Abstract: This paper addresses the questions of what constitutes an ‘armed attack’ for purposes of activating the right of individual and collective self-defense? Can regional and sub-regional organizations authorize uses of force that would otherwise be illegal? Does military intervention at the request of a recognized government to assist it in repressing domestic opponents constitute a permitted use of force? Are interventions, not authorized by the SC, undertaken to prevent or terminate crimes against humanity ever legal under the Charter? Are reprisals legal under the Charter? What limits does the Charter impose on the right of self-defense once it is triggered by an act of aggression?

Keywords: Use of force, legitimacy, intervention, aggression, self-defense

Introduction

Two functionally distinct bodies of law govern the design and implementation of strategies to combat transnational terrorism. One consists of the norms stating the conditions in which states may legitimately project force across national frontiers. Both the generality of international lawyers and most political leaders and diplomats now find those norms principally if not exclusively in the United Nations Charter and in the practice of states: both their actions and their claims about (a) the legality of their actions and (b) the reaction of other states and intergovernmental institutions and international legal scholars to those claims, that is whether they accepted, rejected or ignored the claims and the related acts of force. The other body of law consists of the norms declaring limits on the means that a state using force may employ to achieve its political/military ends, limits that apply whether or not the use of force itself it legal or illegal.

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1 International lawyers refer to this body of norms as the *jus ad bellum*. 
These norms are found both in the so-called Humanitarian Laws of War (principally the Hague Rules and the Geneva Conventions and the related practice of states) and in the various Human Rights Conventions, principally the International Covenant on Civil and Political rights (ICCPR) and the Torture Convention. The most important limits, relating to protection from summary execution and brutal treatment short of killing, apply also to the use of force internally.

Legitimate Recourse to Force

The Original Understanding

At the birth of the United Nations, a majority of legal scholars and probably of governments subscribed to the view that taking into account the language and structure of the Charter, in particular Articles 2 (4) and 51 in conjunction with Chapter VII as a whole, and taking account also of the document’s negotiating history, it should be read as dividing the universe of cross-border military coercion and intervention into three categories. Category 1 is self-defense against an armed attack. Category 2 is force (or the threat thereof) authorized by the Security Council under Chapter VII to prevent a threat to the peace, a breach of the peace or an act of aggression. The domain of the illegal is Category 3, call it the default category, which is occupied by every act of state-initiated or tolerated cross-border violence that does not fall into the first two categories. However, it was not long before states with the capacity to project force across frontiers began proposing additional categories, based in part on curious readings of the Charter that happened to legitimate their uses of force, or discovered unexpected elasticities in the existing ones, and they invariably found some scholars who sympathized with their claims. What follows is a sketch of the areas of ambiguity and contention that marked the Cold War years.

1. What constitutes an ‘armed attack’ for purposes of activating the right of individual and collective self-defense?

a. Do activities short of launching troops, planes or missiles across a frontier, for instance giving material assistance to an insurgency in another state or a terrorist group, ever trigger the right of self-defense?

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2 International lawyers refer to this body of norms as jus in bello, but sometimes when they use the terms they intend a reference only to the Humanitarian Laws of War, but in so limiting their reference they are failing to encompass the full body of the relevant law.


During the Cold War, primarily with respect to the guerrilla wars waged generally by communist-inspired or -aided movements against pro-American regimes in Latin America and Southeast Asia, the US argued that where State A provided weapons or training or safe haven to opponents of the recognized government of State B, the latter and allied states could treat that assistance as an armed attack. With one dissent (by chance the American judge) in the case brought by the Government of Nicaragua (represented by a Legal Advisor to the Department of State) against the United States, the World Court rejected this claim insofar as it purported to justify US acts of war within Nicaragua.

While the US Government refused to appear and argue the merits, on the grounds that the Court lacked jurisdiction, in the forum of public opinion the Reagan Administration claimed that its own clandestine operations inside Nicaragua and its financing, arming and training of Nicaraguan insurgents were legitimate acts of collective self-defense in response to Nicaraguan aggression against the Government of El Salvador, an ally under the Rio Treaty of Mutual Defense. The acts deemed constitutive of that aggression were various forms of assistance to the indisputably independent Salvadoran insurgents. This was not a new argument for the US. It had earlier been marshaled against Cuba for its encouragement and support of insurgency in various Latin American countries and against North Vietnam for its support of the insurgency in South Vietnam. In retrospect, Vietnam was the stronger case for the argument, since it now appears

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6 Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), ICJ 14 (June 27, 1986).
7 Ibid.
that at least by the time the US became openly involved in combat, Hanoi was exercising substantial if not total strategic control over the Vietcong.\footnote{See, for example, Robert McNamara’s account of retaliation against North Vietnam for its support of the Vietcong, beginning in 1964 with proposed air strikes and CIA support for South Vietnamese covert operations in North Vietnam in Robert S. McNamara, \textit{In Retrospect: the Tragedy and Lesson of Vietnam}, New York: Crown (1995), at 114, 130. Also see Robert D. Schulzinger, \textit{A Time for War: the United States and Vietnam, 1941-1975}, Oxford, UK: Oxford University Press (1999) at 95-96, for an account of the creation of the Vietcong (the National Front for the Liberation of Vietnam) in December 1960.}

Composed as it is of mostly distinguished judges and scholars from the various world regions, the Court’s opinions, at least when they are nearly unanimous, are the closest thing we have to authoritative interpretation of the Charter.

b. \textit{At what point, if any, do activities that could reasonably be construed as preparations to launch an armed attack justify preemption?}


Most scholars have regarded \textit{imminence} as the key criterion. Without it, measures plausibly intended for defensive or, in the case of nuclear weapons, deterrent purposes could be construed, hypocritically or otherwise, by another, unfriendly state as preparations for an attack justifying a first strike. If, as President Bush appeared to declare after 9/11, the United States is prepared to strike states deemed unfriendly whenever they engage in behavior which could facilitate an attack
in the indeterminate future, whether by the state itself or by terrorists it might enable,18 we are back in the era of preventive wars, the kinds of wars urged in the late nineteenth and early twentieth centuries by German strategists fearing the future military superiority of the continental-sized powers, Russia and the United States.19 These are wars to eradicate merely contingent risks, often risks not to survival, i.e. not to political independence and territorial integrity, but rather to regional superiority or even global hegemony. Remove the requirement of imminence and it becomes very difficult to distinguish aggression from self-defense.

c. Can forms of coercion other than military ones constitute an armed attack?

Developing states have sometimes argued that economic ones threatening their political independence should be so regarded.20 The US seemed to imply the same during the Arab oil boycott following the 1973 Middle East War.21 In the West, there was little if any scholarly support for this view and efforts by some Third-World states to include economic coercion in the definition of aggression failed.

2. Does the Security Council have authority under the Charter to authorize coercive measures including use of force in cases (a) where the threat to international peace and security is not imminent or (b) the ‘threat’ consists of massive violations of human rights within a country but with little immediate spillover effect to other states?

With respect to (a), two views once competed for dominance. Some commentators argued22 that the Council was an organ with jurisdictional authority strictly limited by the language of the Charter and that the Charter’s grant of authority under Chapter VII to deal coercively with ‘threats’ had to be read in the light of Chapter VI authorizing the Council to employ non-coercive measures like mediation in cases where a situation could develop into a threat. In other words, the Charter itself distinguishes in so many words between immediate and potential or longer-term threats and gives the Council authority to employ force only in the former case. So while it has authority to employ force (or to authorize force by states acting as its proxy) at a somewhat earlier point than an individual state can under Article 51, that authority does not extend to cases where the threat is in so early a stage of incubation that its actualization is uncertain and there is opportunity to test the efficacy of means other than force.

In recent years I have seen little support for this view in Western academic circles, although it may well reflect the preferences of the Chinese and certain other governments in the Global South. While the Council may not have absolute discretion to define its authority, it has and in

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18 An overview of the relevant Security Council Resolutions – and of the overall ‘case’ the US was making – can be found in the text of the draft resolution offered up by the US, Spain and the UK S/2003/215 (March 7, 2003). See also W.H. Taft IV and T.F. Buchwald, ‘Preemption, Iraq, and International Law’, 97 (1) American Journal of International Law, 5-10.


22 See e.g., Kelsen, The Law of the United Nations (1951) at 769-815.
contemporary circumstances must have a very broad discretion to decide at what stage in the gestation of a threat it should intervene with coercive means of one form or another.

With respect to (b), the practice of the Council since the end of the Cold War seems to have resolved the once sharp dispute over its authority to authorize coercion to avert or mitigate catastrophes that occur mainly within one country. When in the 1970s it authorized\(^\text{23}\) coercive measures against the minority racist regime in what was then Rhodesia (contemporary Zimbabwe), the Council was sharply criticized by some legal commentators\(^\text{24}\) and initially the United Kingdom took the position that the matter was an internal concern.\(^\text{25}\) Sanctions against South Africa in the 1980s also encountered some opposition on legal grounds. Since the Cold War, however, the Council has authorized intervention to restore democracy (Haiti),\(^\text{26}\) to protect the delivery of humanitarian relief (Bosnia and Somalia),\(^\text{27}\) and to end civil conflicts marked by massive violations of human rights (e.g. Liberia and Sierra Leone).\(^\text{28}\) Practice has confirmed the breadth of the Council’s power to act for the sake of human as well as national security.

3. Can regional and sub-regional organizations authorize uses of force that would otherwise be illegal?\(^\text{29}\)

Articles 52-54 (Chapter VIII) of the Charter recognize a possible role for such organizations particularly in helping to mediate festering hostility that, if left unattended, could lead to armed conflict.\(^\text{30}\) It also recognizes them as possible instruments of the Security Council in dealing with Chapter VII situations.\(^\text{31}\) But Article 54 states that any “enforcement action” by such organizations requires the approval of the Security Council.

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\(^{24}\) Dean Acheson so argued and was criticized by Myres S. McDougal and W. Michael Reisman in ‘Rhodesia and the United Nations: the Lawfulness of International Concern’, 62 (1) American Journal of International Law (1968), 1-19.

\(^{25}\) The Lusaka communiqué, based on agreement by leaders of an August 1979 Commonwealth, along with establishing the principle of majority rule and legal independence from Britain, was interpreted by British officials as precluding any intervention by the United Nations, see Henry Wiseman and Alastair M. Taylor, From Rhodesia to Zimbabwe: the Politics of Transition, New York: Pergamon Press (1981) at 4.


\(^{27}\) S/RES/816 (1993) and S/RES/794 (1992), respectively.


\(^{30}\) UN Charter art. 53; UN Charter art. 52, para.1; See also Farer, ‘Law and War’, (1971).

\(^{31}\) UN Charter art. 52, paras. 1-3 but see restrictions in art. 53 para. 1.
During the Cold War, the US argued (in relation to the Cuban Quarantine of 1962, the intervention into the Dominican Republic in 1965 and the invasion of Grenada in 1982) that the approval could be after the fact and implicit, a position most scholars and governments rejected. More recently the US has altered its position insofar as the OAS is concerned, insisting (most clearly in the case of Haiti) that enforcement measures require SC authorization. But the first ECOWAS intervention in Liberia, although not authorized, was not criticized, much less condemned. A distinguished panel of experts established by the Swedish government found NATO’s intervention in the Kosovo conflict to be not consistent with the charter and thus technically illegal but nevertheless “legitimate.” Whether NATO, originally a self-defense rather than regional organization, can be said to have evolved into the latter is open to dispute.

4. Does military intervention at the request of a recognized government to assist it in repressing domestic opponents constitute a permitted use of force?

Some scholars and governments have argued that the prerogatives of sovereignty certainly include authorizing foreign intervention and that the recognized government is the agent of state sovereignty. Others have said that in cases of large-scale civil war, an intervention even if invited by the recognized government violates the country’s political independence and the universal right of self-determination and should be deemed illegal.


34 UN General Assembly censure of the US interventions in Grenada and Panama can be found in A/RES/44/240 (1989).


5. Are interventions, not authorized by the SC, undertaken to prevent or terminate crimes against humanity ever legal under the Charter?

In the early decades after the Charter’s adoption, scholars and governments especially were reluctant to concede that the claims of humanity might trump the principle of non-intervention, although at least in particular cases some seemed disposed to treat the circumstances as highly mitigating. The Kosovo Commission mentioned above based its finding of “legitimacy” largely on what it perceived as the imperative necessity of using force in order to abort massive ethnic cleansing initiated by the Belgrade Government against the Albanian population of Kosovo. Few would dispute that mass ethnic cleansing is a “crime against humanity”, with genocidal potential. With respect to the question of law, it is significant that even in the presence of such a crime, coupled with action by an arguably ‘regional organization’ (but not, to be sure against a member of the organization) and SC resolutions condemning the Government of ex-Yugoslavia for its treatment of the Albanian population and calling upon it to cease and desist, a committee of experts with a strong collective commitment to the protection of human rights has found that action to be illegal under the Charter yet still “legitimate.” Nevertheless, some leading, primarily US-based international law scholars, including ardent defenders of the UN and the Charter-based legal order, have argued that Humanitarian Intervention is legal where the following criteria are satisfied:

- A massive crime against humanity is imminent or has begun to be executed;
- Either there is no time for recourse to the SC, if the crime is to be averted or aborted before its completion, or action by the SC is blocked by a Permanent Member’s exercise of its veto;
- The action is reported to the SC;
- The intervention is carried out in good faith and so as to minimize its consequences for the political independence of the target state;
- The intervention complies with the Humanitarian Law of War and is reasonably calculated to cause less harm to “innocent persons” than would occur if the crime against humanity were allowed to proceed.

Scholars insisting on the legality of interventions satisfying the above criteria have emphasized the Charter’s recognition of human rights along with national sovereignty as paired constitutional

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principles. Even scholars from countries with a history of intense opposition to intervention of any kind now show some disposition to concede that in extraordinary circumstances, for example the onset of genocide, international action may be justified even if the SC does not authorize it. A number of Chinese scholars from influential think tanks have so conceded in a recent discussion, but they insisted that circumstances must be so exceptional that they cannot be codified, a position echoing that of the leading English authority on the use of force, Ian Brownlie, who analogized Humanitarian Interventions to “mercy killings” in domestic law which are illegal but may be overlooked in extraordinary circumstances. Efforts by the Axworthy Commission, supported by the Canadian Government, to promote agreement that the prerogatives of sovereignty are dependent in some measure on states meeting minimum obligations to their citizens initially met a cool reception from the generality of governments, implying that they preferred the Chinese approach.

The humanitarian arguments invoked by the US and the U.K. in the case of Iraq, arguments increasingly emphasized when evidence of WMD programs failed to appear, are unusual in that they refer to conditions that were chronic rather than acute. In fact, at the time of the invasion, violations of core human security rights appear to have been considerably less acute than during earlier periods when popular resistance to Saddam was more pronounced. The moral basis for distinguishing chronic violations of rights from acute ones, as most advocates of Humanitarian Intervention do, is problematical. But failure to require a sudden spike in human rights violations as a condition of “Humanitarian Intervention” would exponentially increase the number of potential targets; at least a strong plurality of UN members would be at risk.


6. Are reprisals legal under the Charter?

In pre-Charter international legal practice, reprisals were punitive acts responding to some illegal act committed by another state.\textsuperscript{51} They were deemed legitimate if they were proportional to the delinquency that occasioned them. One of their recognized purposes was to deter a repetition of the delinquency. In relation to a reprisal carried out by the United Kingdom during the 1950s in what is today the Republic of Yemen, the Security Council declared reprisals to be illegal under the Charter in that they did not constitute acts of self-defense.\textsuperscript{52} Self defense presumed an ongoing attack. A one-off border incursion by forces of State A into State B could be resisted. But if State A’s forces withdrew before State B could mount a response and appeared unlikely to make another incursion in the immediate future, then the opportunity for the exercise of self-defense rights had passed.\textsuperscript{53} State B would thus have to pursue other remedies for any damage done to it from the incursion including, of course, an appeal to the Security Council on the grounds that the situation constitutes an ongoing “threat to the peace.”

Distinguishing reprisal and legitimate self-defense can be difficult in the context of ongoing hostile relations between states marked by numerous ‘incidents’. For instance, the bombing of Tripoli by the United States in the wake of the bombing of a night club in Berlin frequented by US military personnel and attributed to Libyan intelligence operatives was arguably a reprisal;\textsuperscript{54} but the US could have argued that the night club incident was only one in a line of Libyan-organized attacks on US installations and personnel and that these various incidents amounted cumulatively to an on-going attack. Similarly, some Israeli incursions into neighboring Arab states could have been characterized as incidents in a single on-going low-intensity armed conflict. However, Israel has an explicit doctrine of reprisal; it has not tried to characterize every incursion as an incident of an ongoing war.\textsuperscript{55} And many of its reprisals have been ignored by the SC or action has been blocked by the US.

It appears that the SC has become inured to reprisals, at least in the context of the Arab-Israeli conflict, and therefore takes note of them only where they risk igniting a general conflict or possibly where they are grossly disproportionate to the damage inflicted by the act held to justify reprisal or violate rights protected by the Humanitarian Law of War. It did not condemn the US missile attack on Iraq following the alleged attempt by Saddam Hussein to assassinate former President George H.W. Bush during a visit to Kuwait. Arguably that was a reprisal, although it


\textsuperscript{55} The United Nations condemns Israel’s reprisals in S/RES/101 (1953) and S/3139/Rev. 2.
might have been defended as mere enforcement of the terms of the cease fire that ended the first Gulf War.\textsuperscript{56}

To help probe the distinction between acts justifying reprisal and acts of war, I offer the following hypothetical case. Suppose the attack on the World Trade Center and the Pentagon on 9/11 had been the first violent act against US persons or property by persons under the direction of Osama bin Laden and his associates and had been accompanied by a statement from bin Laden describing it as a single retaliation for crimes committed against the Arab people and declaring that the slate was clean, there had been an eye for an eye, and now co-existence was possible. If, without benefit of an SC resolution recognizing the availability of the claim of self-defense under the circumstances, the US had launched its campaign to overturn the Taliban regime and to destroy bin Laden’s infrastructure in Afghanistan and to kill or capture bin Laden and his lieutenants, would that have been a reprisal or lawful action in self-defense under the Charter?

It is implausible that under those circumstances, the US or any other nation that had experienced such a blow would have felt constrained either by the Charter or even by the pre-Charter doctrine to treat that blow as something other than an act of war. As an act of war, an aggression against the US, it would presumably allow the United States to take all necessary measures consistent with the Humanitarian Law of War to capture or kill the perpetrators and to dismantle their organization and to wage war against any state that interfered in this effort. In other words, some acts of violence may be of such scope and intensity that states generally will regard them as acts of war even if it is unclear that they will be repeated.

7. What limits does the Charter impose on the right of self-defense once it is triggered by an act of aggression?

The hypothetical case in No. 6 above warrants two further questions. One is whether, in a case where following a wanton act of aggression the aggressor withdraws from any territory it may have occupied and places its forces in a defensive posture and calls for negotiation or mediation of whatever dispute occasioned the aggression, the victim state can initiate a defensive war without SC authorization even though it can seek such authorization without further endangering itself. The second is whether a state exercising its right of self-defense by preparing to invade an aggressor or destroy its military capability through an assault by missiles and aircraft must desist in cases where the SC, acting pursuant to Chapter VII, authorizes less intense measures such as economic sanctions or a blockade to force the surrender of the persons authorizing and conducting the aggression or takes other action which the victim state deems insufficient. Neither the practice of states and of the Security Council under the Charter nor the opinions of international legal experts has provided entirely clear answers to either question.\textsuperscript{57}


The New Global Context and the Call for Loosened Restraints on the Use of Force

Authoritative norms pull relevant actors toward compliance. If they fail, their authority is hollow. Why do legal rules and principles have that pull in a legal system lacking centralized enforcement institutions? Principally because they express the stable interests identified by the main subjects of the norms either through processes of unhurried deliberation (as in the various stages of proposing, negotiating and ratifying a treaty) or through the retrospective rationalization of a series of initially extemporized responses to concrete problems. Whether a single long deliberative process or the cumulation of initially improvised responses, the resulting norm encapsulates national interest contemplated in serenity. (For the neo-Realist, of course, what I call a process of identification, implying the ultimately subjective character of interests, is really the appreciation of objective interests, the rational recognition of a country’s fate).

It follows (from this statement of the probably obvious) that the adequacy of the Charter use-of-force norms is a function of whether they express the interests of today’s main actors. Charter skeptics claim they do not, usually citing in support of that claim the changed structure and challenges of the contemporary international system. That changes have occurred is indisputable, but is it clear that they have correspondingly effected a change in core interests relating to the use of force?

Law and the interests of powerful states after the Cold War: the neo-conservative project and the use of force

In the years immediately following the end of the Cold War, it became almost conventional among writers about international relations to celebrate a new or renewed coincidence between the Charter system and the interests of states both large and small. Experts tended to assume that the disappearance of those fracturing pressures exerted on the system by Cold War strategies would allow Charter norms and processes to operate much more effectively. Restraints on the projection of power across frontiers would now plainly serve the interests of almost all states. Force would be needed largely to protect human security threatened by ethnic tensions and autocratic rulers unable to legitimate their regimes.

Ethnic conflicts and massacres would not touch the core interests of powerful states. For cultural, ideological and domestic political reasons, the major Western states would sometimes be prepared to undertake mercy missions. The Security Council would legitimate Humanitarian Interventions on a case-by-case basis. True, the Chinese and possibly the Russians might be uneasy about the precedents. But normally neither would have interests sufficient to justify blocking interventions remote from their core interests to which its main trading and investment partners in the West were committed. Encouraged in part by the 1992-93 Somali interventions, this expectation seemed confirmed by Security Council authorization of intervention in Haiti primarily

The Charter’s norms cannot be reconciled with the full range of measures the Bush Administration and its neo-conservative advisors have declared necessary for the protection of American interests which it equates with the interests of the West and, indeed, of all states other than a few evil ones. That being so, one might reasonably have expected the Administration to campaign for corresponding reforms in the international legal order. In fact, just as it has evinced little concern about the gap between its stated policies and hitherto conventional views of what international law allows, it has evinced little interest in reform. 62

This relative disinterest in normative reform is subject to several interpretations. One is that the Administration is generally happy with the inherited normative arrangements, but regards them as inapplicable to the United States, because it, not the Security Council, is the ultimate guarantor of international order. Of course this claim has no precedent in the history of modern international law dating back to the middle of the seventeenth century. But that history coincided with the balance of power and an effective monopoly of force by the major states. Today, Administration officials might argue, the system is dominated by a single power and all of the major states are threatened by non-state actors. The attribution of exceptional legal privileges to the hegemonic power acting in the general interest is as congruent with the real character of international relations as the Westphalian idea of the legal equality of all civilized states was congruent with the reality of international relations in the preceding era.

A second possible interpretation is that the dominant figures in the Bush Administration do not regard international law as law or as an element in international relations that needs to be taken seriously. To be sure, the President and the Secretaries of State and Defense occasionally defend one or another policy – for example, the invasion of Iraq and the treatment of detainees – as being consistent with international law. 63 Moreover, when accused of actions that clearly violate treaty law, like the kidnapping of persons in foreign countries or the rendition of suspected terrorists to torture regimes or the torture and cruel and inhuman treatment of detainees by agents of the United States itself, the Administration sometimes pays a kind of deference to law by claiming that senior officials did not authorize the behavior or that despite what appear on the surface to be violations –

rendition to regimes known to torture habitually, for example—it has taken steps to assure that violations will not occur or by refusing to acknowledge that the behavior occurred.\textsuperscript{64}

That said, the fact remains that the Administration was ready and stated its readiness to invade Iraq without Security Council authorization\textsuperscript{65} and then sent as its chief representative to the United Nations a lawyer who has written that international law is not law as we know it domestically, but rather a matter of political understandings adopted for the convenience of states and subject to unilateral change when such understandings prove inconvenient.\textsuperscript{66} In addition, the President’s Counsel, now the Attorney General, endorsed the view, frequently advocated by writers on the right, that international law cannot as a constitutional matter and should not be understood to limit the discretion of the President of the United States, for to do so would be to diminish the nation’s sovereignty, a view of sovereignty that reduces treaty law to the equivalent of mere political understandings.\textsuperscript{67} Moreover, in claiming that the US was not bound by the Torture Convention’s preclusion of cruel and inhuman treatment\textsuperscript{68} because the Congress had limited enabling legislation to torture, the Administration simply ignored the strictures on abusive behavior contained in the International Covenant on Civil and Political Rights to which the United States is a Party. And these are only illustrations of what could fairly be described as a dismissive or simply disinterested attitude toward normative restraint in matters of national security.

A third possible interpretation of the Administration’s position is that it agrees with those writers who claim, as I noted at the beginning of this chapter, that violations of Charter norms have in their number and severity stripped those norms of binding character.\textsuperscript{69} That being our present normative condition, the Administration is implicitly imposing a new, more flexible regime that allows responsible states like the US to exercise effectively in the altered conditions of international relations their inherent right to self-defense.

Yet a fourth interpretation is that the Administration is simply clarifying in light of changed conditions the actions that states are entitled to take pursuant to the “inherent right to self-defense” recognized by Article 51 of the Charter. The main problem with this interpretation, of course, is that Article 51, while recognizing the “inherent right,” limits its exercise to cases of “armed attack” (hitherto construed to be ongoing or at least indisputably imminent) and, in any event, appears to require a state taking self-defense measures to report them to the Security Council with the understanding that the Council shall determine what further actions can be taken by the state in

\footnotesize{\textsuperscript{64} See ‘Secretary Rice’s Rendition’, \textit{The New York Times} (December 7, 2005).}

\footnotesize{\textsuperscript{65} Two months prior to the invasion of Iraq, a documented meeting between Prime Minister Blair and President Bush demonstrates that the US was intent on invading even without a further UN resolution and if UN weapons inspectors failed to find WMD. See Richard Norton-Taylor, ‘Blair-Bush Deal before Iraq War Revealed in Secret Memo’, \textit{The Guardian} (February 3, 2006).}

\footnotesize{\textsuperscript{66} ‘The World According to Bolton’, \textit{The New York Times} (March 9, 2005).}

\footnotesize{\textsuperscript{67} Michiko Kakutani, ‘Presidential Architect of Designs for Power’, \textit{The New York Times} (July 11, 2006). This article is a review of a biography of Attorney General Alberto Gonzales by Bill Minutaglio entitled \textit{The President’s Counselor}, Rayo/HarperCollins (2006).}


\footnotesize{\textsuperscript{69} Michael Glennon, ‘The New Interventionism’, 78 (3) \textit{Foreign Affairs} (1999), 2-7.}
question or by any other state. Given the apparent reluctance of the Administration to submit its actions to final review by the Security Council, this fourth interpretation should probably be seen as a merely cosmetic version of the first, second or third.

All in all, the Administration’s view of international law bears an ironical resemblance to views exhibited by Wilhelmine Germany around the turn of the twentieth century and thereafter in the practices of the Third Reich. When the US delegation to the Hague Peace Conferences proposed agreed limits on the use of force and the arbitration of inter-state disputes, the leader of the German delegation responded bluntly that Germany was not prepared to sacrifice its predominant influence on the European Continent which consisted in its ability to mobilize and employ force superior to that of any other state.\(^70\) The German neo-con of his day, Heinrich von Treitschke, once thundered: How can a puny neutral state like Belgium claim to be a center of international law? The shaping of law lies only with great powers.\(^71\) Or, in the same temper, as an anonymous senior White House official said to a *New York Times* journalist objecting to some Administration statement as contrary to the facts: “We are not fact-dependent because we have the power to create the facts.”\(^72\)

**The Neo-conservative Project and the Interests of the West**

One cannot dismiss the claims of neo-conservatives merely by invoking parallels to the century-old views of German chauvinists and, after them, Nazi ideologues. It is at least conceivable that people with different ends may nevertheless adopt the same means, the means in this instance being a repudiation of widely held views about international law and about appropriate restraints on the use of force. Differences in peoples’ ends should be presumed to matter until it is shown that the differences are dissolved by the common means. As I noted earlier, neo-cons offer a more-or-less coherent diagnosis of non-state transnational violence and then prescribe treatment that happens not to fit within the Charter’s normative framework for the use of force and the protection of sovereignty. Nor, I should add, is it congruent with long-established views on the means states may employ to maintain either internal or external security. However, on the presumption that international law must reflect the interests of its subjects, opponents of the neo-con approach to international law need to challenge its diagnosis of the threat to Western interests or the efficacy of its prescription for reducing it.

On the matter of diagnosis, the neo-conservative explanation of anti-Western terrorism may obscure its real causes. Is it incontestable, as neo-cons and their acolytes like President Bush assert, that Islamic terrorism is best understood as a pathological response to the paradigmatic freedom and affluence Western states enjoy within their own borders, contrasted with the intellectual and material poverty of much of the Islamic world, or, to similar effect, is a demented aspiration to restore Muslim power in all the areas where it once was exercised (i.e. from Spain all the way down the Mediterranean basin and then north to the gates of Vienna) or is a fanatical effort to exclude from the Islamic World the diffuse cultural forces seen to issue from within the

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West, although they may be nothing more than the manifestations of a global post-industrial, consumerist economy? Isn’t there a more parsimonious, straightforward explanation, one that treats Islamist terrorist leaders as rational human beings defending tangible commonplace interests by awful means? The more straightforward although not necessarily the most accurate explanation, let’s call it a not absurd hypothesis, is that Muslim terror is in significant measure a well-precedented response of indigenous forces to what they perceive as an alien exercise of political-military power within territories they perceive as theirs, a response not fundamentally different from, although to this point much more narrowly based than, the rebellions or attempted rebellions in countries like Algeria, Angola, South Africa, Southern Rhodesia, Kenya and Vietnam and earlier in Ireland against imperial structures of domination. To be sure, alien power is exercised through or in collaboration with elements of the indigenous population, is often indirect and to a considerable extent hidden. This is not unusual in the annals of colonialism.

It does not appear to be a controversial proposition of fact that, by means of the various instruments of statecraft – open military intervention (e.g. Iraq, Lebanon), intervention by proxy (e.g. support for Saddam Hussein’s invasion of Khomeini’s Iran), subversion (e.g. the overthrow of the democratically-elected Mossadegh Government in Iran), payments to accommodating chiefs (e.g. the annual subvention for the Mubarak regime in Egypt), the arming and equipping of military, police and intelligence personnel (e.g. Tunisia, Morocco, Saudi Arabia, Egypt) – the United States, like the British and French before it, exercises what could reasonably be perceived as imperial power in the Middle East. I offer this fact not to make a normative point. People will doubtless differ on whether, at the end of the day, imperial domination contributes more to the well-being of local peoples than it extracts in tolls for its efforts. I invoke the fact simply to suggest that Islamist terrorism may be attributable in large measure to tangible policies of domination and perceived exploitation, as was Irish, Kikuyu and Algerian terrorism, to name only three well-known cases.

What follows from this hypothesis is that, at least in theory, it might be possible to reduce the incidence of Islamist terrorism by a sharp withdrawal of the Western political, clandestine and military presence in Islamic countries leaving indigenous forces to negotiate accommodations in some places and to submit their differences to the arbitration of force in others. Even assuming that terrorism directed at the West might thereby be reduced, it does not, of course, follow that a manifest contraction of the Western political-military presence undertaken for the stated purpose of altering a relationship conceded to have been imperial would best serve the interests either of the West or the majority of local peoples. The requisite cost-benefit analysis would be immensely complex and, in the end, highly uncertain which generally means that inertia prevails.

I have put the policy issue dichotomously. In fact there are many points between wholesale dismantling of the imperial presence that has prevailed since the end of World War I and a policy marked by strict non-intervention in local affairs. A finite number of acts such as the withdrawal of Western troops from Arab countries, the establishment of a sovereign albeit neutralized Palestinian state with a capital in East Jerusalem, an apology for the subversion of Iran’s nascent democracy in 1953 (the elephant does not notice the squashed hen, but the hen’s children remember), and a declared commitment to non-intervention in Middle-Eastern countries might alter significantly the apparent perception among many young Muslims all over the Islamic world.
that the West is at war with them.\textsuperscript{73} I reiterate that even if one concluded that a package of such acts might alter perceptions and thus reduce substantially the pool of jihadi recruits and sympathizers, the package’s costs might seem too high. My point, then, is simply this: neo-cons call for a dismantling of restraints on the use of force and on unilateral intervention in the face of irreducible enmity from a pathological foe. In fact, there are plausible grounds for believing that the enmity is reducible, because the foe has tangible, familiar interests which we might be able to accommodate partially through changes in public policy. On this hypothesis, then, the status quo is not our fate; rather, in some measure admittedly difficult to specify, it is our choice.

The choice thus far has been to intrude more violently into the Middle East and to associate the United States openly with Israel’s goal of barring a Palestinian political presence in East Jerusalem and annexing a substantial part of the territories it has occupied since the 1967 war,\textsuperscript{74} a goal that seems incompatible with a negotiated solution of the Palestinian-Israeli conflict and with important norms of international law including the Fourth Geneva Convention dealing with the treatment of people in occupied territories.\textsuperscript{75} The invasion and occupation of Iraq is to this point the principal illustration of that flight from the Charter norms that the successful containment of terrorism is alleged to require. The catastrophic terrorist attacks on Madrid and London appear to have been motivated by this instance of flight. Various observers of trends in the Islamic World, including the part expatriated to Europe, believe that the invasion of Iraq has facilitated the translation of Muslim anger\textsuperscript{76} and alienation into recruits for terrorist organizations.\textsuperscript{77} Moreover, the now well-documented and widely-publicized recourse to torture and inhuman and degrading treatment of detainees in Afghanistan, Guantánamo and Iraq,\textsuperscript{78} Abu Ghraib being a well-precedented response to the frustrations of battling a guerrilla insurgency,\textsuperscript{79} are certain to have weakened the West’s necessary effort to build a worldwide consensus against the use of brutal means for political ends which is the essence of terrorism.

To be sure, it is early days. Things may look different years from now. We might take the leisurely historical view recommended by Premier Zhou Enlai to Henry Kissinger when,


\textsuperscript{76} Daniel Benjamin and Steven Simon, \textit{The Next Attack} (2005), at 15.

\textsuperscript{77} Ibid, p. 16.


responding to the latter’s query about his assessment of the French Revolution’s impact, he said it was too early to tell. Still, if proponents of radical normative change are felt to carry the burden of persuasion, it seems fair to conclude at this point: “Case not proven.” There is, however, a case for codifying certain minor deviations from a literal reading of the Charter norms that still leave in place powerful restraints on unilateral recourse to force.

The Liberal Case for Conserving Normative Restraint

There is nothing new about powerful states using all of the instruments of statecraft including brute force not only to disable potential rivals and to protect against immediate threats to vital interests, but also to create an international environment that mirrors their values. This is particularly true of states with a strong sense of ideological mission. They view the reproduction of their domestic institutions and values as a good in itself. Moreover, despite the disconfirming record of Sino-Soviet or Sino-Vietnamese relations, they presume that mirror image regimes will be far more cooperative than those reflecting very different ideas about government and society. In recent history we have seen Marxist, Fascist, social democratic and liberal capitalist regimes all trying to clone themselves, just as in the Middle Ages Catholic governments sought to reproduce Christian polities in the then pagan areas of Northwestern Europe.

The main premise of neo-con ideologues is that the employment of American hegemony to spread democracy, if necessary at the point of the bayonet, serves American interests no less than its values, incidentally serving the interests and values of all human beings other than the evil ones. Let me confess that I too believe that human security would be far better served in a world of liberal democratic states. I am not convinced, however, that the use of force in violation of substantive and procedural norms supported by the generality of states, or at least the leading states, much less in flagrant violation of human rights and humanitarian law, will advance the democratic cause. On the contrary, there are signs that, at least in the United States, it is beginning to erode those constraints on executive power that have long distinguished North Atlantic Democracy from illiberal formal democracies in Latin America and parts of Asia.

If, as sometimes appears to be the case, the call for looser restraints on the use of force is in the service of a violent crusade for laissez-faire democracy, it will surely go unanswered, for such a crusade will threaten the interests of many states, the United States included. Perhaps for that reason the call is usually made in more traditional and hence disarming terms. Loosened restraint is said to be necessary not for the indefinite reproduction of congenial regimes, but rather to protect conventional interests that all states share, above all the protection of their populations from catastrophic attack.

The main argument is now familiar: unlike states, terrorists (i.e. NGOs with bombs) cannot be deterred because they have few if any sunk assets and their operations are entirely clandestine. Hence they must be preempted, that is killed or captured wherever and whenever they surface. This preemptive action is an exercise of the inherent right to self-defense. Exercise cannot be limited by mandatory recourse to the Security Council in advance of any action. Consultation involves some delay, while the opportunity to strike the shadowy fast-moving enemies of civilization will often be fleeting. Moreover, in order to persuade other countries of the need for
action, it would often be necessary to reveal fragile intelligence sources that could easily be compromised.

To be sure, these concerns are not trivial. Can they be taken sufficiently into account by means of an interpretation of the received normative order that leaves it essentially intact? The answer, I think, is yes.

Take the case of al-Qaeda. For a number of years before 9/11, it had attacked US targets, including its embassies in Kenya and Tanzania and a vessel of its armed forces in Yemen. These attacks were part of a declared campaign against the US presence in the Middle East. Although not carried out by a state, the attacks and their broad aims were arguably analogous in certain respects to the waging of war and the US could therefore exercise its right of self-defense under Article 51 of the Charter. But even assuming the force of the analogy, still the US was obligated to bring the situation to the Security Council so that it could review the situation and determine what collective measures would best serve international peace and security.

However, since the analogue of an aggressive attack had occurred and was likely to recur at times and places of al-Qaeda’s choosing, arguably the US was not required to remain inert while the Council deliberated. If, for instance, its armed forces encountered al-Qaeda operatives aboard a ship on the high seas flying no national flag, it certainly was privileged to attack and destroy the ship or to seize the operatives. Moreover, if, as was the actual case, Osama bin Laden was ostentatiously using a country as his operations base, the US could demand of its government that bin Laden be detained and the base shut down, so no further attacks could be made. Moreover, if that government was indisputably colluding with bin Laden or there was substantial reason to believe that the host government either could not or would not prevent bin Laden from quickly shifting to a new venue, the US could attack bin Laden without any prior request. And in the event that the bin Laden host government attempted to repel this exercise of self-defense rights under the Charter, it too would be a legitimate target of US forces.

In short, the Government of the United States could reasonably have construed the Charter to allow an attack on al-Qaeda installations in Afghanistan, for instance after the Embassy bombings, once it had conclusive evidence that al-Qaeda had authorized the bombings and the Taliban, despite being presented with this evidence, had thereafter refused to detain al-Qaeda leaders and shut down their camps or there were substantial grounds for believing that they were unable to do so even if they wished to or were unwilling. However, unless it appeared that prior referral to the Council would allow al-Qaeda leaders to conceal themselves or launch a new attack on United States property or personnel, the United States would have to seek Council authorization. In the event the Council failed to act, then, assuming the conditions just specified, the United States could have attacked al-Qaeda’s bases in Afghanistan. The Security Council’s implied authorization of the US invasion of Afghanistan following 9/11 is consistent with this analysis of what the Charter allows.

What the Charter does not allow is unauthorized military action against allegedly terrorist organizations or individuals residing in a country able and willing to prevent use of its territory for attacks on other states. Thus if Osama bin Laden were suddenly discovered summering in

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Provence, the United States would not be entitled to lob onto his villa even the most intelligent of missiles or to drop in a few members of Delta Force without permission from the French Government which, in my hypothetical, is perfectly unaware of his presence. Rather it would have to either secure permission from Paris or authorization from the Security Council. Is this an intolerable constraint on the protection of nations against transnational terrorism? Would it not be fair to say that disregard of the extant law in a case like this would end that cooperation between the intelligence services of France and the United States which the Bush Administration has lauded?81 Surely legal constraint in this case reinforces or at the very least reflects the conditions of interstate cooperation essential for the counter-terrorist struggle.

What can be done under Charter norms where a group allegedly disposed to transnational terrorism is merely nascent? Let us hypothesize a case where US intelligence identifies an anti-American group and determines that it is beginning to plan attacks on American targets. Since most governments are today hostile to transnational terrorism and inclined to cooperate in its suppression, a word from Washington wrapped, perhaps, in a few incentives, should be sufficient to secure local steps to suppress the budding terrorists. But suppose the government is reluctant or unable to act because the alleged terrorists are members of an important ethnic constituency or are located in a remote part of the country where there is virtually no governmental presence. Then there are two possibilities. One is that the US would obtain the other state’s authorization to act in effect as its proxy. Obviously the rights of sovereignty allow one state to outsource a limited exercise of its police power to another. The other possibility is that it would seek authorization from the Security Council. Since all Permanent Members regard transnational terrorism, particularly Islamic terrorism, as a threat to their respective national interests, if the US can offer persuasive intelligence of the group’s aims, the Council is likely to exercise its now well-precedented authority to authorize preventive action. This may, admittedly, involve some risk to intelligence sources.

But what is the alternative? That the United States globally and lesser powers regionally should be free to lob missiles or troops into a country and kill or kidnap its residents, often with collateral injury to persons conceded to be innocent, on the basis of such intelligence as each deems sufficiently reliable? The likely result of repeated violation of the territorial integrity of states is the progressive collapse of cooperation on a whole range of issues including non-proliferation. If states are thrown back on their own resources to guarantee their security, the incentive to find means for deterring intervention by more powerful actors will be multiplied. It is hard to think of means to that end other than the reputed possession of weapons of mass destruction.

The one other scenario often adduced by enthusiasts for preventive intervention is the imminent acquisition of nuclear weapons by a state not presently a member of the nuclear club. The High Level Panel Report addresses this case directly, hypothesizing an instance where a state suddenly acquires nuclear weapons-making capability. The Panel members’ response is that even without evidence of any intention on the part of the acquiring state to use the weapons or to seek

81 See ‘Help from France Key in Covert Actions’, in The Washington Post (July 3, 2005), in which they describe the important alliance between French and US intelligence officials. The article states that “the rarely discussed Langley-Paris connection also belies the public portrayal of acrimony between the two countries that erupted over the invasion of Iraq.”
Defense Against Transnational Terrorism: Legal Dimensions

concessions by threatening use, the Council could find a threat to the peace and authorize enforcement measures. In doing so, the Council might well take into account legitimate fears of intervention on the part of the acquiring state and condition enforcement measures on the provision of pledges of non-intervention from states that have previously threatened it.

The nub of the matter, then, is that, properly construed, the Charter’s normative and institutional arrangements are consistent with the imperative interests of great states in the era of transnational terrorism. They are inconsistent only with the dangerous hegemonic delusions not of the United States as a society, but of the small but powerful clique embedded in the Bush Administration.

Neither conclusion is intended to celebrate the existing system of global governance. It is plainly inadequate to deal very effectively with the full range of threats to human security. There are, for instance, two dozen or more states governed by tyrants and kleptocrats unable or unwilling to provide their peoples with a minimum number of public goods and thereby killing them through the slower mechanisms of malnutrition and preventable disease. A more perfect system of governance would remove these mafias or reckless incompetents and place these states under trusteeships for the benefit of their peoples. It would also foster much greater interstate cooperation, including intrusive surveillance, to reduce the risk of pandemics, a risk more grave than bio-terrorism at this time. These examples could easily be multiplied. More effective governance will not occur unless and until the United States is prepared to institutionalize cooperation among the leading states. As long as the United States is ruled by men and women unwilling to acknowledge normative restraint on their discretion to employ force, effective governance will be a vision unfulfilled.

Legitimate Means

It ought to verge on cliché to say that human rights law along with the laws of armed conflict or international humanitarian law, as they are often summarily called, provide the operational standards by means of which we can test whether the methods employed in the struggle with terrorist groups are compatible with our general values. And yet it is not hard to find a substantial body of recent legal writing on the conflicts in Afghanistan and Iraq and on other dimensions of the struggle that focuses exclusively on the Hague Regulations, the Geneva Conventions of 1949 and the 1977 Protocols Additional to them, as if the laws of war alone provided relevant criteria for assessment of what we are doing.

That it is a serious omission, a failure to bring all relevant legal criteria to bear on the issues, seems to me hardly worth disputing. After all, there is nothing in the history or language of the baseline legal statement of core human rights, the International Covenant on Civil and Political Rights, on which to ground an argument that it was not intended to apply once armed conflict begins. Rather the contrary. By virtue of being about human rights, the Covenant purports to

82 International Covenant on Civil and Political Rights, UNGA Res. 2200A (XXI), GAOR, 21st Session, Supp. No. 16, 52 (1966) [hereinafter ICCPR]. See also International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc A/6316 (1966), referred to as the “companion” to the ICCPR.
declare the rights of all individuals at all times in all places and the corresponding duties of states. What distinguishes the idea of human rights from earlier normative declarations concerning rights and human dignity is precisely its comprehensiveness in time and space.

The rights adhere to people by virtue of their being born rather than being Englishmen or Christians or persons at different levels of the feudal hierarchy. Moreover, the Covenant takes explicit account of exigent circumstances, such as threats to public order and security, both in its statement of certain rights, like freedom of association, and in its provision for the suspension of the majority of its guarantees “in time of public emergency which threatens the life of the nation.” Few threats other than a major armed conflict and the looming danger of catastrophic attack could satisfy that standard.

Nor is there anything in the parallel but largely independent evolution of the law of human rights and the law of armed conflicts suggestive of an intention by state parties that the latter should utterly displace the former whenever armed conflict erupts. Humanitarian law is rightly seen as lex specialis, a body of law that brings the relative generalities of the Covenant to earth in an often very detailed form taking painstaking account of the peculiar circumstances of armed conflict. What, for instance, if it is not a commandment to pacifism, does the right to life mean in a context defined by the efforts of organized groups to achieve their political ends by killing each other? The law of armed conflict provides a reasonably detailed answer. But with respect to matters where it does not provide a clearer, more detailed and precise answer than the Covenant or where, allegedly, it does not apply to certain persons, human beings are not relegated to a normative abyss where anything goes.

Thus in the context of armed conflict, human rights law can be seen as a safety net assuring that no one lies beyond the reach of legal protection. Article 16 of the Covenant, which states that “Everyone shall have the right to recognition everywhere as a person before the law,” nicely expresses this idea of human rights law as the ultimate defense against the law of the jungle.

Before turning to legal and ethical issues that the counter-terrorist struggle has generated thus far, I want in all fairness to recall the setting in which the Bush Administration made the fateful decision to pursue its ends unconstrained by conventional interpretations of the applicable law. In the immediate aftermath of the 9/11 catastrophe, the Administration’s imperative was to avert further attacks, attacks which its leaders appeared genuinely to fear. Certainly such fear had

83 Ibid., at Part 2, Article Four (1): “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”

84 Compare ‘By invitation: Harold Hongju Koh, ‘Rights to Remember’’, The Economist (November 1, 2003), at 24: “The American administration responded to the twin-towers tragedy with a sweeping new global strategy: an emerging ‘Bush doctrine,’ if you will. One element of this doctrine is what I call ‘Achilles and his heel.’ September 11th brought upon America, as once upon Achilles, a schizophrenic sense of both exceptional power and exceptional vulnerability (italics added). Never has a superpower seemed so powerful and so vulnerable at the same time.”
ample grounds and, as the Report of the 9/11 Commission implies,\textsuperscript{85} the extraordinary thing is that it took the destruction of the Twin Towers to arouse and focus it on the al-Qaeda network. After all, President Bush and his colleagues preside over a country with immense borders on the land and sea sides, dependent as a global economic powerhouse on the largely uninhibited movement of people and goods across those borders and without an effective accounting system for citizens and documented aliens much less undocumented ones.

Furthermore, as the previous Oklahoma City bombing had demonstrated, the country has a super-abundance of targets vulnerable to catastrophic attack by means easy to assemble from separately innocuous items like fertilizer and diesel oil. In addition, rather than being confronted with some ultimatum to do one thing or another within a certain period of time lest a second attack occur, the Administration faced a diffuse, apparently vengeful, hostility possibly bonded to the belief that a series of devastating blows would effect that generalized withdrawal from the Middle East that Osama bin Laden seemed to seek or would generate broad support for him among Arabs, a people humiliated by centuries of defeat and foreign domination.

From this perspective, it was imperative to act with extreme urgency to disrupt communications and logistics within the terrorist network, to force its members into a defensive crouch, and to incapacitate as many of them as possible in the shortest possible time. Osama bin Laden and associates had been a fixture on the radar screen of US intelligence agencies for at least a half dozen years. As Richard Clarke has testified, the counter-terror specialists within President Clinton’s National Security Council security network regarded al-Qaeda as one of the major threats, possibly the major threat, to the internal security of the United States, regarded it as an organization with the will and the capacity to inflict catastrophic damage whether through conventional means or biological and chemical weapons.\textsuperscript{86}

Given these concerns, stemming in large measure from attacks on US military and diplomatic assets, intelligence agencies had no doubt been tracking persons associated with al-Qaeda for years before 9/11.\textsuperscript{87} Thousands of Muslims had passed through the al-Qaeda training facilities in Afghanistan during the war of national liberation against Soviet occupation and afterwards or had at least fought in units that bin Laden had helped to arm. Many had then dispersed to various parts of the world, including Europe and even the United States.\textsuperscript{88} All of these thousands had at least


\textsuperscript{87} See, e.g., Andrew Zajac, ‘Report Details FBI 9/11 Flubs’, The Chicago Tribune (June 10, 2005), at 19. Zajac summarizes a report by the Justice Department’s Inspector General on why the CIA and the Justice Department at their highest levels failed to receive and synthesize data, available at lower levels, which would have alerted them and hence the President to the immediate risk of a 9/11-like occurrence. The Report notes, for instance, that CIA agents had detected the presence in January 2000, at a meeting of al-Qaeda militants in Malaysia, of one of the 9/11 terrorists and had determined that he had acquired a US passport. They did not pass the information along to the FBI.

rudimentary training in firearms and explosives and most, having left home and family to face the rigors and mortal dangers of war, first against the Soviets and then against local enemies of the Taliban regime, could be assumed to embrace the militant form of Islam then encouraged by Pakistan, which had controlled the flow of American aid to the insurgency, and personified by bin Laden and the Taliban. Their numbers, training and ubiquity and the probable disposition of many to see the world in the same terms as bin Laden and to take if not orders in all cases than at least inspiration from him provided ample grounds for the sensation of a grave and immediate threat of more 9/11s.

While the US and cooperating intelligence agencies must have had many names on their watch lists, some of them identified by CIA agents working with the Afghan resistance to the Soviets, given the thousands of persons who had passed through the conflicts in Afghanistan and the clandestine ways in which they had entered and left that country, the agencies could not not have believed that they had identified more than a small fraction of the persons who might be prepared to carry out missions for al-Qaeda. Moreover, again in light of the numbers involved, many militants must have disappeared from intelligence radar screens after they had left Afghanistan. In addition, given the level of anger and frustration within the Arab world about its poverty, backwardness and legacy of domination by Western countries led since World War II by the United States, the intelligence agencies and the White House were probably destined to assume that the Afghan-trained militants could co-opt to their cause thousands of young men and women from all over the Arab and wider Islamic world including disaffected persons living within the large immigrant communities of Western Europe and, possibly the much smaller American one. In short, the circumstances provided the White House with immense incentives to round up and detain anyone in the United States who might be associated with al-Qaeda and to extract actionable intelligence from them and from persons in other countries detained by their security services. Hence the question of allowable interrogation methods had to have been on the Administration’s mind virtually from the outset of its response to 9/11.

Deconstructing the Laws of War

Debate over the application of the Geneva Conventions to the conflict in Afghanistan appears to have begun within weeks of 9/11. By January 18, 2002, the Department of Justice had already issued a formal legal opinion concluding that Geneva Convention III did not apply to al-Qaeda and that there were reasonable grounds for the President to conclude that it did not apply to the Taliban either. Whereupon the President announced that Convention III would not apply to either. The
Defense Against Transnational Terrorism: Legal Dimensions

State Department immediately sought reconsideration. In a Memorandum to the President dated only seven days later, then-White House Counsel Alberto Gonzalez, after summarizing the competing arguments, concluded that those made by the State Department were unpersuasive. In that memorandum, Mr. Gonzalez, later to become the Attorney General of the United States, argued that the war against terrorism was a new kind of war, one placing a premium on, among other things, “the ability to quickly obtain information from captured terrorists.” He then added: “In my judgment, this new paradigm renders obsolete Geneva’s strict limitations on questioning of enemy prisoners.”

Taking into account the enormous number and variety of that Department’s responsibilities, it would strain credulity if someone suggested that the initial Justice Department memorandum or those written the following year specifically on the issue of torture, were spontaneously generated by mid-level officials. Rather reason and experience dictates the conclusion that the White House requested legal advice both to determine the limits imposed by acts of Congress and the risk of criminal liability particularly for persons not in a position to deny responsibility if they went outside statutory law and their actions became public.

Along with incapacitating potential terrorists and collecting operational intelligence, the highest priority in those early days was to strike directly at bin Laden and to terminate use of Afghanistan as a terrorist haven by replacing the country’s de facto government. An invasion of Afghanistan would serve punitive purposes and might coincidentally disrupt the al-Qaeda network, disperse its leading figures and limit their communications with cadres and affiliates in other parts of the world. A decision must have been made at a very early point that the Administration could not achieve its goals in Afghanistan simply through clandestine support of the Taliban’s internal opposition, the Northern Alliance. There had to be open military intervention.

Not only was this operationally necessary, for three reasons it might well have seemed positively desirable. First, it would demonstrate the power of the United States and the will of a right-wing Republican Administration, unlike its Democratic predecessor, to use it ferociously.

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For years one article of the neo-conservative faith had been that President Bill Clinton was dissipation the advantages of hegemony, indeed was actively betraying the national interest, by failing to use force robustly.\(^\text{96}\) In particular, neo-conservatives believed that the problem of terrorism directed at US assets abroad was integrally related to a perception on the part of terrorist-supporting regimes and of terrorist organizations that public opinion in the United States and hence the US Government was casualty averse.

Second, senior figures in the Administration were keenly aware of public opinion polling data stretching back decades indicating that short and decisive military operations produced spikes in Presidential popularity that could probably be translated into support for domestic initiatives.\(^\text{97}\) In this instance, however, the President had already achieved that spike simply by virtue of going to the Trade Center site, talking tough and announcing that the country was at war.\(^\text{98}\) Actually going to war was likely to sustain his extraordinary approval ratings. As the President appears to have been keenly aware, his father’s approval ratings had fallen gradually but in the end decisively once the Gulf War ended.\(^\text{99}\) Actual war, precedent indicated, could serve a third purpose, namely maximizing Presidential power under the Constitution by inhibiting Congress or the Courts from questioning it.\(^\text{100}\) In time of peace, for instance, a declared policy of holding aliens, much less citizens, without charge or trial for as long as the President deemed necessary or subjecting them to trial by Courts Martial or Military Commissions or turning detained persons over to governments likely to torture them was unlikely to survive a test in the federal courts as currently staffed. So war there was to be and for the professional military and presumably for the President’s

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Defense Against Transnational Terrorism: Legal Dimensions

civilian legal advisors, as well, that meant engagement with the laws of war, in particular the Geneva Conventions.

One benefit of invoking the laws of war is the *laissez passer* they give for killing anyone who appears to be a combatant. Combatants are legitimate targets at all times and places, not simply on the battlefield or when fleeing there from. The fact that he is on leave sniffing roses in his garden does not immunize a commander from attack. Hence another advantage derived from simply folding Afghanistan into a generalized war against international terrorism, to the extent this description came to be widely accepted as reasonable, was that it could arguably legitimate targeted killing of al-Qaeda operatives all over the world, not simply in Western Asia.101

Of course, if the killing occurred within the borders of a state not manifestly complicit with al-Qaeda, and without permission from that state’s government, that government might claim after the fact a violation of sovereignty, but at least the war paradigm would tend to nullify a parallel claim of gross violation of the right to life. Moreover, the United State might defend itself against the alleged breach of sovereignty by citing the Security Council Resolutions following 9/11 recognizing and authorizing exercise by the United States of self-defense rights under Article 51.102 It could claim, in other words, that the resolutions, adopted pursuant to Chapter VII, implicitly licensed the United States to take all measures necessary for self-defense against a diffuse threat.103 And that might include striking al-Qaeda functionaries immediately, wherever found, if delay occasioned by the effort to contact the relevant government and secure permission might allow the target to escape. A further advantage of the war paradigm, as previously suggested, is its power to justify detention without charge or trial for the duration of the conflict.104

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103 Charter of the United Nations, Chapter VII, Article 51. Article 51 states, in part: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” See also Yoram Dinstein, ‘Jus Ad Bellum Aspects of the ‘War on Terrorism’”, in Wybo P. Heere (ed.), *Terrorism and the Military: International Legal Implications*, The Hague: TMC Asser Press (2003), at 13-22: “What gives rise to the rightful invocation of self-defense is only (and exclusively) an armed attack. All the same, once an armed attack is unleashed, the victim state is allowed by Article 51 to take forcible action (without seeking the prior approval of the Security Council).”

104 See Avril McDonald, ‘Terrorism, Counter-Terrorism and the Jus in Bello’, *Terrorism and International Law: Challenges and Responses*, Meeting at the International Institute for Humanitarian Law (May 30-June 1 and September 24-26, 2002), at 68.
The conflict in Afghanistan itself promised to be short, but as the President and Secretary of Defense repeatedly declared, the war against terrorism could last for a generation or more.

The Temptation to Torture

The main disadvantage in invoking the humanitarian law of war is, as the former White House Counsel noted, its detailed safeguards for prisoners of war. The Bush Administration must have hoped to capture and interrogate those members of al-Qaeda who survived the fighting. Senior Taliban commanders might also have information useful for foiling planned actions and rolling up the al-Qaeda global network. Geneva law does not incorporate anything like the American Miranda rule which requires police to inform criminal suspects of their right to remain silent and to have appointed counsel and also requires them to cease interrogating a suspect who, having been informed of his rights, requests a lawyer. Interrogation can begin again after the lawyer appears, but in the normal course, defense lawyers counsel silence at least until suspect and lawyer have had a chance to develop a defensive strategy.

Military interrogators can ask POWs all the questions that occur to them, but Article 17 of the Third Geneva Convention ties the hands of coercion by stating that “[n]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever.” And just in case that is not clear enough, it adds: “Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.” In addition, Article 21 limits more subtle forms of coercion by declaring that “prisoners of war may not be held in close confinement (e.g. in cells) except where necessary to safeguard their health.” Naturally there is an exception where prisoners are properly subjected to penal and disciplinary sanctions, as would be the case if they had attacked guards or fellow inmates or attempted to escape. Article 25 goes still further and requires that POWs be quartered “under conditions as favorable as those for the forces of the Detaining Power who are billeted in the same area.”

Other articles spelling out obligations concerning the provision of medical services, food, clothing, opportunities for physical exercise, and contact with the outside world through letters to loved ones also assure that the conditions of detention are not such as to pressure militant detainees into providing the authorities with intelligence. Overall the Geneva-mandated POW regime is far less severe than the regime for common criminals in most prisons, certainly less severe than prisons in the United States other than those set aside primarily for wealthy non-violent felons biding their time before returning to the wars of capital accumulation. Nor is it

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possible to evade the regime by transferring detainees to the custody of governments less punctilious about observing the commandments of Geneva III. Article 12 precludes transfer to any state’s authority unless the transferring state “has satisfied itself of the willingness and ability of the [receiving state] to apply the convention.”

As far as one can tell, the chronology of Bush Administration responses to this dilemma was essentially as follows. Its first reaction was to declare that the Geneva Conventions did not apply to the conflict in Afghanistan because the Taliban was not a government but rather a mere faction and therefore its troops were not members of the armed forces of a High Contracting Party, to use the language of the Convention. The previously mentioned Justice Department memorandum suggested, moreover, that the President could conclude that Afghanistan was a “failed state,” i.e. that there had been a complete collapse of legitimate authority. As a matter of general international law, the claim that the Taliban leaders did not constitute the government of Afghanistan was a hard position to maintain persuasively in a legal order in which historically, the de facto authorities had generally been deemed to embody sovereignty for most purposes. In September of 2001 and for several years previously, the Taliban had controlled all but a small fraction of the country. Moreover, it enjoyed formal recognition by Pakistan, Saudi Arabia and the United Arab Emirates.

A second difficulty for the Administration, assuming it sought a free hand in dealing with members of al-Qaeda and the Taliban, arose from Article 2 of Geneva IV, which deals with the protection of civilians. It provides that “The Convention shall … apply to all cases of partial or total occupation of the territory of a High Contracting Party” (Afghanistan was such a party). If, as the semi-official steward of the Conventions, the widely respected International Committee of the Red Cross, has concluded, all persons in occupied territory are either civilians or POWs, then if the Taliban soldiers and officials were not the latter, they were the former and that meant, according to Article 27 of the Fourth Convention that “they are entitled to respect for their persons,” that “they shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.” As if that were not enough protection, Convention Four doubles up along the lines of the Third. Article 32 states that

108 See footnote 15 above, at 1.
109 Ibid., at 1: “Afghanistan was a failed state because the Taliban did not exercise full control over the territory and people, was not recognized by the international community, and was not capable of fulfilling its international obligations.” But compare William H. Taft, Memorandum to John C. Yoo (January 11, 2002), at 4, available at http://www.newyorker.com/online/content/articles/050214on_onlineonly02 [hereinafter the Taft Memo]: “neither the United States nor any other country has viewed Afghanistan at any point as ceasing to be a State. Neither the United States nor any other State has viewed it as ceasing to be a party to international agreements. The fact that the United States did not recognize the Taliban as the government of Afghanistan is completely irrelevant.”
110 For a concise overview of the creation and evolution of the Taliban, see generally ‘Afghanistan – Crisis of Impunity: the Role of Pakistan, Russia and Iran in Fueling the Civil War’, Human Rights Watch, Vol. 13, No. 3 (July 2001).
111 Ibid., at 16.
112 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War [hereinafter GC IV].
“The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering … of protected persons in their hands. This prohibition applies not only to murder, torture, [and] corporal punishment … but also to any other measure of brutality whether applied by civilian or military agents.”

In one respect, the Fourth Convention looked to be a harder legal nut to crack for the Administration’s purposes even than the Third, because unlike the latter, it precluded “individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, … regardless of motive.” The only exception allowed is movement of people who get in the way of military operations under circumstances where moving them elsewhere in the territory is impossible. But persons so moved must be “transferred back … as soon as hostilities in the area in question have ceased.” It is clear from the overall language of the Article that merely having conflict going on, as it still is, in some part of Afghanistan, for instance in a remote area near the Pakistan border, would not justify keeping civilians from returning to an area of the country where the ongoing conflict would not threaten their well being.

Worse yet, from the Administration’s perspective, the Fourth Convention appears applicable to al-Qaeda members no less than native Afghans. For Article 4 defines Protected Persons not as citizens or permanent residents of the occupied territory, but simply as “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”

Faced with these obstacles to its ends, the Bush Administration rejected the ICRC dichotomy, insisting that in addition to POWs, protected by the Third Convention, and civilians, protected by the Fourth, in any given conflict there may be a third category of persons: These are people who are not civilians, because they were organized combatants, but neither are they POWs because they do not satisfy the Third Convention’s criteria of eligibility for POW status.

In my recently published book, Confronting Global Terrorism and American NeoConservatism: the Framework of a Liberal Grand Strategy, I have noted certain problematic aspects of the Administration’s characterization claims. But even if one accepted those claims, the Administration would still be faced with insuperable legal obstacles to its apparent initial desire to evade all legal restraints on its discretion with respect to the extraction of information from detainees and more generally setting the conditions and length of their detention. For however the United States characterized the Taliban or al-Qaeda fighters, in its treatment of them it was at a minimum required to comply with Common Article 3 of the Four Geneva Conventions which states that:

the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to [persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause] (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; … (c) outrages upon personal dignity, in particular, humiliating and degrading treatment and (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
There can be no legitimate dispute about the proposition that Article 3 is a summary of the core elements of the Conventions, the elements designed to inject a minimum of humanity into the awful business of war, the elements without which war becomes a struggle among rabid beasts. In 1949, most states were unwilling to treat persons who took up arms against the constituted authorities as prisoners-of-war. They wanted the option of treating them as criminals. Article 3 summarizes what minimal part of the Four Conventions they were willing to accept as inhibiting their choice of means. This minimum did not come from beyond the rest of the four conventions; it clearly came from the conventions themselves. It is striking, and suggestive of how basic are the Article 3 prohibitions, how inseparable they are from the essence of the Geneva Conventions, that they correspond so closely to the substance of the idea of Crimes Against Humanity as the activator of legitimate intervention and international criminal liability, concepts that have ripped holes in the definition of national sovereignty that prevailed at least until the end of World War II and the Nuremberg Trials.

Reinforcing Article 3 is the very widely ratified Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It defines ‘torture’ as: 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 … 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.

Consistent with the equivalent prohibition in the ICCPR, it provides that “No exceptional circumstances whatsoever, whether a state or war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” And it forecloses the evasive practice of rendition of persons to other jurisdictions by prohibiting extradition of a person “to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” Also strikingly relevant is Article 11’s requirement that “Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any

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114 Donald W. Wells, War Crimes and Laws of War, 2nd edition, Lanham, Maryland: University Press of America (1984), at 114; quoting from ‘Nuremberg Trial Proceedings Vol.1: Charter of the International Military Tribunal’, Section II, Article 6 (August 8, 1945), available at http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm. Article 6 defines ‘Crimes Against Humanity’ as: “namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”

115 Convention Against Torture, Article 1.

116 Ibid., at Article 2, Paragraph 2.

117 Ibid., at Article 3.
cases of torture.” While not defining acts of cruel, inhuman and degrading treatment which do not amount to torture, the Treaty says that all of the provisions in it relating to torture are also intended to cover such acts.

The first formal statement of the Bush Administration’s interpretation of the Torture Convention as incorporated into American law is contained in a memorandum addressed to the President’s Counsel by the Department of Justice. It defines torture as:

Physical pain … equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily functions, or even death. For purely mental pain or suffering to amount to torture … it must result in significant psychological harm of significant duration, e.g. last for months or even years. [In sum], we conclude that the statute, taken as a whole, makes plain that it prohibits only extreme acts.118

Under this construction such tactics as the removal of teeth by means of hammers and the extraction of finger and toe nails might be found merely cruel and inhuman in that they were not akin to acts producing organ failure or the impairment of bodily functions and therefore could be presumed not to cause the threshold intensity of pain. After all, as long as some teeth remain, a chap can eat; indeed with implants he can ultimately be as good as new, after a time. As for feet without nails, they can still be made to walk, however painfully.

From credible press reports, it is apparent that most military lawyers strongly opposed the conclusions of the memorandum, in part because they in effect licensed behavior clearly prohibited by the rules and regulations of the US armed forces.119 When the memorandum was leaked to the press, it became the subject of widespread denunciation by human rights and civil liberties groups, by leading newspapers and by many independent legal experts. The Administration has denied ever acting on the basis of the definition of torture contained in the memorandum120 and it has since nominally repudiated the definition’s narrowness,121 although it


121 See Bybee, Re: Standards of Conduct for Interrogation under 18 US C 2340-2340A; and Re: Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949. But compare especially the Taft Memo. In his recently published book War by Other Means: an Insider’s Account of the War on Terror, New York: Atlantic Monthly Press (2006), Yoo writes that the second memorandum, notionally repudiating the first (written largely by Yoo) was an “‘exercise in political image-making’ … [which]
has never specified where it wants the line to be drawn and opposed the legislation that lay down binding limits on interrogation. Nor has it repudiated, indeed it has reaffirmed perhaps the most controversial aspect of the memorandum, namely its claim that in time of war, the President as Commander-in-Chief under the Constitution can override Acts of Congress and international law and treaties incorporated by Congress into US law if, in his or her judgment, that is necessary for the effective prosecution of the conflict.

In large measure, the President himself has stuck to his original script, insisting that persons captured in Afghanistan are not POWs but have been, in general, humanely treated and will continue to be so treated, consistent, however, with military necessity. The positions of the Defense Department and the American armed forces have been more fluid. However, on September 6, 2006, the Department in effect repudiated several tactics of interrogation hitherto employed by specifically forbidding US troops from using forced nudity, hoisting, stress positions, military dogs and water-boarding to elicit information from detainees. The new interrogation policies were incorporated in a revised Army field manual. The manual and the related Pentagon directive stated that US forces must adhere to the standards of the Geneva Convention’s Common Article 3 and that its standards would apply to unlawful combatants including persons linked to non-state organizations like al-Qaeda. “The new policies also eliminate the … practice of hiding detainees—sometimes called ‘ghosting’—and requires anyone operating in a Defense Department facility to follow the … new regulations.”

The most legally important definition of torture currently available is the 1999 decision of the European Court of Human Rights in Selmouni v. France, where the Court stated that:

…having regard to the fact that the [Torture] Convention is a ‘living instrument which must be interpreted in the light of present-day conditions’, the Court considers that certain acts which were classified in the past as ‘inhuman and degrading treatment’ as opposed to ‘torture’ could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and

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126 Ibid.
inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.\textsuperscript{127}

Selmouni, the Court found, had been urinated on and beaten in various parts of his body over an extended period. He had not experienced organ failure or otherwise been deposited at death’s door.

\textit{A ticking-bomb exception?}

Defenders of the use of torture and brutal measures on torture’s gray frontier regularly invoke the so-called ticking bomb scenario; that is the case where the authorities have incontrovertible evidence that the detainee possesses knowledge essential to aborting an imminent act of mass-casualty terrorism. Surely, they argue, whatever limits may properly be imposed on the use brutal methods must be waived in that case.

My response is as follows: The ticking bomb case is really just a rhetorical device, a debater’s fantasy. You could run torture operations for a century without encountering the smirking sociopath who credibly assures you that he’s planted a small atomic device which will incinerate the population of lower Manhattan in three hours. That is not the real world.\textsuperscript{128} The real world is Algiers, 1958. The resistance owns the Kasbah by night. By day they are teens on street corners, shopkeepers, shoe-shine boys, vendors, students. But at night they own the Kasbah. So one night you begin.

You cordon off a block and grab every male between the ages of 16 (or at least who look 16) and 40. You blindfold and shackle them and take them to some improvised detention center. You strip them and you let them sit naked on the stone floor. If they doze off, you kick them awake. After a while, maybe a long while, you bring them to the interrogation room. Maybe you begin softly, ask if they would like some water or a cigarette or to use the toilet. Maybe you don’t. Maybe you start off as if you did not care what they have to say, as if you did not want answers to questions, you just want to experience the pleasure of hurting them. Silent colleagues strap them to the water-board or attach electrodes to their gums and ears and testicles and pour water on them. And you begin. And after a time, most will beg for questions to answer. And eventually they will get their wish. You will give them questions. And sooner or later they will give you answers, names and addresses; they will give them fulsomely, almost with pleasure. Finally, when you can’t think of any more questions and they can’t think of any more answers, you may just send them back to the bare room and the crawling vermin who share it with them or you may become soft, paternal, concerned, rueful, offer them some tea. Then you go and seize the people they named and search the houses and collect more names. And you discover that some lied, but others told the truth, because you find a pistol or a grenade or a pamphlet in the closet or under a floorboard. You continue, day after day, deliberately sorting through the cornucopia of screamed names, distinguishing the militants from the sympathizers from the innocent until you have unpeeled the

\textsuperscript{127} Selmouni v. France (1999).

onion and the Kasbah belongs to the parachutists and the Legion. Mission accomplished, sir. The battle of Algiers was won, but of course the French lost the war and in the process almost lost their democratic government.129

Now let’s move forward forty-six years to another part of the Arab world, to Iraq. A report (the “Fay Report”) stemming from an internal US Defense Department investigation following the exposure of the mistreatment of detainees in the prison of Abu Ghraib, states that:

As the pace of operations picked up in late November-early December 2003, it became a common practice for maneuver elements to round up large quantities of Iraqi personnel [i.e. civilians], in the general vicinity of a specified target as a cordon and capture technique. Some operations were conducted at night…130

As Mark Danner has written, “In this way the Americans arrested thousands of Iraqis—or, as the Schlesinger Report puts it, they reverted to rounding up any and all suspicious-looking persons, all too often including women and children. The flood of incoming detainees contrasted sharply with the trickle of released individuals.”131 The release was a trickle, according to one US General, because combat commanders had the attitude: “We would not have detained them if we wanted them released.”132 The flood was a flood because, as General Fay points out, the combat soldiers, in their zeal to apprehend Iraqis who might conceivably be supporting those shadowy figures attacking American troops, neglected to filter out those who clearly did not belong in [prisons like Abu Ghraib]. The capturing soldiers, in Fay’s words,

…failed to perform the proper procedures at the point-of-capture and beyond with respect to handling captured enemy prisoners-of-war and detainees (screening, tactical interrogation, capture cards, sworn statements…) Failure of capturing units to follow these procedures contributed to facility overcrowding…133

My main point is that once torture and cruel, inhuman and degrading treatment become normalized, even if nominally restricted to the ticking bomb case, it will in fact be employed as an every-day means to the end of rolling up the whole carpet of the organization or organizations perceived to be potential planters of such a bomb and then rolling them up again and again as the kin and friends of the tortured and others who feel aggrieved by real or perceived oppression and humiliation resist. Your interrogators will not wait for the mastermind or the delivery agent to

129 See generally General Paul Aussaresses, The Battle of the Kasbah, New York: Enigma Books (2006). See also Alistair Horne, A Savage War of Peace: Algeria 1954-1962, London: Macmillan Ltd. (1977). But compare Slater, at 203: “It may be rhetorically effective to say that it was torture that caused the French to ultimately lose in Algeria, but it is not accurate; they resorted to torture precisely because they feared defeat if they did not…”

130 Jones-Fay Report at 37.

131 Danner, at 30; quoting the Schlesinger Report at 29.

132 Ibid., at 31; quoting the Fay-Jones report at 39.

133 Ibid., at 32; quoting the Jones-Fay Report, at 39. See also HRW, ‘Leadership Failure’, at 3-4. Human Rights Watch conducted extensive interviews with US troops in Afghanistan and Iraq to determine how US forces were handling prisoners/detainees, and what directives/orders they were given regarding this: “These soldiers’ accounts show how the administration’s refusal to insist on adherence to a lawful, long-recognized, and well-defined standard of treatment contributed to the torture of prisoners.”
come into their nests. They are not sure who these people are or where they are. You have to start somewhere, they will say. Find the right thread and you can unravel the whole quilt. The trick is finding the right thread and, regrettably, mistakes will be made. To be sure, they are foreseeable, but so is the collateral damage of air and missile attacks. What’s the moral difference? Are you a worse human being because you look your mistakes in the eye?

And perhaps, to toughen yourself or because people of a certain cast of mind will be drawn, by process of self-selection, into the game, you will begin to say: Maybe many of these people that did not actually seem to know anything were not really innocent. After all, they were friends of the bad apples. Hell, that’s how we got their names in the first place. Or they sympathized with the goals of the bad apples, even if they did not support or had yet to become involved with the means. Innocence is relative. Not everyone, but some may end up thinking just a little bit like the Argentine general in the days of state terror in that country (1976-83) who said: First we will kill all the subversives. Then we will kill everyone who helped them. And then we will kill everyone who did not help us. Yes, the precedent may seem a bit too extreme to be taken as evidence of the potential for contagion.

Still, I think you can see that people who spend their working days inflicting pain and humiliation on other people and are not eager sociopaths or crazed fanatics to begin with, will need to do something to thicken their mental skin. The utilitarian calculus sounds fine when you are sitting in your study in a thick leather chair and telling subordinates what results you want and making sure they understand you don’t need to know about the means. But it is pretty weak medicine when human beings are screaming and vomiting blood in front of you. It certainly must help to convince yourself that they are at least a little bit guilty in most cases.

In short, beyond the extreme unlikelihood of the true ticking bomb case, a large part of the liberal answer is that torture like a taste for luxury goods once experienced has an irremediable tendency to spread beyond the small special places where governments may attempt to isolate it. Extreme necessity becomes routinized. And more and more people become implicated. To be implicated in an age or at least in a society where torture remains a dirty little secret is to become deeply wedded to keeping the secret, not just now, but forever.

The Israeli experience illustrates the difficulty of limiting the use of brutal means to ticking bomb cases. In the late 1960s, following the beating death of two Palestinian detainees, the Israeli Government constituted a blue-ribbon commission (the eponymous Landau Commission), chaired by a Supreme Court Justice, to consider, among other things, the methods that the General Security Service, the state’s internal security organization, could employ against suspected terrorists in detention. Following prolonged deliberation, the Commission concluded that “in cases where the saving of human lives necessarily requires certain information, the investigator is entitled to apply both psychological pressure and ‘a moderate degree of physical pressure [not amounting to torture].’”

While the various apparently stringent conditions surrounding this license to hurt were set out in a secret part of its report, the general understanding was that the Commission intended to limit

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Defense Against Transnational Terrorism: Legal Dimensions

physical pressure to ticking bomb types of cases, i.e. to cases where the threat of terrorist attack was strongly evidenced and imminent. When defending physical coercion in a 1999 Supreme Court case concerning GSS interrogation methods, the Government implicitly confirmed this limitation. It argued that GSS authority to employ physical coercion in certain circumstances is implied by the language of the criminal law defense of “necessity” prescribed in Israeli Penal Law. The relevant provision states that:

A person will not bear criminal liability for committing any act immediately necessary for the purpose of saving the life, liberty, body or property, of either himself or his fellow person, from substantial danger of serious harm, imminent from the particular state of things [circumstances], at the requisite timing, and absent alternative means for avoiding the harm.

Despite this nominal policy, according to reliable reports, Israeli GSS personnel have long employed on a widespread and systematic basis practices that are unquestionably cruel and inhuman and sliding over into torture as understood by official inter-governmental institutions and by widely respected non-governmental organizations.

If substantial numbers of people, in high as well as low places, become members of a fraternity of the guilty, democratic governance can begin to erode. You need judges who will find they have no jurisdiction when complaints are brought by torturees who lived to tell the tale or who deliver summary judgments with one-line opinions, you need a compliant press, you need friends in Congress, and you will have them, because the members of the joint-intelligence committee probably knew and so they too are implicated. And you need a military institution and intelligence

136 Among other organizations, B’tselem, the most prominent Israeli human rights group monitoring activities both in Israel and Occupied Territories, has widely reported on torturous behavior of Israel’s General Security Service: http://www.btselem.org/english/Torture/Torture_by_GSS.asp.
agencies staffed by persons who will rally round, if exposure is threatened, who will ‘understand’, maybe even celebrate your ability to transcend your humanity in the name of humanity and national interest. The fraternity needs to maintain a conspiracy of silence. And it needs to be large. Maybe it is sheer coincidence that French democracy barely survived Algeria. Maybe there is simply no comparison. I myself can think of a hundred differences. Still, there just might be a distant cautionary bit of history here. It is not hysterical to factor it into the liberal answer.

But perhaps the strongest strand in the liberal answer also connects to the French experience. As I said, the French lost their war. Flash forward to the present moment and our struggle against mass-casualty terrorism inspired by the example of al-Qaeda. Mark Danner tells of meeting a young Iraqi from Falluja and peppering him with questions about the insurgency. Why were American troops being attacked? How many were carried out by foreigners? How many by local Muslims? And so on. Then Danner writes: “The young man—I’ll call him Salih—listened, answered patiently in his limited but eloquent English, but soon became impatient with what he plainly saw as my American obsession with categories and particulars. Finally he interrupted my litany of questions, pushed his face close to mine, and spoke to me slowly and emphatically:

‘For Fallujans it is a shame to have foreigners break down their doors. It is a shame for them to have foreigners stop and search their women. It is a shame for the foreigners to put a bag over their heads, to make a man lie on the ground with your shoe on his neck. This is a great shame, you understand? This is a great shame for the whole tribe. It is the duty of that man, and of that tribe, to get revenge on this soldier—to kill that man. Their duty is to attack them, to wash the shame. The shame is a stain, a dirty thing; they have to wash it. No sleep—we cannot sleep until we have revenge. They have to kill soldiers.’

I suppose that, for that list of shames, torture is a fortiori.

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Defense Against Transnational Terrorism: Legal Dimensions

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