger scale human community working toward a shared goal. The difference is that this goal is not security through stability but rather security through knowledge; namely, a knowledge of one another facilitating the needs of individuals in the morality community. "The international," on this account, remains firmly embedded in the teleology of natural law in that it is dynamic, embracing the changing nature of political structures indicative of the moral development of its constitutive members.

The flexibility associated with "the international" becomes increasingly important in light of the contemporary problems posed to the development and maintenance of security. Fiona Robinson, concerned with the inequality and harm evident in international politics, articulates a phenomenological framework of care in order to achieve a just international order which is flexible and adaptable, taking due consideration of the needs and desires of diverse human communities.[47] Similarly, Jean Bethke Elshtain articulates an ethic of equal regard

demonstrating the need to heed the voices of the powerful and powerless when deciding to intervene in the face of violent conflict.[48] While different in their political and intellectual orientations, Robinson and Elshtain highlight the relational nature of knowledge needed in order to react in the appropriate context. An "international" that draws on natural law morality sustains this dynamism and flexibility yet it distinguishes itself, emphasizing the relational and commutative nature of justice. As it is the product of the self-same relational ontology of the natural law agent and the moral community it endorses an account of being which chooses to focus on the knowledge of the self and other. It uses this knowledge to foster trust prefacing a moral account of human security.

The bedrock of a moral security endeavor is community building which requires, above all else, trust. The idea of trust in international politics is an under-theorized idea. It is, however, discussed by Annette Baier who challenges the negative consequences of the security dilemma in moral philosophy. She proposes trust as an alternative mode of being political which asks of individuals to accept the vulnerabilities associated with relationships of power and relationships of authority.[49] Like Baier's ideas, a natural law framework also paves the way for discussions of trust in international politics. It champions knowledge which, when set alongside the ethic of love, challenges the vulnerabilities of power and authority. The idea of this reasoning is quite simple. The love of natural law calls on agents to recognize "the good" in another. This shared goodness, this relational ontology, brings forth a shared agreement of ends leaving open the method through which ends are achieved; however, the agreed-upon ends rest on an equality of being found in a commutative idea of justice. This equality of being tempers the vulnerabilities associated with power and authority in international politics, choosing instead to focus on the non-instrumental relationships of individuals. With this imbalance reduced, individuals are more comfortable engaging with others and consequently reveal knowledge which is otherwise absent in the practice of politics. And it is this knowledge which will diminish the negative consequences of the security dilemma. The natural law agent, on this account, provides a living example of the commitment to the ends of well-being and development simultaneously revealing how love of self and other impacts on the practice of politics. It builds on the basic understandings of being human, cumulatively acquiring a personal and highly contextual understanding of agents and their communities. This knowledge then contributes to the moral taxonomy of the agent cultivating along the way a further level of trust.

The knowledge arising out of love, unlike that generated through fear, facilitates an agent's understanding of the specific needs of those less-powerful and less-experienced individuals. This relational form of knowledge builds on the basic motivations of love providing an alternative understanding of political engagement. It is a more personal understanding of being political which complements the idea of an objective account of politics. At the root of this account rest human non-instrumental relationships which go on to provide a model of institutional design whereby the individual is an agent of justice and the community is opened-ended, dynamic, and plural which culminates in a shared sense of purpose;

namely, the pursuit, in common, of "the good." This common endeavor generates fellowship which is the end result of trust within the community. This account of being political simultaneously criticizes the subjectivity of contemporary politics and reaffirms its commitment to "the good" in individuals, conceptualized as relational agents of justice.

Conclusion

How realistic is this account of politics? The reality of the global environment is such that individuals today are interconnected at a level never before witnessed. Rather than rehash the globalization issue, my point here is to note the newly developing capacities of individuals acting as agents of justice. Similar to critical theorists elaborating on the discursive ability of agents to reflectively deliberate, this account of political agency combines the social nature and moral capacity of individuals to act alongside the interconnectivity characterizing their contemporary existence. Natural law, its account of agency, agents, and communities offers an objective account of "being political" that is agent-centric, revolving around the choice of individuals to commit to a particular interpretation of morality and develop the structures of the community in accordance with its ends. What this emphasis of choice reveals, like the morality of natural law itself is this; within each individual the potential to do good exists equally alongside the very real possibility that agents will forgo the opportunity should it arise. Bearing this in mind, the possibility exists that individuals, situated within the subjective political structures of contemporary international affairs will choose to remain firmly embedded therein. It is thus realistically understands the challenge posed by individual apathy.

Rather than suggest that agents will chose this new form of agency, my purpose in this chapter is more limited. First, the account of natural law agency articulated here reveals an alternative mode of "being political" with which to contrast contemporary international politics outlining, along the way, an alternative structure guiding its practice. In so doing it demonstrates how rules, functioning as agents of stability in international politics are, in light of the GWOT, failing to provide the ends which they were originally designed to achieve. The overarching benefit of this account of "being political" is represented in the potential of all agents to act as agents of justice. It is this potentiality, I argue, that provides the incentives to question the ends of the rules and in so doing envision an alternative approach to world order that emphasizes a relational form of human interaction sympathetic to the social and moral needs of individuals throughout the world. The value of this interpretation is becoming increasingly clear as the GWOT continues to be waged, incurring along the way a high cost to the security and well-being of individuals throughout the world.

The GWOT will not be won on the battlefield, nor will the security of the global population be achieved through the guise of military led invasions and interventions. It is, in reality, intelligence services that will bear the brunt of the fall-outs of the GWOT. As Paul Wilkinson reiterates in a variety of his works, intelligence requires human interaction and cooperation.[50] Interaction and

cooperation, I maintain, require personal relationships revealing the necessary information with which to counter the primary threats of terrorism. In and of itself this process reveals a particular space whereby the beginnings of trust and understanding can be built. In light of both the 9/11 and 7/7 bombing, intelligence services are actively recruiting capable individuals, moving beyond the interpretation of intelligence, seeking individuals out in the world acquiring information from real life sources. There is no reason why such agents, cultivated and trained in an objective framework cannot serve a dual purpose. In the first instance agents can acquire information with which to safeguard individuals within the community. A second role for security agents, unlike contemporary understandings of security officers, lies in the dissemination of information, cultivating a respect for pluralism in light of mutually sought-after ends. This alternative role for individuals as intelligence gatherers is not new. Within the United Nations itself discussions of an intelligence bureau are ongoing. While they exist only in a theoretical capacity at present, such discussions are evident of a shifting series of assumption in which intelligence officers represent not the State, but international institutions.[51] Similarly, within the intelligence community itself the limits of traditional intelligence gathering are well known. One such individual, Robert David Steele, has provided an alternative account of understanding the role of intelligence gatherers as "tribes". One such tribe is the role of individuals. Unlike State security institutions they are not concerned with "sensitive information" or traditional "security concerns" and yet enjoy a similar degree of access to information dispersion technologies powered by the internet.[52]

Reflecting on the events of 9/11 and 7/7 and the traditional manner with which both the United States and the United Kingdom reacted to them, reveals an altogether different problem: namely, the ends of justice, and the utilitarian and retributive function rules play in light of security threats. The invasion of Afghanistan and the ensuing coalition of the willing who invaded Iraq demonstrated the continuing desire for punishment. This practice stands in opposition to the ends of commutative justice outlined in this chapter. It begs the question: was a traditional invasion and military-led invasion the best means of challenging al-Qaeda and those who support its ends? Terrorism is about knowledge. One defeats terrorists, as Brian Jenkins and others constantly reiterate, by capturing the hearts and minds of the community which supports such ends. Again, the value of natural law justice and its structure demonstrate their import. Commutative justice highlights forgiveness in contrast to traditional modes of punishment. It is the final stage of unified being exemplified by the full incorporation of all individuals in the community. As the chapter by Aguilar demonstrates, the truth and justice commissions in South Africa distinguish themselves as theologically and communally based, in sharp contrast to the military juridical approach of Chile; however, the reparations and continued development of the State of South Africa provides a thoughtful example of a community overcoming fear, harm, and insecurity of previously immoral political structures.

In light of all of these facts, it remains to be seen if the informal nature of political interaction offered in this chapter will come to bear. This is not an event that

will happen overnight but represents, like the process of human happiness itself, the journey of agents, both singularly and in common, to recognize the morally appropriate choice and actively implement it. It reveals "the art of being political." It is a proactive and agent-centered approach which takes, at the outset, the well-being of the individual, living in common with other like-minded individuals. It reveals a particular ordering of international politics interested in the processes and deliberations of governing ordered around a particularly sought-after end. Lisa Sowle Cahill argues that politics revolves around the practical matters governing the lives of agents, not the imagined possibilities of theoretically outlined plans.[53] If this is the case then politics is the product of agency which requires, in the pre-modern interpretation of natural law morality, a moral taxonomy. Politics is not focused solely on the ends of political governance, or the means with which to achieve it. Instead, means and ends are the reflection of the goals orienting human agency, and rules must be structured to address this flexibility. The function of rules, in an objective account of being political, reflect the personal nature of politics reinforcing along the way the autonomy of the agent within the community. Rules then are neither constitutive nor regulative, but must be considered in light of the ends they see to uphold, ends which are, at the end of the day, decided upon by the agents and the community they wish to structure.

Notes

1 This chapter could not have come to fruition without the invaluable assistance of my co-editor Anthony F. Lang, Jr. He provided invaluable editing assistance and tutelage throughout this project. It has also benefited from a number of informal discussions with the participants of the *Rethinking the Rules Project*, in particular Nicholas Onuf, Nick Rengger and Kate Schick.
2 Anthony Lang, Jr., Chapter 1.
3 Anthony Lang, Jr., Nicholas Rengger, and William Walker, "The Role(s) of Rules: Some Conceptual Clarifications" *International Relations* 20 (2006): 274–294. They point to the Atlantic Charter signed by Churchill and Roosevelt and then go on to illustrate how rules have subsequently been used with the League of Nations, the United Nations, and the European Union.
4 Anthony Lang, Jr., "The Problem of Rules" *Contemporary Politics* 13, 3 (2007): 257–276.
5 Janne Haaland Matlary, Chapter 5.
6 Ariel Colonomos, Chapter 6.
7 See for example the works of Kenneth Waltz, *Man, the State and War* (New York: London: Columbia University Press, 1959); Michael Doyle, *The Ways of War and Peace* (New York: London: Norton, 1997); Jack Donnelly, *Realism and International Relations* (Cambridge: Cambridge University Press, 2000) for an overview of the realist tradition.
8 Before 9/11 war was conceptualized in traditional terms, drawing on the Clausewitzen phrase, the practice of politics by other means. It was also related to the Geneva conventions outlining best practice in warfare for soldiers and prisoners of war, influencing the charter of the United Nations and the rights of state to go to war finding resonance in the contemporary theory of just war.
9 Nicholas Onuf, Chapter 2.
10 Jill Harries, Chapter 3.
11 Larry May, Chapter 9.

12 Mario Aguilar, Chapter 10.
13 Robert E. Goodin offers an in-depth examination of the nature of institutional design and its practice. See his work *The Theory of Institutional Design* (Cambridge: Cambridge University Press, 1996). Suffice to note, institutional design points to a particular unfolding of "being political" itself the overarching theme of this chapter.
14 Michael E. Smith, Chapter 7.
15 William Walker, Chapter 8.
16 Historically, this is best illustrated in the arms races of the cold war. Today, it is best illustrated in the United States led missile defense initiative which has refueled a discourse between Russia and the United States with echoes of a Cold War mentality. This is a sad decline in the state of weapons limitation in light of the point made by Smith and the limited use of lasers on the battlefield before they had even been tested.
17 I am aware that my use of *objective* and *subjective* is contrary to typical philosophical uses of the word. It is necessary to qualify how I use these terms. An objective account of political understands the individual as an agent. That is to say, he or she is the product of a particular ontology which is social and moral and thus a political being. She is an object due to her ability to reason, act and act rationally. This builds on the categories of being articulated by Aquinas in his *On Being and Essence*, translated with an introduction and notes by Armand Mauer (Toronto, Canada, Pontifical Institute of Mediaeval Studies, 1949). He notes that individuals, as beings, exist above inanimate objects because they are self-movers and at the same time are below the angels owing to the need to discover the laws of nature through grace. On the other hand, I understand a subjective account of politics with reference to the liberal rights culture of the contemporary age. Individuals are understood as political subjects owing to the rights conferred on them by the political authority; they are, in other words, subjects to political authority. This particular interpretation of politics thus reveals a lack of reciprocity in and among individuals highlighting the self-interested nature of the individual existence. I am particularly influenced in this interpretation by the works of C.B. Macpherson who discusses the possessive individual and the idea espoused by Onora O'Neill when she writes of a culture of recipience. See in particular her work "Agents of Justice" *Metaphilosophy* 32 no. 1 & 2 (January 2001): 180–195. See also C.B. Macpherson *The Political Theory of Possessive Individualism: Hobbes to Locke* (London: Clarendon, 1962).
18 Modernity, building on the ideas of Stephen Toulmin, does not refer to one particular moment in the history of Western political thought. Rather, like Toulmin, modernity in this chapter refers to the changing series of metaphysical, epistemological and ontological assumptions which was occurring during the Enlightenment. Modernity is employed throughout this chapter in order to highlight these changing assumptions, show how they influence the development of political order and contemporary understandings of laws, morality and justice. It is particularly important to note these changing assumptions. They provide the necessary counterpoint to the account of *being political* offered throughout this chapter and the pre-modern natural law it espouses. See for example, *Cosmopolis: The Hidden Agenda of Modernity* (Chicago: The University of Chicago Press, 1990).
19 Charles R. Beitz, *Political Theory and International Relations* (Princeton, NJ: Princeton University Press, 1979).
20 See Michael Walzer's *Just and Unjust Wars, A Moral Argument With Historical Illustrations*, Third Edition (New York: Basic Books, 1977) for an account of the domestic analogy whereby he shows how the social contract is evident within international order, paying particular attention to the role of sovereignty as an ordering principle similar to the liberty associated with the domestic idea of the social contract.
21 Barry Buzan, "The English School: An Underexploited Resource in IR" *Review of International Studies* 27 (2001): 474.

22 Tim Dunne, "Sociological Investigations: Instrumental, Legitimist and Coercive Interpretations of International Society" *Millennium: Journal of International Studies* 30, 1 (2001): 69.
23 G. John Ikenberry, *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order After Major Wars*, (Princeton, NJ: Princeton University Press, 2000) 23.
24 Ibid.
25 Janice Bailly Mattern, *Ordering International Politics, Identity, Crisis and Representational Force* (New York: Routledge, 2005), 30.
26 For an interesting examination of this claim see the work of Fiona Robinson, *Globalizing Care: Ethics, Feminist Theory, and International Relations* (Boulder, Colorado: Westview Press, 1999) in which she details the historical development of these two streams of thought, represented in contemporary discourse as opposing one another, yet in actual fact, they share the same historical ascendancy.
27 Walzer, op. cit.
28 A. Buchanan and R.O. Keohane, "The Legitimacy of Global Governance Institutions" *Ethics & International Affairs* 20, 4 (December 2006): 405–437.
29 Ikenberry, op. cit.
30 Arnold Wolfers, "'National Security' as an Ambiguous Symbol" *Political Science Quarterly*, 67, 4 (December 1952): 481–502.
31 The idea of a natural law framework has not been chosen at random. During the conference held in June 2006 the idea of a natural law order was discussed by a variety of participants when discussing torture, technology, and even warfare. There seemed to be wide-spread appeal with regards to the flexibility it could offer to those in a position of authority with regards to the use and abuse of the issues. What could not be established was how best to move forward. What follows is one attempt to navigate the waters of International Politics in light of the assumptions of natural law.
32 Jean Porter, "A tradition of civility: the natural law as a tradition of moral inquiry" *Scottish Journal of Theology* 56, 1 (2003): 27–48.
33 A.P. d'Entreves, *Natural Law: An Introduction to Legal Philosophy* (London: Hutchinson House, 1951).
34 Thomas Aquinas, *Summa Theologiae*: *A Concise Translation*, Timothy McDermott (ed.) (London: Methuen, 1991).
35 *Ibid.*
36 See for example the works of Germain Grisez, *The Way of the Lord Jesus: Christian Moral Principles, Vol. 1* (Chicago, United States: Franciscan Herald Press, 1983); or, Joseph Boyle "Natural Law and International Ethics" in *Traditions of International Ethics*, eds Terry Nardin and David R. Mapel (Cambridge: Cambridge University Press, 1992) 112–128; or John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980).
37 Albert R. Jonsen and Stephen Toulmin, *The Abuse of Casuistry: A History of Moral Reasoning* (Berkley, CA: University of California Press Ltd., 1988).
38 Germain Grisez and Russell Shaw, *Beyond the New Morality: The Responsibilities of Freedom, The Revised Edition* (Notre Dame: University of Notre Dame Press, 2001), 56.
39 O'Neill, op. cit.
40 Alasdair MacIntyre, "Social Structures and their Threats to Moral Agency, delivered as the Annual Lecture to the Royal Institute of Philosophy on 24 February 1999" *Philosophy* 74, no. 289 (July 1999): 311–329.
41 Jacques Maritain, *The Person and the Common Good* (Indiana: University of Notre Dame Press, 1996).
42 Joan C. Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (London: Routledge, 1993).
43 Richard B. Miller, *Casuistry and Modern Ethics, A Poetics of Practical Reasoning* (Chicago: University of Chicago Press, 1996), 4–5.

44 Nicholas Rengger, "On the just war tradition in the 21st century" *International Affairs* 78, 2 (2002): 353–363.
45 Richard Shapcott, *Justice, Community and Dialogue in International Relations* (Cambridge: Cambridge University Press, 2001).
46 John Dryzek, *Deliberative Global Politics, Discourse and Democracy in a Divided World* (Cambridge: Polity Press, 2006).
47 Robinson, op. cit.
48 Jean Bethke Elshtain, "International Justice as Equal Regard and the Use of Force" *Ethics & International Affairs* 17, 2 (2003): 63–75.
49 Annette Baier, *Moral Prejudices, Essays on Ethics* (Cambridge, MA: Harvard University Press, 1995).
50 Paul Wilkinson, *Terrorism versus Democracy: The Liberal State Response* (Great Britain: Frank Cass Publishing, 2001).
51 Frank van Kappen highlights the idea of a United Nations Intelligence force in his chapter "Strategic Intelligence and the United Nations" in *Peacekeeping Intelligence: Emerging Concepts for the Future* (eds) Wies Platje, Dame Pauline Neville-Jones, Ben de Jong and Robert David Steele (Oakton, VA: Open Source Solutions Inc, 2003). While the DPKO welcomes the inclusion of intelligence services informing the peacekeeping operations in which they are involved, the humanitarian agencies of the United Nations are concerned that the potential for harm against their impartial workers will increase if they are associated with an institution which trains and employs "spies."
52 Robert David Steele, "Information Peacekeeping and the Future of Intelligence" *International Journal of Intelligence and CounterIntelligence* 17, 2 (January 2004): 265–285.
53 Lisa Sowle Cahill, *Love Your Enemies: Discipleship, Pacifism, and Just War Theory* (Minneapolis: Fortress Press, 1994).

11 Inter arma, silent leges?

The political community, Supreme Emergency and the rules of war

Nicholas Rengger[1]

The chapters in this book all examine and reflect on various aspects of the rules of war and the normative dilemmas that they throw up. In this context, naturally enough, there is little explicit discussion of the character of the moral world and how that shapes the possibility of our claims about the 'rules of war' and exceptions to them that are quite properly foregrounded in the individual chapters; torture and its (im)permissibility, for example, or such contemporary and topical notions like preventive war, the implications of nuclear technology and the notion and deployment of the idea of aggression.

In my contribution, however, I want to raise the question of the one argument which says that, under certain circumstances at least, we can set the rules of war (along with all their normative dilemmas) to one side and not concern ourselves with them at all. This is the argument that is usually known – these days anyway – as the argument for 'Supreme Emergency' and I will get to it in detail in a moment. First, though I just wanted to flag up another issue that will, so to say, frame the discussion. In what follows I am going to assume that the framing of this question should lie with the just war tradition in general rather than with either the laws of war as jurisprudential form or wider notions that might possibly be deployable in the context of ethics of force. The just war tradition, as I understand it, contains a variety of possible positions on almost any aspect of the relationship between morality, politics and force but just as there are certain arguments that are unquestionably central to it, so there are certainly some arguments that would unquestionably lie outside it. The mere fact of legality in the context of modern international law, for example, is not, on my reading, simply equivalent to moral worth. So this discussion will not be framed exclusively in terms of whether supreme emergency violates the *laws* of war (as codified in international humanitarian law) but rather what its violations of the *rules* of war – considered more generally – might imply. The more general significance of this is something I shall return to briefly at the end of these remarks.

A second consideration here is that while in general 'supreme emergency arguments' (as I shall call them) have a long history in the just war tradition,[2] they are most often seen as the exception rather than the rule. Since 9/11, however, they have become much more common in various ways, as earlier chapters in this book have already documented and part of my aim here is to uncover the basis for what

seems to me to be some very bad and very slipshod reasoning about this topic in many contemporary discussions where it is not (or not only) just plain mendacity. Thus, this chapter falls into three broad sections. In the first, I shall consider what I regard as the classic contemporary formulation of the Supreme Emergency argument – Michael Walzer's in *Just and Unjust Wars*[3] – and examine some of its strengths and weaknesses. In the second I shall look at some more recent attempts to deploy what are at least believed to be similar arguments and suggest both some specific reasons why they are problematic and also one general reason why they are all problematic. And then, finally, I shall offer a reflection as to what this argument might in general suggest about the idea of the 'rules' of war, in the very general sense in which we have been using it in this book.

The Supreme Emergency argument

With that as a preliminary, let me turn to the Supreme Emergency argument itself. As I suggested above, perhaps the canonical statement of this argument in the modern literature of the just war is the version given in Michael Walzer's *Just and Unjust Wars.* Walzer develops the idea in the context of spelling out what he terms 'the war convention' – roughly Walzer's version of the traditional *jus in bello* – and specifically as a precursor to his discussion of perhaps the most problematic aspect of that (for him) the question of nuclear deterrence. He suggests that the idea of Supreme Emergency is, in fact, a compound of two conditions both of which must be present if the idea of supreme emergency is to be (justifiably) invoked: danger and imminence:

> [Supreme Emergency] is defined by two criteria, which correspond to the two levels on which the concept of necessity works: the first has to do with the imminence of the danger and the second with its nature. The two criteria must both be applied. Neither one by itself is sufficient as an account of extremity or as a defence of the extraordinary measure extremity is thought to require … can a supreme emergency be constituted by a particular threat – by a threat of enslavement or extermination directed against a single nation? Can soldiers and statesmen override the rights of innocent people for the sake of their own political community? I am inclined to answer this question affirmatively, though not without hesitation and worry … (but) danger makes only half the argument; imminence makes the other half.[4]

Walzer illustrates this thesis with two detailed examples, both cases where the central principle of the *jus in bello* – non-combatant immunity – was intentionally violated. The first is the case of the strategic bombing of German cities by the British between 1940 and 1943 (which he argues could be seen as a context in which Supreme Emergency was legitimately deployed) and the second, the decision to drop the Atomic Bomb on Japan (which he argues cannot really be seen as a case of supreme emergency and was therefore doubly a crime). The reasons why the one was a case of supreme emergency and which could therefore justify setting

aside the rules of war and the other could not are complex but deserve some attention, since they go to the heart of the justification Walzer wants to offer for the idea of Supreme Emergency.

In the British case, Walzer's argument depends on the claim, disputable of course but nonetheless very widely believed at the time, that the possibility of German Victory in 1940–41 seemed real and that a German victory, given the character of the Nazi regime, was an appalling prospect, perhaps the most appalling prospect imaginable. Walzer is here drawing on a well known earlier argument of his,[5] to wit that a Nazi victory *would* have been the worst thing imaginable and that, in order to defeat it, almost anything would be permissible. As he puts it in *Just and Unjust Wars:*

> it does seem to me that the more certain a German Victory appeared to be in the absence of a bomber offensive, the more justifiable was the decision to launch the offensive. It is not just that such a victory was frightening, but also that it seemed in those years very close; it is not just that it is close, but also that it was so frightening. Here was a supreme emergency, where one might well be required to override the rights of innocent people and shatter the war convention.[6]

But the corollary of this, of course, is that when the two things diverge, the idea of Supreme Emergency loses its hold. Walzer argues that while the bomber offensive *was* justified when Britain stood alone, by 1942 – when other military options had become available – it no longer was. And, similarly, he argues that Truman's decision to drop the Atomic Bomb cannot be seen as a case of Supreme Emergency – though it is often portrayed as such – since the determining condition – that which made the choice *either* dropping the Bomb *or* possibly suffering unimaginably large casualties on both sides[7] – was not a fixed and appalling possibility (as in the case of a German Victory) but rather a relatively easily removable policy – the allied policy of unconditional surrender – so the twin poles of supreme emergency were not both present in this case.

Yet as Joseph Boyle has made clear in a searching interrogation of Walzer's arguments,[8] there are at least two ways of reading his argument here. On the first, the basic assumptions underlying the claim are fundamentally consequentialist. As such they threaten to trump every other consideration (as consequentialist moral arguments usually do). As Boyle puts it, 'If the constraints of supreme emergency still allow a justification of terror bombing, as well as an inferred justification of nuclear deterrence, then it seems hard to fix the limits as stringently as Walzer wants'.[9] This is an argument that has been put to Walzer before, of course. David Luban, for example, suggested many years ago that the danger in Walzer's 'casuistry' is that it effectively adopts a 'sliding scale' attitude to moral judgement; as the conventions change, in response, say, to technological development, moral judgements do as well and this effectively tips the argument into consequentialism.[10]

Boyle suggests, however, that this consequentialist reading is not one that meshes with the emphasis Walzer gives in the book on rights, with considerations

of utility playing only a secondary role. And so he is disposed to understand Walzer's claims about supreme emergency in a different way. This is simply to see them as 'genuinely tragic'. 'Although required, they are wrong; *pecca forbiter* ("Sin bravely") as a Lutheran might prescribe'.[11] This way of thinking, Boyle suggests, explains in a way consequentialism cannot, Walzer's sense that wrong is still done, in such cases (for consequentialists, of course, it simply is not the case that wrong is done, if the action undertaken was the best in the circumstances).

Boyle thus suggests that this second way of reading Walzer's claim about supreme emergency certainly seems truer to Walzer's more general position than the previous consequentialist one. Yet, both he thinks leave a gap, at the same place. Simply put, the gap lies in the inability of Walzers's argument to stipulate how we should choose between possible actions; either on utilitarian calculations or on principled ones. 'Even after all moral considerations have been made', Boyle remarks, 'one can only choose randomly between opposing demands or be guided by non-rational considerations like feelings. Calculation and intuition are replaced by volition and desire'.[12]

Why might this matter? It matters for Boyle, of course, since he wants to assert both that consequentialism fails as an ethical standard (a view he thinks he shares with Walzer) *and* that there is a plausible alternative in the form of a rationalistic deontology such as that proffered by Alan Donegan,[13] which is importantly different from Walzer's 'tragic', existential view of human moral choice, in that it can offer reasons for (or against) this or that course of action and does not have to fall back on 'volition or desire'. And in that respect, though Boyle does not make this case explicitly, the just war tradition is perhaps resistant to this particular gloss that Walzer seeks to give it. There are boundaries that cannot be crossed, and those boundaries do rule out certain kinds of actions, including perhaps setting aside the rules in times of national crisis.

What Walzer seems to be arguing, by contrast, is that however central the 'rules of war' must be for our thinking about war in general, there are cases – such as Britain in 1940 – that stand outside them and where the rules therefore simply do not apply since the danger posed was so great and so imminent that anything could be justified in opposition to it. Yet here, though Boyle does not mention it, there is it seems to me a suppressed premise of very considerable importance; for Walzer's position in particular and, indeed, for Supreme Emergency arguments in general. That premise is simply that if this conclusion is to be generally upheld then it is surely predicated on seeing the survival of political community *as such* as central, rather than simply seeing the opposition of one State at one time as a necessary and just opposition to a particularly vile form of political community, that is, Nazi Germany. In other words if there is a defensible argument about Supreme Emergency that is not specific to a particular moment in time or particular historical situation, but is generalizable as a part of the just war tradition, then it must be the case, for Walzer, that the character of the moral world as such allows for a reasoned suspension of the rules. But in which case, there must be a limit to the casuistry of the tradition; so Walzer's argument seems to be circular.

Supreme Emergency and contemporary international relations

Let me pause here and insert some reflections on more recent invocations of the idea of Supreme Emergency, since that 'suppressed premise' I detected in Walzer's argument also seems to be present in these accounts but in much less qualified and more unambiguous ways. And that is helpful because it will assist us, I think, in pinpointing the character of the problem with Walzer's deployment of the idea of Supreme Emergency and, by extension, raise the possibility that the argument in general is incoherent, at least if run in tandem with the just war tradition.

The context in which certain kinds of Supreme Emergency argument have been made in recent years is obvious; it is the aftermath of 9/11.[14] While there was already considerable interest in notions of 'catastrophic risk' or 'laws of fear' in more general terms,[15] these ideas both fed off, and were fed into, both academic and practical debates surrounding 9/11. In both the United States and within the United Kingdom especially, wholly new legislative and executive powers have been deemed to be warranted – for example the creation of the whole apparatus of homeland security in the US[16] and the new anti-terror laws and new potential crimes such as are suggested in the Government's new draft anti-hate speech legislation in the UK.[17]

In addition to these developments, however, has been the decision by Western and other governments to use techniques – let us say 'quasi judicial' techniques – that have long been regarded with suspicion in Western politics, or indeed have been completely foresworn – at least in theory. Perhaps the most notorious of these is the perceived relaxation of the attitude to torture by the US government.[18] This phenomenon, it is argued, is attested to by the creation of the internment camps at Abu Ghraib Prison and at Guantanamo Bay,[19] a deliberately 'extra-legal' area outwith formal US jurisdiction, yet wholly controlled by the US government; by the now well documented practice of 'extraordinary renditions'.[20] This is where suspected or captured terrorists are flown to countries without the usual 'liberal' legal restrictions for 'interrogation'; as well as by the less formal, but perhaps equally revealing behavior of some in the detention camps like Abu Ghraib.[21] And, in terms of commentary on this set of issues, the alleged new situation has even led some, in the US – most notoriously the Harvard Law professor Alan Dershowitz – to argue for the incorporation of torture into US law under specific circumstances through the creation of what he called 'torture warrants'.[22]

Indeed, although Supreme Emergency type arguments are fairly common in the post 9/11 justification of a number of policies, it is perhaps in relation to 'torture' – or at least certain forms of interrogation techniques etc. – that they have been most pronounced, not only practically but academically. A standard ethical dilemma much cited in the context, in variously different versions, was what Judith Jarvis Thompson famously called the 'trolley problem'.[23] Dershowitz's version is as follows:

> The classical hypothetical case involves the train engineer whose breaks become inoperative. There is no way he can stop his speeding vehicle of death. Either he can do nothing, in which case he will plough into a busload of schoolchildren, or he can swerve onto another track, where he sees a drunk lying on the rails. (Neither decision will endanger his passengers) There is no third choice. What should he do?[24]

In the contemporary post 9/11 context, of course, the argument is that we are often faced with a 'devil's alternative', a choice between two evils, and all we can do is to choose the lesser evil. This argument has been pressed by many in the post 9/11 context, including authors as otherwise different as Dershowitz, Michael Ignatieff and even, on some readings, Jean Bethke Elshtain.[25] While the formal language of Supreme Emergency is not often used, the sentiment is very similar; the argument usually couched (as Walzer couches it) as a version of the argument from necessity. And a not atypical attitude to these developments is that expressed by Richard Posner in his contribution to Sanford Levinson's excellent *Torture: A Collection* . 'Only the most doctrinaire civil libertarians (not that there aren't plenty of them) deny that *if the stakes are high enough,* torture is permissible. No one who doubts that should be in a position of responsibility' (emphasis added).[26]

But this, of course, begs the question of when we can determine when the stakes *are* 'high enough' what indeed the 'stakes' might be said to be and just who, exactly, is empowered to make that decision. Given the debate between Walzer and Boyle we looked at above, it seems to me that there are two problems here. First, determining when the 'stakes' *are* high enough – whatever they might be – which would run foul of the problem of making the casuistic choice that Boyle points to in his critique of Walzer and second, obviously, determining just what the stakes in fact are. In most of the justifications of the kinds of things detailed in the above couple of paragraphs there would be general agreement that Walzer's two tests of Supreme Emergency would be met – a major threat and an imminent one, indeed, beyond imminent since the enemy has already struck, and disastrously.[27] But crucially, – and leaving to one side the question as to whether in fact 'global terrorism', or al-Qaeda and its surrogates form any sort of real threat to Western societies as such, as opposed to an obvious and ongoing (albeit intermittent) threat to people within them[28] – the criteria Walzer outlines must be supplemented by that 'suppressed premise' which places a huge amount of weight on the political community *as such* as being the main (if indeed not the only) bearer of the relevant rights and values, if the argument is, even in principle, to cohere. For if the political community is simply *not* that important, there is no basic reason why one would be justified in ignoring the normal moral rules in defending it. It is the assumption of the moral centrality of the political community concerned that carries with it the weight of the argument that when *that* is under real and imminent threat then we are released from the normal restraints that should affect us. Indeed, I would go further and suggest that *only* if we assume that the political community is as Walzer assumes it to be, can we even begin to use the notion of Supreme Emergency – and even then Boyle's question

remains, I think, to be answered. But perhaps at least in principle we might be able to answer it, but only on the assumption that the 'suppressed premise' is correct. So the question is clear: is Walzer right to give the political community the weight it has in his system and how might we go about answering this.[29]

The just war tradition against Supreme Emergency

In the remainder of this paper I want to suggest a rather oblique strategy for answering this question, or at least problematizing it. To begin with let me say, rather baldly, that I simply do not accept Walzer's characterization of the political community or the value he accords to it, but do accept that to argue that case in detail here would take me a long way away from the central concerns of this essay (and indeed this book). Suffice to say that on my own reading, forms of political community, especially what Oakeshott once called 'the somewhat novel associations of human beings which came to be called the States of modern Europe',[30] are far more ramshackle, ambiguous and divided than would be required for them to be the carriers of rights and value they would need to bear the weight that Walzer's account (and indeed, those of more recent defenders of Supreme Emergency like Posner) requires. This does not mean of course that we cannot stipulate any role for political community or need to deny any positive role to States (or other forms of political community). Only that they simply do not carry the particular weight that would justify setting aside all 'normal rules' – and whatever sense is given to this idea – when they are threatened, even if they are threatened greatly and imminently.

But beyond this obviously disputable claim, I want to draw attention to one other issue that, it seems to me, ought to give us pause in deploying the idea of Supreme Emergency, at least in the context in which Walzer develops it. This is the simple fact that the idea itself has absolutely no warrant in the just war tradition as generally understood. It is significant I think in this context, that Walzer, in his chapter on Supreme Emergency in *Just and Unjust Wars,* does not cite a single canonical source for the idea and also does not mention the perhaps telling fact that the British policy of bombing German cities was condemned in the House of Lords and elsewhere in the strongest possible terms by George Bell, the Anglican Bishop of Chichester, explicitly in the language of the just war tradition.[31]

The point here is not merely to emphasize that (obviously) differences of opinion existed (and still exist) on the morality of the bombing of German cities but also to point out that in traditional discussions of the just war Supreme Emergency does not figure at all. And this is hardly surprising if we see the tradition, as Oliver O'Donovan has suggested we should, as neither 'a theory', nor about 'just wars' but rather as 'a proposal for doing justice in the theatre of war'.[32] On this reading, one I have sought to defend in detail elsewhere,[33] the idea of 'setting aside the rules' is simply nonsensical. The tradition is, in a very important sense, constituted by and through its 'rules' and they cannot be 'trumped' by any particular social or contextual circumstance. That indeed, is what it means, I think, to see the just war tradition as I do (and as Walzer claims to do) as a casuistic tradition.[34] Any given

action – the bombing of German cities, for example – would have to be examined in the context of the 'rules' – which are not merely laws, nor are they fixed, but they certainly have a centre of gravity around a common set of precepts. 'political communities' may have a putative right of defence under these precepts, but such a right is always conditional on other precepts being met and never absolute.

By introducing the 'suppressed premise' in the way that he does, Walzer effectively seeks to make political communities absolute in a way that the tradition simply cannot accept. And this, I would suggest, drives a coach and horses not only through the general strategy Walzer uses in the rest of *Just and Unjust Wars* – which is to emphasize casuistry, context and the circumstances of judgement – but also runs the risk of simply denying what the just war tradition in general is most at pains to emphasize and thereby failing in his expressed aim of 'recapturing' the just war for moral and political theory. In the specific cases he discusses – the bombing of German cities, the decision to drop the Atomic bomb and the structures and strategies of nuclear deterrence – a seriously casuistical just war theory could argue the toss about each of the decisions without any recourse to notions of Supreme Emergency. The only function that doctrine fulfils is simply to permit political communities – essentially States – to *set aside the constraints of the tradition* in specific contexts. And that in itself only looks justifiable if the State has the kind of value Walzer wants to claim for it. As I have said I do not think that it does, but even setting that to one side, the effect of retaining the Supreme Emergency justification would be to effectively condemn the rest of the just war tradition to irrelevance since it would effectively say that the rules that consitute it and through which it has sense can simply be set aside whenever the decision makers in any State think the need is great enough. And if we are to take issue with them – as even Walzer well might – we are back to the question I raised earlier: who is to determine whether the stakes are high enough to warrant the invoking of Supreme Emergency; presumably the representatives of the State. So the argument becomes circular once again.

Let me close these remarks by elaborating on just one aspect of this argument. The just war tradition, I have said, as a tradition is constituted by and through the rules that it develops. These rules include what we would call the 'laws of war' (or now international humanitarian law) but are not limited to them. As Walzer himself says, what he calls the 'war convention' consists of 'articulated norms, customs, professional codes, legal precepts, religious and philosophical principles and reciprocal arrangements'.[35] Yet recognizing this seems to me to carry two implications.

To begin with, it suggests that our judgements about war are never merely legal judgements; that we cannot reduce our judgements about the legitimacy of this or that instance of the use of force to the question of whether it was (or is) 'legal'. In the contemporary context, as I have argued elsewhere,[36] this implies that questions about (for example) the legitimacy of the war in Iraq, either in general (*jus ad bellum*) terms or more specific (*jus in bello*) senses might begin with discussions of its legality but that is the beginning of the discussion not the end. And it

may be that our judgement determines an instance of the use of force to have been 'legal' (but illegitimate) or the reverse. It is precisely in this 'casuistic', case-based way that the tradition should offer its interpretation of events and in that respect contemporary public international law, important though it unquestionably is, is only a small part of the story and cannot be assumed in advance to trump the other parts.

The second implication is simply that, just as international law cannot be assumed to trump other aspects of the constitution of judgement, the *deus ex machina* of the sovereign State, as Walzer's bearer of rights and value, cannot be supposed to do so either. Political communities in the just war tradition do not have an intrinsic right of self-defence, only a stipulative one, and even if such a right is granted, other criteria have to be met for an act of self-defence to constitute a legitimate act of force. But if this is so, then there can never be a meaningful deployment of the idea of Supreme Emergency because if a certain act is deemed legitimate one does not need to invoke special reason to justify it and if it is not, it is simply gratuitous special pleading to argue that 'the rules' don't apply.

Walzer opens *Just and Unjust Wars* by trying to refute an idea that is best known in its familiar Latin form; *Inter arma silent leges:* in time of war the laws are silent. He was, of course right to do so and his reformulation of the just war tradition has quite properly been among the most influential treatments of the political theory of war in our time. For this reason it is, I think, doubly worrying that by deploying a notion of Supreme Emergency that depends on a very particular conception of the moral priority of a particular political community (the post-eighteenth-century sovereign State) he is running the risk of undermining his theory at its core – the casuistical character of the human moral world. For it is precisely the point of the tradition, as he rightly stresses, to assert that the laws – the rules – are not silent in time of war; they speak with the force they have always had. But they address the political communities that would invoke them as much as the agents who act for them and as such it is not open to those communities simply to set aside the rules to which they cleave under any circumstances; that is why the rules are as they are. In that sense, as Cicero once said, and in order to end as we began, with a Latin tag; *Etiamsi tacent, satis dicunt:* Even if they are silent, they say enough.

Notes

1 I am grateful to all the participants in the *Rethinking the Rules 2:The Ethics of Force* conference for the discussions we had in St Andrews. This paper emerged very much out of those discussions, though in this form it was not presented at the conference. I should like particularly to thank Chris Brown, Ariel Colonomos, Pierre Hassner, Jan Klabbers, Caroline Kennedy-Pipe and Larry May whose input was especially helpful and, from outside the conference, Steve Lee and Henry Shue for very helpful conversations. My biggest debt of all is to Tony Lang and Amanda Beattie; for organizing the conference, inviting me to contribute to the volume and for persisting in the belief, in the face of much evidence to the contrary, that there would eventually *be* a contribution.

2 A classic discussion is James Turner Johnson, *Ideology, Reason and the Limitation of War* (Princeton: Princeton University Press, 1975). I have also essayed some thoughts on

this in 'The *Jus in bello* in historical and philosophical perspective' in Larry May (ed.) *War and Political Philosophy* (Cambridge: Cambridge University Press, 2008).

3 Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (London: Pelican, 1980). This is the first edition. The book has now run to four editions, but in each case Walzer has kept the text intact, adding merely a new foreword discussing events in the world (The Gulf War, Kosovo, 9/11, Afghanistan and Iraq) on which his theory might have some bearing. All references to *Just and Unjust Wars* in what follows are to this edition.

4 *Just and Unjust Wars*, 252–255.

5 See his well-known essay 'World War Two: Why was this War Different' in *Philosophy and Public Affairs*, 1,1 (Fall) 1971.

6 *Just and Unjust Wars*, 259.

7 American military planners estimated that Operation Olympic – the invasion of Japan – would cost at least one million US battle deaths and many more Japanese ones, both military and civilian.

8 See His 'Just and Unjust Wars: Casuistry and the Boundaries of the Moral World' in *Ethics & International Affairs*, 11, 1997, 83–98.

9 Boyle, 93.

10 See David Luban, 'Just war and Human Rights' in *Philosophy and Public Affairs*, 9, 2, 1980, 161–181.

11 Boyle, 97.

12 Boyle, 97.

13 In his book *The Theory of Morality* (Chicago: University of Chicago Press, 1977). Boyle also sees this imminent in the 'new natural law theory' developed by himself, Germain Grisez and John Finnis. See, for example, their jointly authored book *Nuclear Deterrence*, *Morality and Realism* (Oxford: Oxford University Press, 1987).

14 The next couple of paragraphs draw on a previously published co-authored paper of mine; see Caroline Kennedy-Pipe and Nicholas Rengger 'Apocalypse Now? Continuities and Disjunctions in World Politics after 9/11' in *International Affairs*, (May 2006), 82, 3.

15 See, for example, Corey Robin's excellent *Fear: The History of a Political Idea* (Oxford: Oxford University Press, 2004); Cass Sustein, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge: Cambridge University Press, 2005); *Richard Posner, Catastrophe: Risk and Response* (Oxford: Oxford University Press, 2004).

16 For the remit and mission of the Department of Homeland Security see the Executive Order under which it was established: http://www.whitehouse.gov/news/releases/2001/10/20011008–2.html. For an assessment of its achievements since then see the *RAND Corporation* report 'The Department of Homeland Security: The Road Ahead', January 2005.

17 Racial and Religious Hatred Act 2005, http://www.publications.parliament.uk/pa/cm200506/cmbills/011/2006011.pdf. For an overview of British legislative and organizational responses to 9/11 see Bradley W.C. Bamford, "The United Kingdom's 'War Against Terrorism'", *Terrorism and Political Violence*, 16(4) Winter 2004, 737–756.

18 For general discussion surrounding this issue see Sanford Levinson (ed.) *Torture: A Collection* (Oxford: Oxford University Press, 2004.)

19 To place Guantanamo Bay in its legal context see Christopher Greenwood, 'International Law and the "War on Terrorism"', *International Affairs* 78(2) 2002, 301–317. For a review of the controversies surrounding the camp see 'The Case for Closing Guantanamo is Overwhelming', *The Observer*, 26 February 2006.

20 'Minister Admits "Rendition" Planes Used RAF Bases'. *The Guardian*, 7 March 2006. Also, see the Council of Europe report 'Alleged Secret Detentions in Council of Europe Member States', published 26 January 2006.

21 'U.S Abuse of Iraqi Detainees at Abu Ghraib Prison', *The American Journal of International Law*, 98(3) July 2004, 591–596. Also, see Amnesty International report 'Beyond Abu Ghraib: Detention and Torture in Iraq', published 6 March 2006. See also Executive Summary of Article 15–6 Investigation of the 800 Military Police Brigade henceforth Taguba Report, prepared by Major-General Antonio M. Taguba. Posted on MSNBC.com on May 4, 2004. http://www.msnbc.msn.com/id/4894001/.
22 See Alan Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press, 2003). See also the discussions in Levinson (ed) *Torture: A Collection*, and the discussion in the chapter by Caroline Kennedy-Pipe and Andrew Mumford in this volume.
23 Judith Jarvis Thompson, 'The Trolley Problem' *Yale Law Journal* 94, (1985), 1395–1415. Perhaps the earliest recognizable version can be found in Phillipa Foot, 'The problem of abortion and the doctrine of double effect' *Oxford Review*, 5, 1967, 5–15.
24 Alan Dershowitz, *Why Terrorism Works* (New Haven: Yale University Press, 2002) 132.
25 Not all of these are necessarily versions of supreme emergency, though most come close. See, in addition to Dershowitz, Michael Ignatieff, *The Lesser Evil Political Ethics in An Age of Terror* (Princeton: Princeton University Press, 2004) and Jean Elshtain, *Just War Against Terror* (New York: Basic Books, 2003). I have offered a critical reading of the latter argument in 'Just a War Against terror: Jean Bethke Elshtain's Burden and American Power' in *International Affairs*, 80, 1, (January 2004).
26 Sanford Levinson (ed.) *Torture: A Collection* (Oxford: Oxford University Press, 2004) 295. Emphasis added. Posner is here partly agreeing with (though also criticising) Alan Dershowitz's arguments about torture.
27 I am not suggesting, by the way, that Walzer would s*hare* these views. There is plenty of evidence to suppose that he would not.
28 In the article I co-wrote with Caroline Kennedy and which is cited above, we argued that it cannot be so seen.
29 It is perhaps worth emphasizing here, that the way in which at least formal understandings of public international law are couched reinforce the claim that Walzer – and others – would make about the centrality of political community, in that public international law is, essentially, still oriented around the primacy of the sovereign state, thus effectively privileging this form of political community at least. I will return to this issue below, but suffice to say here, that even if we grant this (as a fact) it still does not establish the *moral* priority of the state in the way required if the notion of Supreme Emergency is to hold. For that we need an additional claim about the *kind of community* the sovereign state may be said to be.
30 Michael Oakeshott, *On Human Conduct* (Oxford: The Clarendon Press, 1975) 185.
31 A good discussion can be found in Ronald Jasper, *George Bell, Bishop of Chichester* (Oxford: Oxford University Press, 1967).
32 Oliver O'Donovan, *The Just War Revisited* (Oxford: Oxford University Press, 2003) vii.
33 See Nicholas Rengger 'The Jus In Bello in Historical and philosophical perspective' and 'The Judgement of War' in *The Review of International Studies*, special issue 2005, and 'On the Just War Tradition in the twenty first century' in *International Affairs*, 78, 2, April 2002.
34 For a discussion of the sense of casuistry as a general practice that supports this interpretation see Al Johnson and Stephen Toulmin, *The Abuse of Casuistry: A History of Moral Reasoning* (Berkeley: University of California Press, 1986).
35 *Just and Unjust W*ars, 44.
36 See Rengger, 'The Judgement of War'.

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n = endnote; *t* = table/diagram.