



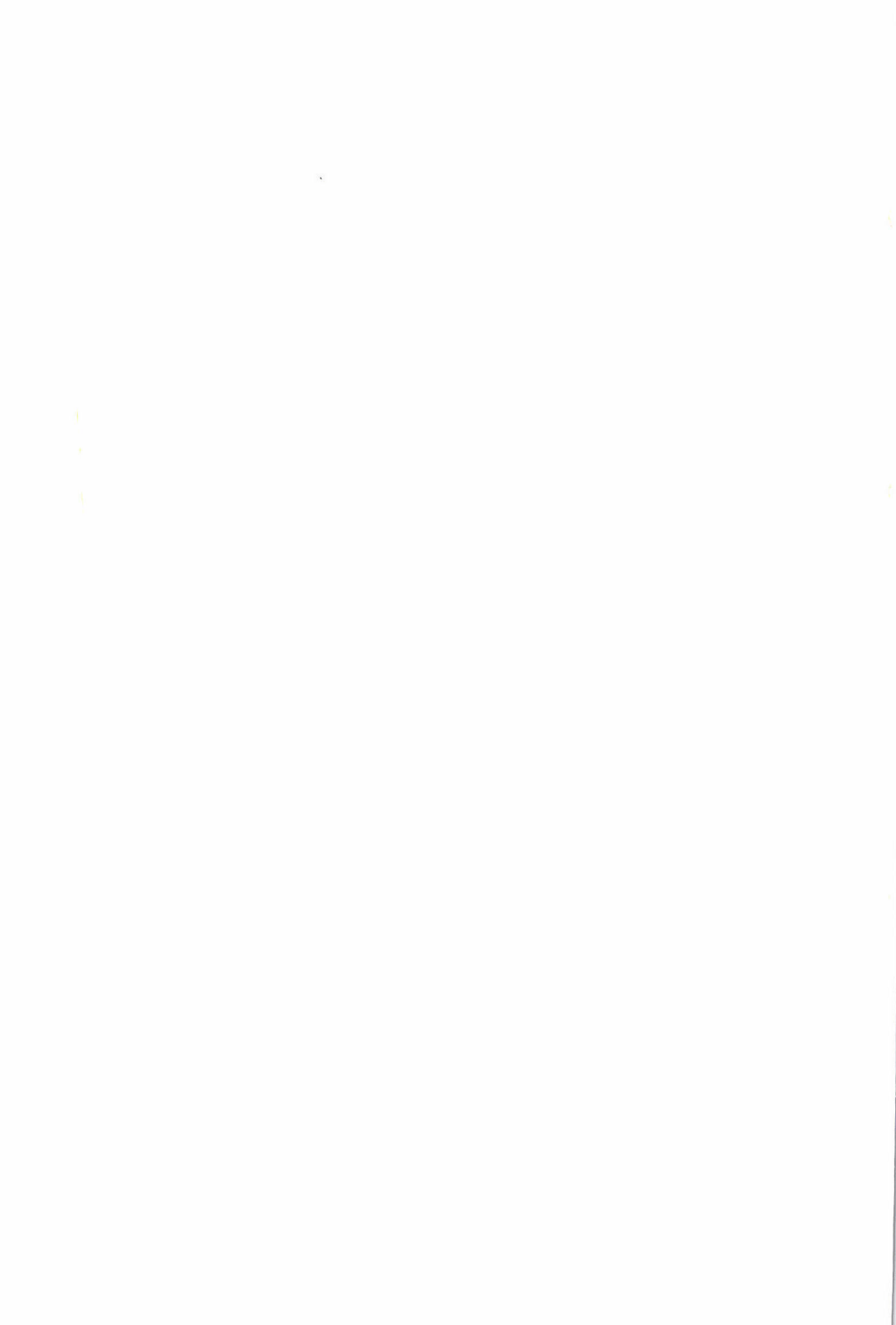
ETHICS OF WAR IN A TIME OF TERROR

Edited by Christian Enemark



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ABSTRACT

This book is a collection of papers originally presented at a workshop entitled 'After Nine Eleven: Ethics in the Time of Terror' hosted by Monash University on 24 June 2005. The workshop participants included members of the Ethics of War and Peace (EWAP) working group which was inaugurated at the first Oceanic Conference on International Studies in July 2004. EWAP provides a cross-disciplinary forum for scholars and non-academic professionals to exchange and debate ideas on topics including the ethics of armed intervention, the Just War, pacifist ethics, international humanitarian law, ethics in the military profession, and the relationship between law, ethics and politics.

The chapters within this book examine themes including 'lesser evils' and 'dirty hands' in the fight against terrorism, the ethics of intelligence gathering, humanitarian intervention, terrorism and the North-South divide, cultural equality as a response to terrorism, human rights and counterterrorism legislation, and the ethics of defending against 'bioterrorism'. Contributors include Alex Bellamy and Richard Devetak (University of Queensland), Baogang He (Deakin University), Christopher Michaelsen (Office for Democratic Institutions and Human Rights, Organization for Security and Co-operation in Europe), Jeremy Moses (University of Canterbury), Christian Enemark and Hugh Smith (University of New South Wales, Australian Defence Force Academy). This paper represents the authors' views alone. It has been drawn entirely from open sources, and has no official status or endorsement.

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ACRONYMS AND ABBREVIATIONS

BW	biological weapons
BWC	Biological Weapons Convention
CBM	confidence-building measure
ECHR	European Convention on Human Rights
EWAP	Ethics of War and Peace
ICCPR	International Covenant on Civil and Political Rights
NATO	North Atlantic Treaty Organisation
NBACC	National Biodefense Analysis and Countermeasures Center
NGO	non-governmental organisation
RTI	resistance to interrogation
UN	United Nations
UDHR	Universal Declaration of Human Rights
USAMRIID	United States Army Medical Research Institute for Infectious Diseases
UNSC	United Nations Security Council
WMD	weapons of mass destruction

INTRODUCTION

Christian Enemark

After passenger aircraft crashed into the World Trade Center and the Pentagon on the morning of 11 September 2001, reports and images of the immense damage inflicted on two great institutions of American power quickly circulated the globe. To this day, the story of these events—why they occurred and what they signify—is still being told around the world. Many of the politicians, journalists, officials and academics who tell the story have adopted the expression ‘after nine eleven’ as an historical marker which implies the commencement of a new political era. For the United States, the newness of ‘9/11’ lay in the use of civilian aircraft as weapons, but more significant was the unfamiliar feeling of being under attack at all. This had been the first aggressive assault on US territory since the bombing of Pearl Harbor in 1941, and the first on the US mainland since the British burned Washington in 1814. The response of a terrified United States was to declare war on ‘terrorist’ individuals and organisations, and the worldwide reach of American interests and alliances meant this war would necessarily be a global one—a global ‘War on Terror’. In effect, the physical and human damage incurred in New York and Washington has stimulated political and intellectual attention virtually everywhere else.

Adding to the intellectual attention, the chapters within this book explore many of the ethical issues surrounding the War on Terror, including whether and how this war (if it is indeed a war) should be waged. Among the chapter authors and among scholars more generally, there is no consensus on the definition of a 'terrorist' or 'terrorism'. A major part of the problem of trying to define these terms objectively is that they are based on the word 'terror'—a word universally accepted as describing extreme fear. This powerful emotion feeds into ethical considerations, generating shifts in the balance between right and wrong as perceived by different people in different places. A common theme running through this book is that of changing political circumstances and mindsets in a 'time of terror', although readers may also discern strong elements of continuity with the pre-'9/11' world.

In the opening chapter, Alex Bellamy provides a theory-informed assessment of the notion that terrorism is presently so grave a threat as to require exceptional response measures that go beyond what would normally be politically and morally acceptable. Bellamy builds his arguments around two key concepts—'dirty hands' and 'lesser evils'. The first insists that there is a separation between public and private morality, such that politicians may need to act in ways normally considered immoral but which are nevertheless permissible according to public morality. The 'lesser evils' approach contemplates the breaking of rules on utilitarian grounds if the evil of rule-breaking is calculated to be less than the evil that it aims to prevent or halt.

Following Bellamy's broad discussion of exceptional measures, Hugh Smith focuses in Chapter 2 upon one of the most fundamental counterterrorism responses—intelligence gathering. He examines ethical objections to, and justifications for, the gathering of information for national security purposes, and poses the questions: who is fair game and what methods of intelligence collection are morally permissible? Smith's exploration of the latter question includes a valuable survey of interrogation techniques. These are presented in increasing order of severity, from interviews where the subject is

allowed not to answer questions through to the suspension of basic human rights and outright physical torture.

Human rights violations are a central concern for Christopher Michaelsen who in Chapter 3 critiques the notion, frequently endorsed in policy and academic circles, that a balance must be struck between national security and civil liberties. He argues that liberty is a precondition of and related to security, such that the two cannot logically be balanced against each other. It is a mistake, according to Michaelsen, to invoke the balance metaphor to justify new security laws to counter the immediate dangers posed by terrorism without considering the long-term consequences of curtailing fundamental rights and liberties. Despite some possible short-term gains in security, he argues, some countermeasures may actually increase the potential for terrorism and diminish security in the long run.

Continuing the theme of counterterrorism measures carrying risks, Chapter 4 focuses on 'bioterrorism' and discusses legal and ethical questions arising from past and current US biodefence projects. Such projects have the potential to reduce the vulnerability of Americans to biological attacks, but they are morally questionable because of the risks they pose to national and international security. Of particular concern are projects conducted for 'threat assessment' purposes which investigate offensive biological weapons capabilities. Absent appropriate transparency measures, such projects risk undermining the international norm against deliberate disease, as embodied in the Biological Weapons Convention. This in turn would exacerbate and accelerate the problem of biological weapons proliferation.

Moving further into the international dimensions of terror and ethics, Chapter 5 illustrates the continuity between some present Western thinking about international politics and that which was being expounded before 11 September 2001. Jeremy Moses challenges the argument, prevalent in 'democratic peace theory', that Western

liberal democracies have a duty, through humanitarian intervention and the War on Terror, to persuade or force other states to adopt their political system for the sake of world peace. Referring to Emmanuel Kant's treatise *Towards Perpetual Peace*, and to the debates surrounding the 1999 Kosovo intervention and the 2003 invasion of Iraq, Moses warns against the dangers associated with Western attempts to transform the world according to a liberal democratic image.

As an alternative to striving for a liberal democratic world, in Chapter 6 Baogang He suggests cultural equality as a more likely solution to the problem of international terrorism. The problem at present, he argues, is that the West tends simply to condemn terrorism without ever questioning whether it has some responsibility for terrorist actions. In particular, were the grievances of the Muslim world to be replaced by a sense of cultural equality, resentment of and violence against Western culture would likely be reduced. Baogang contends that governments which presently rely heavily on military approaches to achieve temporary relief from terrorism should instead place greater emphasis on community and culture as the key to relief in the long term.

In the final chapter, Richard Devetak contemplates terrorism in the context of how wealthy countries (the North) perceive the less developed South. He argues that the 'civilised' North has tended to see the 'barbaric' South as comprised of failed states that require assistance and rogue states that demand punishment. Both are identified as sources of terrorism. According to Devetak, the North continues to believe in a spatial and temporal distance from the sources of terrorist violence in such a manner that its origins appear to be exclusive to the South. This is despite the South having crashed into the North on the morning of 11 September 2001. He suggests that the North, which sees itself as the sole source of good governance and civilisation, needs also to acknowledge its complicity in the South's problems—terrorism included.

Taken together, the chapters that follow serve the purpose of ventilating and analysing moral concerns from various perspectives—ethical, legal, national and international—about the War on Terror. Although this book is entitled ‘Ethics of War in a Time of Terror’, it is unable and not intended to provide straightforward moral guidelines. Rather, readers are encouraged as much to disagree as agree with the views expressed herein, and to decide for themselves the meaning and content of justice.

CHAPTER 1

HARD CASES, DIRTY ETHICS: RULE-BREAKING IN THE WAR ON TERROR

Alex Bellamy

Since 11 September 2001, several Western governments have argued that the threat of mass casualty terrorism requires the taking of exceptional measures: acts that are normally forbidden but which may nevertheless be necessary. As Jean Bethke Elshtain exhorted, 'when a wound as grievous as that of September 11 has been inflicted on the body politic, it would be the height of political irresponsibility and a dereliction of duty for public officials to fail to respond'.¹ According to Elshtain and others, Islamic fundamentalist terrorism poses a particularly pernicious threat to liberal societies because it aims to create a general context of fear that will coerce those in authority to accede to the terrorists' demands. It is the spread of fear, Elshtain and others argue, that makes terrorism particularly dangerous because 'none of the goods human beings cherish—including politics itself—can flourish absent a measure of civic peace and security'.²

It is widely accepted that embedded norms governing the use of force may be overridden in certain circumstances. That is not to say that there are no moral absolutists. Writing in the 13th century,

Thomas Aquinas argued that it was always unlawful to kill the innocent, though this begged the question of what it meant to be 'innocent', an issue that Aquinas did not address.³ More recently, Thomas Nagel suggested a deontological account of *jus in bello* which forbade attacks on non-combatants and the use of weapons that could not distinguish between the person and the soldier.⁴ Nagel accepted that there could be cases where the weaker party in war may be confronted with situations where it must choose between annihilation or resort to atrocities. However, he insisted that the atrocities option would only be available if principles guiding such choices emerged and were generally accepted and that no such principles had been codified. Likewise, contemporary international law contains *absolute* prohibitions in relation to *jus as bellum* and *jus in bello*. The UN Charter's ban on the use of force except in self-defence or when authorised by the United Nations Security Council (UNSC) was understood by its writers as a peremptory rule. The 1949 Geneva Conventions and subsequent 1977 Protocols contain an absolute ban on the deliberate targeting of non-combatants, with the Protocols going as far as to insist that combatants take 'every reasonable precaution' to ensure that non-combatants not be even accidentally killed.

In practice, however, moral and legal absolutism runs up against at least two problems identified by Brian Orend. First, absolutism is 'unrealistic'. In the real world, Orend argues, political leaders will not respond to supreme emergencies 'with one hand tied behind their back'. Secondly, 'it is fundamentally irresponsible on the part of the victim country's government, which has a foremost duty to protect its country's citizens from massacre and enslavement'.⁵ To forgo that responsibility would be to fiddle whilst Rome burned.

The idea that the embedded norms of war are conditional on calculations of necessity is well-established in the Just War tradition. Augustine, for example, insisted that a just king only fought wars of necessity, not of choice—a position later endorsed by the jurist Gentili.⁶ Once engaged in war, the king's primary responsibility was to prevail and conduct was only limited by the requirement to respect

agreements and 'show mercy'.⁷ During the Middle Ages, the influential canon lawyer Gratian endorsed this view. Gratian suggested that exemptions from being targeted in war granted by canon law could be overridden by the principle of military necessity and rejected the second Lateran Council's ban on the use of particular weapons such as the crossbow, since 'if a war was necessary and just, then all possible means to victory must be employed'.⁸ In the 16th century, Gentili concluded that certain groups should be granted immunity from attack on account of their social function, but that there were at least ten instances in which it was legitimate to kill non-combatants. Principal among them was reciprocity: one was not bound to respect the enemy's non-combatants if they did not respect yours.⁹ More recently, Telford Taylor, the chief American prosecutor at Nuremberg argued that the rules of war were to be valued because they limited war's brutality but that, in situations where following the rules would reduce the likely success of an otherwise justifiable military operation, the requirement for success should override the obligation to abide by the rules.¹⁰

It is not necessary to labour the point. Suffice it to say that, although some of the embedded norms governing the use of force—in particular rules governing when force might be used and who may be targeted—are proffered in absolutist terms, there is a widespread view that the rules are conditional on calculations of necessity. In other words, if victory is at stake embedded norms can be overridden. This poses the question of *when* the rules may be overridden? There are at least two ways of addressing this question. The first—referred to as the 'dirty hands' doctrine—insists that there is a radical separation between public and private morality and that political leaders may be required to act in ways normally considered immoral but that are nevertheless licit according to public morality. The second—referred to as the 'lesser evil' approach—investigates whether political leaders are entitled to act in ways that are prohibited by *public ethics* in emergencies. It insists that rules may be broken on utilitarian grounds if the evil of rule-breaking is calculated to be less than the evil that it aims to prevent or halt. There are two variants

of this approach. The *restrictive* account holds that such calculations do not apply to *all* the rules. In particular, the rule prohibiting non-combatant killing cannot be bargained away in this fashion.¹¹ A less restrictive account insists that there are *no* rules that cannot be overridden for a greater good. Michael Walzer's supreme emergency exception to non-combatant immunity provides an excellent example of this.¹² Significantly, both approaches portend to offer an ethic that balances the need to abide by the rules wherever possible with a recognition that, in practice, leaders have a prior responsibility to protect the welfare of their citizens. On closer scrutiny, however, both fail to accomplish this task.

'Dirty hands' and 'lesser evils' therefore offer two ways of reconciling the notion of universal embedded norms governing behaviour in war with the idea that political leaders have a primary moral and legal responsibility to protect their citizens' welfare, even if that means overriding those norms. Indeed, political leaders are *obliged* to do so. The first posits a distinctive public ethic that leaders are obliged to follow when they assume office. The problem with 'dirty hands' is that it begs as many questions as it answers. There is no agreement, for instance, about the role of necessity. Does necessity override all the rules or only some of them? *When* should rules be overridden? *Who* should decide to override them? What, after all, do the rules consist of? The key problem, of course, is that 'dirty hands' doctrine does not tell us very much about how 'dirty hands' claims are made, assessed and legitimated. Machiavellians are wrong to argue that political leaders have a *carte blanche* to decide for themselves what necessity dictates. Opposition to the US war in Vietnam or Soviet occupation of Afghanistan suggest that there are limits to what may be legitimised by reference to necessity. Similarly, however, the Augustinians and Grotians must recognise that perceived necessity can override a leader's obligation to follow the Just War tradition's rules. For example, although it was condemned by the UNSC, Israeli public opinion welcomed the preventive attack on the Iraq nuclear facility in Osirak in 1981 and states chose not to impose sanctions on Israel.

The 'lesser evil' approach purports to overcome these problems by setting out a more explicitly utilitarian calculation. Embedded norms may be overridden when the evil associated with doing so is reasonably believed to be less than the evil that will result through not doing so. Thus, the more we value the norms at stake, the more serious the situation must be before we are permitted to override the norms. Political leaders may therefore only sanction the deliberate killing of non-combatants when there is literally no other way of defending the political community from annihilation. Because lesser evil ethics are concerned with ethics in the public realm, however, and therefore begin with the liberal proposition that the international sphere is a rule-governed space, both Ignatieff and Walzer insist that actors who break the rules commit a wrong even though the act itself was necessary. Here is the main problem with lesser evil ethics. It points to what Ignatieff and others describe as a tragic tension between what is necessary and what is right.¹³ But what does this mean?

For classical realists, long misrepresented by their contemporary interpreters, the distinction makes little sense. The tragedy for realists such as Hans Morgenthau and Arnold Wolfers was that, because the world was anarchic, decent and honourable people were forced to commit indecent and dishonourable acts abroad to defend decency and honour at home.¹⁴ In wartime, doing what is necessary is doing what is right; it is just that what necessity requires is not always what decent and honourable people would voluntarily choose to do, all other things being equal. This view was ably expressed by Wolfers:

The 'necessities' in international politics ... do not push decision and action beyond the realm of moral judgment; they rest on moral choice themselves. If a statesman decides that the dangers to the security of his country are so great that a course of action that may lead to war is necessary, he has placed an exceedingly high value on an increment of national security. ... In every case the interpretation of what constitutes a vital national interest and how much value should be attached to it is a moral question. It cannot be answered by reference to alleged amoral necessities inherent in international politics; it rests on value judgments.¹⁵

For realists, therefore, necessity and right are interrelated not competitors in a tragic struggle. Necessity does not overcome 'right'. Instead, political leaders choose between different sets of values. Where they ostensibly prioritise necessity over right, what they are in fact doing is weighing one set of values (say, national security) over another (for example, non-combatant immunity). Acts become necessary only when societies or political leaders decide that something is worth fighting for.

Under closer scrutiny, the idea that there is a radical tension between what is necessary and what is right is also problematic for liberal ethicists for at least two reasons. First, most liberal ethicists who make lesser evil arguments are doing so from a communitarian perspective and are thus making essentially the same argument as realists: that the political community is more than just the amalgamation of individual rights and therefore its preservation might warrant the sacrifice of individual rights. Walzer makes this argument explicit but chooses not to defend it: 'communities in emergencies seem to have different and larger prerogatives. I am not sure that I can account for the difference, without ascribing to communal life a kind of transcendence that I don't believe it to have'.¹⁶ This communitarian argument has been criticised, but it is not its veracity that is of interest here.¹⁷ The point is that, from a communitarian perspective, the 'thick' obligations that states owe to their citizens and citizens owe one another override the 'thin' duties that political communities owe strangers. As for the realist, communitarian necessity and right are not in tragic competition.

The second strategy for liberals who endorse a lesser evil ethics is the resort to utilitarianism. In the preface to the second edition of *Just and Unjust Wars*, Walzer emphatically rejected utilitarianism, arguing that 'considerations of utility ... are secondary to that of rights; it is constrained by right' he continues, 'at every point, the judgments we make are best accounted for if we regard life and liberty as something like absolute values'.¹⁸ In war, Walzer argues, there are certain rights that are inalienable.¹⁹ 'A legitimate act of war', Walzer

concludes, 'is one that does not violate the rights of the people against whom it is directed'. Moreover, 'no one can be threatened with war or warred against, unless *through some act of his own* he has surrendered or lost his rights' to life and liberty.²⁰ Thus, Walzer clearly repudiated the utilitarian idea that, if a cause is just, one may use whatever means necessary to secure victory, therefore securing the greatest good for the greatest number.²¹ Indeed, in his discussion of supreme emergencies he concedes that 'to kill 278,966 civilians (the number is made up) in order to avoid the deaths of an unknown but probably larger number of civilians and soldiers is surely a fantastic, godlike, frightening and horrendous act'.²² However, lesser evil calculations are utilitarian. It is, after all, the very idea that, in certain circumstances, political leaders should prioritise the greater good over the (supposedly inalienable) rights of non-combatants. Walzer concedes as much and even uses a utilitarian analysis to defend the British decision to bomb German cities in 1940 and reject the American decision to launch an atomic attack on Japan in 1945: Britain faced defeat in 1940, the United States did not face defeat in 1945. According to the doctrine of supreme emergency, utilitarian calculations come into play and may override the rules when defeat and disaster are imminent, but not in other circumstances.²³ Once again, however, if emergency ethics are grounded in utilitarian calculations, how can it be that necessity is in tension with right? For the utilitarian, what is necessary for the maximisation of utility is what is right. The only difference between supreme emergencies and utilitarianism is that the former reserves resort to utility for emergencies only.

The problem is that the claim that wrongful acts committed for the greater good may be necessary, but always remain wrong in themselves, is difficult to decipher in a politically intelligible fashion. Such arguments contain echoes of realism, communitarianism and utilitarianism, and hold that what appears to be necessity overriding right is actually one set of values overriding another. However, as we observed earlier, necessity does not make every act licit. History is littered with examples of political leaders unsuccessfully claiming

'necessity' to justify actions. The key, I argue, lies in thinking carefully about the political currency we are talking about. The currency that matters most in politics is neither ethics nor law; it is legitimacy.

There are at least two ways of understanding legitimacy. Ian Clark describes them as 'substantive' and 'procedural' approaches.²⁴ The substantive approach, widely favoured by the earliest Just War writers, holds that an act is legitimate if it conforms to certain rules.²⁵ Some realists, however, argue that moral rules have *no* validity in international relations; whilst others such as Morgenthau insist that international moral rules are much weaker than domestic moral rules but that foreign policy should nevertheless be partly guided by moral considerations.²⁶ A further problem is raised by cases where there are tensions between the rules or disagreement about what the rules might require in particular cases. As Nicholas Wheeler argues, in world politics especially, actors are free to interpret rules in relation to their own values and interests.²⁷ In the absence of an authoritative global judge to adjudicate competing claims, legitimacy claims cannot be resolved by appeal to the rules alone.²⁸

Procedural approaches focus on the manner in which a decision about an action's legitimacy is reached. There are a number of different procedural approaches. The most basic holds that what is legitimate is whatever there happens to be a consensus about. Indeed, several writers go as far as to argue that legitimacy and consensus are reducible to one another.²⁹ This approach creates the logical possibility that a decision which produces intuitively immoral consequences may nevertheless be legitimate. For instance, if there is a broad consensus that it is right for fascist states to annihilate their Jewish populations, the consensus approach insists that such annihilation be considered legitimate. A different take on this theme suggests that an act is legitimate if the decisionmaking procedure that led to it conformed to particular moral principles.³⁰ Decisions may be considered legitimate if they are made on the basis of a genuine consensus (reached through exhaustive dialogue) among all the parties likely to be affected by the proposed

course of action. Sadly, present conditions in world politics are so alien to the ideal environment that underpins this approach that virtually every decision taken must be considered illegitimate. Furthermore, as Gerry Simpson has convincingly argued, small and medium sized states have tended to recognise the legitimacy of 'legalised hierarchies' which grant powerful states special rights and responsibilities for the maintenance of international order.³¹ What this second approach captures, though, is the idea that legitimacy and consensus cannot be elided with one another; that consensus must be founded to some extent on agreed moral rules to reflect legitimacy. For instance, Morgenthau argued that the Cold War consensus on the balance of power was based on a complex relationship between common moral rules, civilisation and self-interests.³² Thus, Clark concludes that, whilst legitimacy is closely related to consensus, it cannot be reduced to it. Where consensus is valuable, it is because it indicates agreement about other rules and norms; it is only 'indirectly important' to legitimacy.³³

I argue that acts are legitimate if they are justified in terms of common referents and if those justifications are validated by other actors.³⁴ This approach rejects both the substantive claim that rules can be applied to particular cases in a neutral fashion and the dialogic insistence on inclusive consultation. Traditionally, states have been considered the most important voices in this dialogue, but the legitimacy of an action could be enhanced by support from non-state actors within what is sometimes referred to as 'world society'. In practice, multiple and competing claims are made through the common language provided by the Just War tradition, the laws of war and language of diplomacy. When actors proffer justifications for their actions, others serve as 'judges and juries' weighing the balance of the different claims.³⁵ 'Judges' are those entities capable of backing up their judgments with serious material rewards or punishments; in particular, the world's most powerful states. 'Juries' comprise the rest of world opinion. Juries debate and form their own opinions, can impose some relatively minor penalties and rewards and can attempt to influence judges' decisions. The

approach to legitimacy adopted here is therefore based on two ideas: (1) actors use a common language and set of reference points to justify their behavior to others;³⁶ and (2) actors use these common reference points (among other things) to assess the legitimacy of others' actions which in turn frame their responses to them. The more actors believe an act to be legitimate, the more legitimate it is. Legitimacy and illegitimacy should not therefore be viewed as two distinct categories but, rather, as two ends of a broad spectrum; most acts are more or less legitimate. Actors that accept the legitimacy of a particular act are more likely to provide material and diplomatic support; those that believe an act to be illegitimate may condemn it, impose sanctions or try to punish the perpetrators.

According to Ian Clark, legitimacy claims are articulated and assessed by reference to three subordinate sets of norms, none of which is permanently prioritised over the others. Clark describes these as legality, morality and constitutionality. The first two relate to commonly understood legal and moral principles respectively. Constitutionality refers to the interplay of politics, power and interests. According to Clark, constitutionality 'at its core are political sensibilities about what can properly be done, and how affairs should be conducted'.³⁷ How does this relate to dirty hands and lesser evils? The first thing to note from this schema is that dirty hands and lesser evil debates take place at the level of secondary norms; they do not by themselves determine whether an act is considered legitimate. As with the utilitarian and communitarian variants of the liberal approach to this question, dirty hands and lesser evil arguments may be used to shape moral judgments when—as writers like Wolfers argued—certain values such as national security are privileged over others such as non-combatant immunity. In addition, dirty hands and lesser evil arguments may affect the relative weight that actors afford to each of the norms in relation to particular cases. For instance, the political sensibilities that comprise constitutionality may direct actors towards thinking that a particular regime is so onerous, or the danger of a distortion in the balance of power so grave, that it is permissible to override moral and legal rules to effect

regime change or defend the prevailing order. Alternatively, communitarian or utilitarian moral calculations may override legal prohibitions such as the prevention of torture.

Secondly, this schema gives meaning to the idea that an act might be morally wrong (it may violate embedded moral norms) yet be legitimate. When they commit such acts, actors may be punished in their conscience but they are not materially punished. That is, the actor may believe that the act remained wrong, but the insistence that this is so has little political meaning. Most other actors believed the act to be legitimate and framed their reactions to it accordingly. It is important, however, to distinguish between dirty hands/lesser evil acts and other types of acts that may be considered 'wrong' in some sense yet legitimate. Dirty hands and lesser evil arguments deal with actions that are ordinarily considered immoral. Contrast that with humanitarian intervention. It is not ordinarily considered immoral to intervene to halt genocide or mass murder, though such acts may be illegal if they are not authorised by the UNSC. Nevertheless, judges and juries may decide that the moral necessity of acting overrides the legal prohibition on intervention. Thus, for instance, when an independent commission judged NATO's 1999 intervention to be 'illegal but legitimate', it was arguing that, although illegal, it was sanctioned by 'its compelling moral purpose'.³⁸ Dirty hands and lesser evil arguments deal in actions that are ordinarily considered immoral: launching aggressive wars against states that are not planning an invasion or massacring their own population; assassinating political leaders; torturing suspected terrorists; deliberately killing non-combatants; lying to the electorate; sanctioning covert operations and instructing operatives not to take prisoners. This is the stuff of dirty hands and lesser evils.

Third, this view holds that legitimacy calculations are never absolute. Of course, in world politics there are no actual 'juries', 'judges' or even courtrooms, so legitimacy judgments are always to some degree indeterminate. The level of indeterminacy, however, can vary considerably. Sometimes the global jury passes a clear

judgment: the tens of millions who protested against the wars in Iraq and Vietnam spoke for a larger body of world opinion. The judgment is never unanimous, however. Tens of millions supported those same wars on moral, legal and prudential grounds. Moreover, no matter how much influence one thinks global civil society has on world politics, the best the global jury can hope to achieve is to help influence the judges' decisions by swaying the opinions of the world's most powerful states. Ultimately, these states determine whether or not rule-breakers will be punished. Their judgments are likewise prefaced on a mixture of legality, morality and constitutionality.

In practice, therefore, 'dirty hands' or 'lesser evil' arguments attempt to legitimise actions that would ordinarily be proscribed as illegal, immoral or both. They attempt to do so either by invoking one set of moral values (based on consequences) over another (based on deontology), by invoking moral values to overcome legal prescription or by mobilising political sensibilities to override both morality and legality, or a combination of the three. They do not invoke 'necessity' to override 'right', but employ a broader, political, conception of 'right' embedded in legitimacy.

Notes

- ¹ Jean Bethke Elshtain, *Just War Against Terror: The Burden of American Power in a Violent World*, Basic Books, New York, 2002, p. 59.
- ² Jean Bethke Elshtain, 'How to Fight a Just War' in Ken Booth and Tim Dunne (eds.), *Worlds in Collision*, Palgrave, London, 2002, p. 264.
- ³ Joan D. Tooke, *The Just War in Aquinas and Grotius*, SPCK, London, 1965, p. 156.
- ⁴ Thomas Nagel, 'War and Massacre', *Philosophy and Public Affairs*, vol. 1, no. 2, 1972, pp. 123–44.
- ⁵ Brian Orend, 'Is there a Supreme Emergency Exemption?' in (ed.) Mark Evans, *Just War Theory*, Edinburgh University Press, Edinburgh, 2005.
- ⁶ 'Let it be necessity, not choice, that kills your warring enemy', letter to Count Boniface in (ed.) Wilfrid Parsons, *Saint Augustine Letters Vol. IV*

- (165-203), Fathers of the Church Inc., New York, 1955, p. 269. For Gentili, necessity arose when there was no possibility for just arbitration: see Gesina H. J. Van Der Molen, *Alberico Gentili and the Development of International Law: His Life, Work and Times*, A. W. Sijthoff, Leyden, 1968, esp. pp. 108–116.
- 7 Richard Shelly Hartigan, 'Saint Augustine on War and Killing: The Problem of the Innocent', *Journal of the History of Ideas*, vol. 27, no. 2, 1966, p. 203.
 - 8 Frederick H. Russell, *The Just War in the Middle Ages*, Cambridge University Press, Cambridge, 1975, p. 71.
 - 9 Timothy M. Renick, 'Charity Lost: The Secularization of the Principle of Double-Effect in the Just War Tradition', *The Thomist*, vol. 58, no. 3, 1994, pp. 453–54.
 - 10 Telford Taylor, *Nuremberg and Vietnam: An American Tragedy*, Quadrangle Books, Chicago, 1970, pp. 426–29.
 - 11 Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror*, Edinburgh University Press, Edinburgh, 2004.
 - 12 Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 2nd ed., Basic Books, New York, 1991 [1977].
 - 13 Ignatieff, *The Lesser Evil*, p. 29, and Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?', *Yale Law Journal*, vol. 112, March 2003, p. 1101.
 - 14 See Bernard Brodie, *War and Politics*, Macmillan, New York, 1973, p. 438.
 - 15 Arnold Wolfers, 'Statesmanship and Moral Choice', *World Politics*, vol. 1, no. 2, 1949, pp. 187 and 190.
 - 16 Walzer, *Just and Unjust Wars*, p. 254.
 - 17 Simon Caney, *Justice Beyond Borders: Towards a Global Political Theory*, Oxford University Press, Oxford, 2005.
 - 18 Walzer, *Just and Unjust Wars*, xxix.
 - 19 Walzer, *Just and Unjust Wars*, p. 134.
 - 20 Walzer, *Just and Unjust Wars*, p. 135.
 - 21 This utilitarian argument can be found in some of the earliest attempts to outline a theory of justified war. It is even implied in some medieval canon law, which spent much more time explicating the conditions by which a war may be waged justly than it did exploring restraints on the conduct of war. See Frederick H. Russell, *The Just War in the Middle Ages*, Cambridge University Press, Cambridge, 1975, p. 71.

- ²² Walzer, *Just and Unjust Wars*, p. 262.
- ²³ Walzer, *Just and Unjust Wars*, p. 168.
- ²⁴ Ian Clark, *Legitimacy in International Society*, Oxford University Press, Oxford, 2005, pp. 18–19.
- ²⁵ See Alan Donagan, *The Theory of Morality*, University of Chicago Press, Chicago, 1977, pp. 149–57, and Terry Nardin, 'Justice and Coercion' in (ed.) Alex J. Bellamy, *International Society and its Critics*, Oxford University Press, Oxford, 2005, especially p. 252, and Clark, *Legitimacy in International Society*, p. 18.
- ²⁶ For a contemporary example of the former position, see Robert J. Art and Kenneth N. Waltz, 'Technology, Strategy and the Uses of Force' in (eds.) Robert J. Art and Kenneth N. Waltz, *The Use of Force: International Politics and Foreign Policy*, 2nd edition, University Press of America, Lanham, MD, 1983, p. 6. The latter position is exemplified by Hans J. Morgenthau, *In Defense of the National Interest: A Critical Examination of American Foreign Policy*, Alfred Knopf, New York, 1951.
- ²⁷ Nicholas J. Wheeler, 'The Kosovo Bombing Campaign' in (ed.) Christian Reus-Smit, *The Politics of International Law*, Cambridge University Press, Cambridge, 2004, pp. 194–95.
- ²⁸ Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, Clarendon Press, Oxford, 1994, pp. 7–8.
- ²⁹ See, for instance, Andreas Osiander, *The States System of Europe 1640-1990: Peacemaking and the Condition of International Stability*, Oxford University Press, Oxford, 1994, pp. 9–10. I am grateful to Ian Clark for bringing this to my attention.
- ³⁰ See Richard Shapcott, *Justice, Community and Dialogue in International Relations*, Cambridge University Press, Cambridge, 2001 and Andrew Linklater, *The Transformation of Political Community*, Polity, Cambridge, 1998.
- ³¹ One such legalised hierarchy is the UN Security Council, which grants numerous special privileges to the Permanent Five members; see Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*, Cambridge University Press, Cambridge, 2004.
- ³² Hans Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, 5th edition, Alfred Knopf, New York, 1973, p. 219. I am grateful to Ian Clark for bringing this to my attention.
- ³³ Clark, *Legitimacy in International Society*, p. 206.

- ³⁴ From this perspective, legitimacy is a social fact built on consent that is meaningful only to the members of the community that accepts it. Ian Clark, 'Legitimacy in a Global Order', *Review of International Studies*, vol. 29, supplement no. 1, 2003, p. 80.
- ³⁵ Thomas Franck, *Recourse to Force: State Action against Threats and Armed Attacks*, Cambridge University Press, Cambridge, 2002, p. 185.
- ³⁶ This point was first suggested in Friedreich V. Kratochwil, 'How Do Norms Matter?' in (ed.) Michael Byers, *The Role of Law in International Politics: Essays in International Relations and International Law*, Oxford University Press, Oxford, 2000.
- ³⁷ Clark, *Legitimacy in International Society*, p. 220.
- ³⁸ Independent International Commission on Kosovo (IICK), *Kosovo Report: International Response, Lessons Learned*, Oxford University Press, Oxford, 2000, p. 4, and Ian Clark, *Legitimacy in International Society*, p. 212.

CHAPTER 2

ETHICS AND INTELLIGENCE

Hugh Smith

Studies of intelligence deal mostly with issues such as operations, organisation, technology, politics, resources and the analysis of threats. Few discuss the ethics of intelligence in any depth.¹ Intelligence—in the sense of collecting information, analysing it and providing assessments to government for policymaking in relation to national security—will by its nature push the bounds of legality and propriety, and perhaps routinely overstep them. This chapter focuses on one stage of the process, namely the ethical problems liable to arise in the gathering of information.

Ethical Objections

One school of thought regards ‘ethical espionage’ as an oxymoron on a par with ‘military intelligence’ and ‘honest politicians’. In 1929 US Secretary of State Henry L. Stimson closed a code-breaking unit within his Department, known as the Black Chamber, when he learned of its existence. Later, he said of this decision: ‘Gentlemen do not read each other’s mail’. For him, spying and code-breaking were inherently dishonourable. In effect, Stimson applied his personal

moral standards despite the potential disadvantages to the United States.²

A more philosophical critique argues that the intelligence business is unethical since it entails deception and lying. Thus, for Immanuel Kant, such activities are inherently wrong since they diminish another person's capacity to act morally by depriving him of full information. They also make mutual confidence among states impossible since they are practices which cannot be universalised; that is, followed by everyone. Kant condemned in particular the instigation and use of 'treachery' in other states.

The democratic objection to intelligence focuses on problems of accountability. In order to be effective, many activities of intelligence agencies occur covertly and remain hidden from the public, even from members of elected legislatures. Nor is the legal system likely to become involved, save in unusual circumstances. Prime responsibility thus falls on the executive government if intelligence agencies are to be kept accountable.³ This contrasts with most government activity, including military action, which takes place in public view—on occasion in front of the media—and which is subject to extensive legal regulation.

Intelligence is also more susceptible than most government activities to the problem of disparity of power among those involved. Lord Acton's dictum—'power corrupts, absolute power corrupts absolutely'—suggests that, where ethics is most needed, it is most difficult to sustain. For example, holding someone prisoner creates a natural temptation to use physical violence to extract information. Even collecting information from targets who do not know it is being collected (often the most valuable kind) creates a disparity in power that may encourage agents to gather more information than strictly necessary.

Ethical Justifications

The most common ethical justification for intelligence is that it contributes to the security of the state. Like war, intelligence is a continuation of policy by other means and can be defended in the same way that Niccolo Machiavelli justified war in *The Prince*: 'that war is just which is necessary'. Whatever it takes to secure the state and its citizens is justified.

Machiavelli, it may be noted, assumes a distinction between political and personal morality. Every ruler has an overriding moral duty to protect his state and must therefore overcome any personal ethical qualms about what he has to do. He must therefore 'learn to be bad'—as Stimson did. In other words, actions can be justified in the name of defending the state which may nonetheless leave the ruler (or the intelligence agent) with a sense of having 'dirty hands'. This goes with the job.

Thomas Hobbes' view of international politics has no place at all for ethical qualms. Since there is no sovereign authority among states, there can be no law and no morality. *Leviathan* thus describes a 'state of nature' in which sovereigns have 'their eyes fixed on one another; that is, their forts, garrisons and guns upon the frontiers of their kingdoms; and continual spies upon their neighbours; which is a posture of war'. Preparing for war and spying on neighbours are not so much justified as simply necessary for survival.

Though ethical relativism (Machiavelli) and ethical nihilism (Hobbes) are dominant philosophies, in practice states generally seek to identify certain principles that are widely enough shared to guide their behaviour in some measure. As well as pursuing national interests, states also develop common legal and moral rules. The just war tradition and the law of armed conflict embody this approach with varying degrees of success. Where intelligence is concerned, however, legal and moral principles are much thinner on the ground—but not absent altogether.

There are in fact some black-letter rules. The 1984 Convention against Torture, for example, expressly prohibits such methods for collecting information or any other purpose. Other 'rules' are unwritten, informal and unclear. Thus, in wartime, enemy spies do not qualify as prisoners of war if captured and may be subject to the death penalty, but in practice are often treated with some leniency. As Geoffrey Best observes: 'The spy remains in his curious legal limbo; whether his work is honourable or dishonourable, none can tell'.⁴ In the Cold War, the United States and the Soviet Union on occasion exchanged captured spies rather than punish them, partly to boost morale among other agents, but partly also out of a recognition that spies are simply doing their job.

Clearly, such 'rules' are precarious and based as much on calculation of interests as on shared moral values. Much also depends on reciprocity—fear that breach of a rule will lead to retaliation in kind. Yet motives for observing moral principles are a secondary issue. Ethics and law in any context rely on a mixture of reasons for their observance. The rest of this chapter asks whether ethical rules exist in the gathering of information for intelligence purposes, in particular: (1) from whom can information be acquired?; and (2) what methods can be employed?

1. Who is Fair Game?

This question is important because it determines who gets involved and may help keep the game confined to the players 'on the field' rather than involving innocent or unwitting spectators. The same moral principle of discrimination in the law of armed conflict seeks to limit killing as far as possible to those who pose an active threat, specifically those armed and in enemy uniform.

Where soldiers can often focus on direct threats, however, intelligence deals with longer term as well as short-term threats. This entails securing information from many sources about many possible future developments. Targets will be far more diverse and difficult to identify than those in military operations, and there is almost

no limit to the people who may be targeted for information or the type of information that may be sought.

In the first instance, targets can be considered in terms of states or individuals. Enemy states easily qualify since they display hostile intent. In time of war, hot or cold, we need information about them for our security and can assume they are spying on us. In peacetime 'enemies' may be more difficult to identify unless one assumes a Hobbesian war of all against all. Can one, for example, treat trade rivals as enemies?

Gaining useful information from neutral states is also problematic. Respect for neutrality may carry some weight, though fear of antagonising neutrals is perhaps a greater factor. Most contentious of all is espionage against friendly or allied states which have similar interests to ourselves and do not spy on us—or, at least, are not expected to do so. R.V. Jones argued that moral scruple should prevent British bugging of the French embassy in London from 1960–1963.⁵ Can Australia assume the United States does not spy on us?

Spying on international organisations such as the United Nations raises other dilemmas. In 2004, for example, a former British cabinet minister, Clare Short, expressed outrage that the United States should engage in spying on the United Nations (UN). For one thing, the UN can claim a certain immunity from such practices as an organisation designed to promote peace—in the same way that the Red Cross enjoys protected status. For another, the UN does not spy on its members, so reciprocity does not apply.

Much information gathering today is directed against transnational terrorist groups. If they are planning violent attacks, a state is clearly entitled to defend itself. The difficulty, however, is that such organisations usually operate across several countries. If the governments concerned cannot or will not take effective action against them, it may be legitimate self-defence for a state under threat at least to gather information about them, if not take military action, regardless of any rule about non-intervention in internal affairs.

Individuals as targets of information collection vary in ethical terms according to one principal criterion, namely the degree of their involvement in security matters.⁶ Most legitimate are those agents of another state—military and civilian—who have information useful for our security. Such people are in fact identified by the state they work for through the granting of security clearances in the same way that military uniforms identify legitimate targets in time of war. Of course, it is not always apparent who has clearances so that many people may have to be checked to determine their status.

More problematic are individuals who are not part of a security establishment, but who have knowledge that is of value for security purposes. Doctors may know about diseases relevant to biological warfare and engineers about nuclear power generation relevant to nuclear weapons production. 'Dual-use technology' means dual-status citizens. In some cases such individuals may not know of their potential vulnerability in security terms and their own government may have a moral duty to inform them accordingly.

Using the family or friends of targeted individuals to secure information is yet more problematic. Such individuals may be involved purely by chance of birth, marriage or friendship. Indeed, they may have no idea that they are likely targets, kept in the dark by the target himself for security reasons. Ethical considerations might suggest they should be off limits—like civilians in war—though their value as sources of information makes this unlikely.

As a general ethical principle, targets appear more legitimate the more directly they are concerned with security and the more they are aware of their own security value (since, as in warfare, this puts them on a more level playing field). However, in practice, information is often more easily gained from the weak, the vulnerable and the innocent.⁷ It might, at least, be argued that the less legitimate the target, the less intrusive and harmful should be the means of seeking information; and the more legitimate the target, the more damaging can be the methods employed.

2. What Methods of Collection are Morally Permissible?

Intelligence agencies employ a wide range of methods to collect information. These vary along several dimensions of relevance to ethical judgment:

- (a) the extent of intrusion into the privacy of others;
- (b) the degree of harm inflicted or threatened;
- (c) the nature of any deception involved;
- (d) the extent to which a target renders himself open to exploitation;
- (e) the moral harm incurred by the agent (because of the nature of the acts he or she performs); and, arguably,
- (f) the extent to which all states employ certain methods and expect to have them used against themselves (reciprocity).

Different methods of collection in a debatable order of harmfulness can be assessed against these criteria.

Open Sources

Open sources, notably the World Wide Web, provide most information for intelligence agencies—some estimates put it at 90 percent. This does not create dilemmas except those of judging the reliability and significance of data. It does raise the question whether open sources should be used in preference to more covert or harmful means of gathering information. The latter, however, may be valuable in confirming or disconfirming open source information.

Observation

As Yogi Berra once said: "You can observe a lot just by watchin'". Simple observation of others by legal means does no significant or

immediate harm, though it may entail a minor invasion of privacy. Much electronic eavesdropping is simply listening to transmissions in the ether. Targets may or may not be aware that it is occurring. Most states engage in such activities and expect others to do so.

Mutual observation by satellites has in fact become acceptable. During the Cold War reliance on 'national technical means of verification' made superpower arms control agreements possible. These high-tech means of collection, it has been argued, have 'the advantage of doing only minimal damage to the ethical standards of the operators and processors'.⁸ But if satellites are acceptable, spy-planes in another nation's airspace are not—witness the downing of the U-2 over the Soviet Union in 1960.

Deception

Deception entails the use of cover or disguise to obtain information—for example, by pretending to be a journalist, trade official, representative of a non-governmental organisation (NGO) or an agent of a different country.⁹ Long-term 'sleepers' disguise themselves as ordinary citizens or workers. Such deception is dishonest but *in itself* does not seriously hurt the target. Most types of deception in intelligence thus resemble *ruses de guerre* such as camouflage and ambush that are permitted in warfare.

Some deceptions, however, can unfairly harm organisations which are falsely represented. The Red Cross, for example, suffers if an individual purports to be an official of that organisation to secure information. The notion of perfidy in the law of armed conflict similarly prohibits abuse of Red Cross symbols.

Invasion of Privacy

This generally entails methods such as theft of documents, interception of communications and computer hacking. These methods may be illegal under an agent's national laws, under the target's national laws and under international law. Electronic

eavesdropping, for example, may involve secretly placing bugs in private premises.

Efforts are usually made to act covertly so that the target does not know an invasion of privacy has taken place or to disguise actions as something else—for example, as burglary for private gain. This suggests that minimum harm is done to the unknowing target though great harm may be done to his nation's security. Those in the game, of course, will expect such activity and take active steps to prevent it or nullify its consequences.

Persuasion

Persuasion seeks to convince a person of the justice of your cause. Defectors and traitors in the Cold War mostly acted out of genuine conviction—for or against communism. Attempts to win over such people are simply part of political dialogue. This is usually quite lawful on the part of the recruiter, but those recruited will find themselves in breach of their nation's laws and guilty of treachery.

Those who betray their country for a genuine belief, perhaps out of idealism (even if naïve and unrealistic), nevertheless attract a certain moral aura. Those who betrayed Hitler or Stalin are naturally praised in the West. But even those who went over to fascism or communism may be seen as in some way admirable in that they took great personal risks for the sake of an ideal.

Entrapment

Entrapment relies on offers of money, sex, drugs or status for the provision of information on a one-off or continuing basis. It is akin to persuasion on ideological grounds, but exploits the target's more base motives. In recent decades money rather than ideology has become the dominant motivation of defectors.¹⁰

Initial requests for information may be minor in order to induce a target to more fully compromise himself. Once a person has taken money or a bribe of some sort, they are 'on the hook' because of the

threat, spoken or unspoken, to reveal their treachery. Alternatively, a target may already have something to hide—illegal or immoral behaviour—which positively invites blackmail. At this point, it is difficult to ignore threats of exposure, though some may have sufficient moral courage to report the situation to their organisation.

Coercion

Here violence is used or threatened against an individual—or perhaps members of his family—in order to secure information (the case of those held in captivity is considered next). Threats may be explicit or implicit and will usually be illegal (even if the threat is not carried out). Clearly, psychological pressure is placed on the target which can be highly stressful. If a threat is carried out, physical harm also enters the picture.

There are obvious moral and legal objections to making and carrying out threats of harm. What might be said in defence is that targets could well expect such treatment (particularly if they are professionals) and that they and their agency may be able to take appropriate countermeasures.

Capture

Those held physically captive have few, if any, defences other than their own psychological strength. Their one asset is the possession of information that can be withheld.¹¹ But the great disparity of physical power allows the captor to treat a prisoner as he chooses. The ethical dilemma is how far can the captor go—from scrupulously observing the prisoner's rights through to sustained torture. Can any moral lines be drawn in this grey area? Again, methods will be considered in approximate order of harmfulness.

(a) Kid gloves

This approach seeks information without, for instance, the use of pressure, threats, inducements, and coercion. The prisoner may

even be free to refuse to answer questions or terminate an interview without fear of consequences. Strict rules may be spelled out in national codes as they are for prisoners of war in the Geneva Conventions.¹² The moral basis for such an approach is that it maximises respect for human rights, encourages trust in official institutions and protects interrogators from demeaning practices. It may even pay dividends in the short term. Christopher Mackey recounts how one prisoner in Afghanistan, after lengthy interrogation, decided to assist the United States on the grounds that if 'this was the worst the Americans were going to do', he would change sides.¹³

Even within strict guidelines, however, those held prisoner are inevitably under some pressure. They may not know the length of their confinement; they may be anxious about family and friends; they may fear mistreatment in the future despite assurances to the contrary. Can interrogators play on these concerns without overstepping the mark? Another grey area is the manipulation of privileges: all prisoners are treated according to minimum standards but those who cooperate are given preferential treatment. The use of deceptions such as posing as agents of another country, exploiting forged documents or pretending that other prisoners have given information pushes the moral boundaries to the limit and perhaps beyond.¹⁴

(b) Velvet gloves

If kid gloves do not work, information can be sought through deliberate threats of violence, whether implicit or explicit. Fear is created that the 'iron fist' hidden in the velvet glove could be used. The 'good cop, bad cop' routine often produces this uncertainty—what if the bad cop gets to make the decision? Human rights and dignity are abused in some measure, and persistent or extreme threats can cause severe psychological harm to the victim even if never actually carried out.

A difficult moral issue here is whether one may legitimately *threaten* to do something that is wrong in order to achieve a good

outcome. Does it make a difference ethically if one has no intention of carrying out the threat should information not be forthcoming? Similar dilemmas are found in other cases where the threatener wishes to benefit from a threat but prefers not to carry it out. These range from disciplining children ('do that again, and I'll thrash you') to nuclear deterrence ('if you attack Washington, we'll destroy your nation').

(c) Surgical gloves

This approach works on the mind of the prisoner in the present time rather than creating some fear about the future. The most obvious case is the use of drugs to extract information, a process which entails some harm—making an individual do what he does not want to do—but is likely to be short-term and relatively painless. Use of a 'truth serum', it has been argued, is morally acceptable and permissible under US law.¹⁵ Whether drugs of this kind are likely to be successful is another matter.

Another method is the humiliation of prisoners. This need not involve physical contact but relies on manipulation of personal and cultural values. Techniques such as sexual flaunting in front of prisoners and abuse of the Koran have been reported. Other methods such as using dog collars or forming human pyramids of naked prisoners do involve limited force, but it is the immediate psychological effect that is harmful rather than the physical measures employed. Whether such treatment is more acceptable in moral terms than direct physical force can be debated.

(d) Boxing gloves

Physical pain is inflicted by direct or indirect methods and psychological disorientation is sought by physical routines, e.g. sleep disruption, stress positions, hooding, isolation, or incessant loud music. Implicitly or explicitly there is a threat of more to come. Physical and psychological hurt short of outright torture is imposed directly on the prisoner—hence the analogy with boxing gloves which

are designed to inflict pain but less so than bare knuckles. This extends to causing pain to a third party as a means of manipulating the prisoner.

There is room for much ethical debate over what can be called 'robust interrogation'. The United States has attempted to define some of these techniques as acceptable, and others as unacceptable, in dealing with prisoners in Afghanistan, Iraq and Guantanamo Bay. However, no clear moral dividing lines are evident (many would argue that all methods are acceptable; others that none are acceptable). Two principles relating to the effects on the prisoner can be suggested. One relates to the length of time the pain is inflicted and the time needed to recover. The shorter period of pain and the faster the period of recovery, it can be argued, the more acceptable the method.

A second principle suggested is that treatment permitted in regard to one's own soldiers—for example, at training camp—ought to be permissible against prisoners.¹⁶ Thus Australian soldiers at risk of enemy capture are subjected to harsh resistance to interrogation (RTI) training which includes being blindfolded and stripped naked, as well as stress positions, sleep deprivation, intense questioning and sexual humiliation. The argument, however, overlooks the fact that trainees are usually volunteers (unlike captives) and that training is carried out under strict controls for a beneficial purpose. There is also the possibility that some training in a military force may actually be unethical.

(e) Iron fist—torture

Here the gloves are taken off altogether and severe physical pain inflicted directly and deliberately. 'Just two minutes. Give me just two minutes alone with him' is a wish sometimes heard from interrogators. Mackey cites such a case in Afghanistan, but observes that it could lead to twenty years imprisonment for the interrogator.¹⁷

The temptation to use torture against prisoners to gain information is always present and some countries practise it routinely or condone it unofficially. Certain legal systems even accept the results of torture as evidence in a court of law. Torture is a reality and its ethical standing has been examined at length. Here it is necessary only to outline the debate.

The simple deontological or duty-based approach is to condemn the practice outright. It is never justifiable, even if in some cases good results can be obtained by torture. International law takes this approach through the prohibitions contained in the Convention Against Torture and the Universal Declaration of Human Rights.

An immediate problem is how to define the prohibited activity.¹⁸ Too narrow a definition creates widespread concern since it permits a great deal of violence short of torture as defined. Thus a memorandum by the US Assistant Attorney General Jay S. Bybee released in June 2004 proposed defining torture as physical pain equivalent to that 'accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death' or mental pain resulting in 'significant psychological harm of significant duration, e.g. lasting for months or even years'.¹⁹ A narrow definition, however, may be more likely to be enforced.

A wide definition of torture, on the other hand, undermines support for the prohibition of hard-core torture. Banning stressful interrogation techniques is liable to drive them underground and generate disrespect for rules. Wide definition may also undervalue the suffering of those who have experienced the worst kind.²⁰ Yet if torture is to be prohibited, it can be argued, a definition that covers the grey areas is desirable.²¹

Can torture ever be justified to extract information? The main argument in favour is the consequentialist claim that, as a last resort, torture may yield information that prevents a greater abuse of human rights. Several factors can give moral weight to this view:

- the harm to be prevented is very great—imagined scenarios often include weapons of mass destruction;
- a real possibility exists that the information sought will allow a disaster to be prevented—the ‘ticking bomb’ can be disarmed;
- the certainty or near-certainty that the victim has the relevant information; and
- the degree of culpability of the victim—one who has actually placed a ‘ticking bomb’ or has committed outrages in the past may be more ‘deserving’ of torture. Terrorists can be regarded as being ‘at war’ with society and hence to have lost their immunity from attack.²² Although, whether anyone can lose ‘inalienable’ rights is a problem here.

Those who argue for torture also point to practical and political considerations:

- there are instances (even if rare) where torture is known to have saved lives;
- use of torture can be made exceptional and subject to specific approval at the highest levels;
- legal control of torture is more satisfactory than an ineffective prohibition which drives it underground;²³ and
- if terrorists know that torture will not be used, they will be more likely to hold out against robust interrogation, especially if they have been trained to resist.²⁴

Those who oppose torture may concede some or all of the above points but argue that

- it is still inherently wrong (the deontological or duty-based position). Even if good can sometimes be achieved, torture should still be prohibited. This is the cost of virtue;

- arguments for torture often rely on extreme and hypothetical situations but ‘artificial cases make bad ethics’;²⁵
- there can be no defined limit to an act of torture—the victim must believe it will continue until they break;
- there is a ‘slippery slope’ in that, once torture is permitted, its use will naturally and inevitably widen; and
- someone must carry out torture. What impact does torture have on the torturers themselves and on their society? How are they to be trained? Torture is incompatible with professionalism.²⁶

Debate about torture is characterised by extreme positions. An extreme activity does not easily permit compromise either in practical or ethical terms. Permitting torture on occasions entails (or should entail) extraordinarily difficult judgement. What is apparent is that acceptance of torture makes acceptance of all other methods more likely.

Ethics and Responsibility

This chapter has focused on those who actually seek information, but their activities—and their moral position—can be further complicated by the actions of others. For example, mistreatment of prisoners by jailers at Abu Ghraib was not necessarily connected with interrogation.²⁷ However, in practice, prisoners draw a natural conclusion: cooperating with interrogators will lead to better treatment. Can interrogators ethically take advantage of this situation? Also difficult to justify is the attempt to shift responsibility through the practice of ‘rendition’—handing prisoners over to other countries known to use torture.

The ethics of information-gathering for intelligence purposes faces an unfavourable environment. Lack of transparency and accountability, the high stakes involved, disparities of power, the difficulties of judgment about legitimate targets and legitimate

methods—all conspire to starve ethical principles of oxygen. However, human conscience, a certain respect for human rights and a sense of professionalism, together with the discipline of reciprocity, may help sustain some ethical principles in ‘the great game’. Something can be expected, but not too much.

Notes

- ¹ R.V. Jones in *Reflections on Intelligence*, Heinemann, London, 1989, identifies several ethical dilemmas but usually observes that he was fortunate not to have to face them himself.
- ² By 1940, when he was Secretary of War, Stimson advocated the use of code-breaking to counter Japan’s growing power. This was too late, some argue, to prevent the intelligence failure at Pearl Harbor in 1941: see A.N. Shulsky, *Silent Warfare: Understanding the World of Intelligence*, Brassey’s, Washington DC, 1993, pp. 187–88.
- ³ For an extended analysis which also deals with Australia, see L. Lustgarten and I. Leigh, *In From the Cold: National Security and Parliamentary Democracy*, Clarendon Press, Oxford, 1994.
- ⁴ G. Best, *War & Law Since 1945*, Clarendon Press, Oxford, 1994, p. 291.
- ⁵ Jones, *Reflections on Intelligence*, pp. 35–36.
- ⁶ See the discussion in Tony Pfaff, Tony and Jeffrey R. Tiel, ‘The Ethics of Espionage’, *Journal of Military Ethics*, vol. 3, no. 1, March 2004, pp. 6–10.
- ⁷ E. Drexel Godfrey, ‘Ethics and Intelligence’, *Foreign Affairs*, vol. 56, no. 3, April 1978, p. 629.
- ⁸ Godfrey, ‘Ethics and Intelligence’, p. 637.
- ⁹ On ‘false-flag’ recruitment and other ruses, see David L. Perry, ‘“Repugnant Philosophy”: Ethics, Espionage, and Covert Action’, *Journal of Conflict Studies*, vol. 15, no. 1, Spring 1995, p. 97ff.
- ¹⁰ Stan A. Taylor and Daniel Snow, ‘Cold War Spies: Why They Spied and How They Got Caught’, *Intelligence and National Security*, vol. 12, no. 2, April 1997, pp. 102–103.
- ¹¹ Barrie Paskins, ‘What’s Wrong with Torture?’, *British Journal of International Studies*, vol. 2, no. 2, July 1976, p. 141.
- ¹² According to the Australian Minister for Defence, Senator Robert Hill, Australian Defence Force interrogators dealing with prisoners of war do not use ‘personal verbal attack to lower morale and weaken the will to

resist' or 'ploys and tricks such as impersonation, fake documents, and threat (only) of dire punishment', *Weekend Australian*, 20 August 2005, p. 1.

- ¹³ Chris Mackey, *The Interrogator's War: Inside the Secret War Against Iraq*, John Murray, London, 2004, p. 426.
- ¹⁴ For examples, see Mackey, *The Interrogator's War*, pp. 88–9 and 97.
- ¹⁵ Allan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge*, Yale University Press, New Haven, 2002, pp. 247–48, note 6.
- ¹⁶ Mackey, *The Interrogator's War*, p. 96.
- ¹⁷ Mackey, *The Interrogator's War*, p. 95.
- ¹⁸ The Convention Against Torture defines it as 'the infliction on an individual of severe physical or mental pain, either for punishment or to extract information'; it also includes outrages on a person's dignity and humiliation of individuals.
- ¹⁹ Heather MacDonald, 'The Right Questions', The Review website, February 2005, available at <http://www.ajiac.org.au/review/2005/30-2/essay302.htm>, accessed 19 November 2005. Macdonald argues that the memo had no effect on actual interrogations. See also Paul Monk, 'Capone or Malone? Terrorism and the Uses of Coercive Interrogation', AusThink website, <http://www.austhink.org/monk/torture.htm>, accessed 6 June 2005.
- ²⁰ Neil James, 'Torture: an Unwarranted Case', *Defender*, vol. XXII, no. 2, 2005, p. 26.
- ²¹ Paskins, 'What's Wrong with Torture?', pp. 145–46.
- ²² Paskins, 'What's Wrong with Torture?', pp. 141–42.
- ²³ Dershowitz, *Why Terrorism Works*, chapter 4.
- ²⁴ MacDonald, 'The Right Questions', The Review website, February 2005, available at <http://www.ajiac.org.au/review/2005/30-2/essay302.htm>, accessed 19 November 2005.
- ²⁵ Shue, Henry, 'Torture', *Philosophy & Public Affairs*, vol. 7, no. 2, 1978, p. 141.
- ²⁶ James, 'Torture', p. 27.
- ²⁷ MacDonald, The Review website, February 2005, available at <http://www.ajiac.org.au/review/2005/30-2/essay302.htm>, accessed 19 November 2005.

CHAPTER 3

NATIONAL SECURITY VERSUS CIVIL LIBERTIES: RIGHTS-BASED OBJECTIONS TO THE IDEA OF BALANCE¹

Christopher Michaelson

The academic, political and public discourse on anti-terrorism law and policy has been frequently revolving upon the idea that a balance must be struck between national security and civil liberties. This idea, however, is problematical for a number of interrelated reasons. First, a simple balancing approach does not give adequate consideration to the philosophical and conceptual underpinnings of the notions of liberty and security. Liberty is a precondition of and interrelated with security. As a consequence, the two goods cannot be balanced against each other logically. Secondly, commentators invoking the balance metaphor to justify new security laws to counter the immediate dangers posed by terrorism do not give appropriate weight to the long-term consequences of curtailing fundamental rights and liberties. Despite some possible short-term gains in security, some countermeasures may actually increase the potential for terrorism and diminish security in the long run. Thirdly, tough questions need to be asked as to whether a diminution of liberty actually enhances security or whether we are trading off civil liberties

for purely symbolic gains and psychological comfort. Finally, there are major rights-based objections to a simple balancing exercise. These rights-based objections will be outlined in this chapter.

Consequentialism in the Realm of Civil Liberties?

The idea of balancing liberty and security basically rests on the assumption that individual rights can and must be balanced against the interests of the greater community—or, put in the context of counterterrorism, that the civil liberties and human rights of individuals must be sacrificed in order to gain greater security for the majority.² This utilitarian calculus finds its philosophical roots in the doctrine of consequentialism. As its name suggests, consequentialism is based on the view that normative properties depend only on consequences. The paradigm form of consequentialism is utilitarianism, whose classic proponents were Jeremy Bentham and John Stuart Mill.³ According to Bentham, for example, an act is morally right only if it causes ‘the greatest happiness for the greatest number’.⁴ It is not the purpose of this chapter to examine in greater detail the philosophy of consequentialism in all its aspects and criticisms.⁵ Suffice it to say that a consequentialist approach may not be appropriate in the realm of civil liberties.⁶ Civil liberties are associated with rights. And, as leading political and legal philosophers of the 20th and 21st centuries have pointed out, rights discourse is often resolutely anti-consequentialist. Being superior to mere individual and societal interests, rights are generally not vulnerable to routine changes in the calculus of social utility.

Two of the most powerful arguments in this regard have been made by the late Harvard philosopher John Rawls and by London-based theorist Ronald Dworkin respectively. Again, it would be foolish to assume that the nuanced arguments as advanced by these scholars could be adequately summarised here. Nevertheless, it is helpful for the purposes of this chapter at least to outline briefly some key features of their lines of reasoning.

In *A Theory of Justice* John Rawls argues that a just society would be based on two principles.⁷ His theory follows from the social contract tradition and develops a contractarian view of justice in which principles of justice are themselves the object of a kind of social contract. The first principle of justice states that all individuals have an equal right to liberty. Once this liberty is satisfied, the second principle is considered. This second principle states that social and economic inequalities shall be arranged to the greatest benefit of the least advantaged of society. The hierarchy of the two principles in this order is justified by two rules of priority. The first priority rule, the priority of liberty, states that the principles of justice must be ranked in 'lexical order'.⁸ Consequently, liberty can only be restricted for liberty's sake in situations where the limitations would strengthen the total system of liberty shared by all, or when unequal liberty is acceptable to those with the lesser liberty.⁹ The second priority rule, 'justice over efficiency and welfare', is concerned with the maximising of advantages and opportunities. The inequality of opportunities is acceptable when it enhances the opportunities of those with the lesser opportunities, and the excessive rate of saving by those with the most advantage must, on balance, mitigate the burden of those bearing the hardship. In other words, justice is achieved when unequal opportunities are weighted towards the least fortunate and the accumulation of wealth is just when it helps to alleviate the burdens of the less fortunate. In contrast to consequentialists and utilitarians, Rawls thus does not allow some people to suffer for the greater benefit of others.

Ronald Dworkin has taken a similar approach. In *Taking Rights Seriously* he argues that rights claims must generally take priority over alternative considerations when formulating public policy and distributing public benefits.¹⁰ Rights are best understood as so-called 'trumps' over some background justification for political decisions that formulates a goal for the community as a whole. As Dworkin put it:

The existence of rights against the Government would be jeopardized if the Government were able to defeat such a right by

appealing to the right of a democratic majority to work its will. A right against the Government must be a right to do something even when the majority thinks it would be wrong to do it, and when the majority would be worse off for having it done. If we now say that society has a right to do whatever is in the general benefit, or the right to preserve whatever sort of environment the majority wishes to live in, and we mean that these are the sort of rights that provide justification for overruling any rights against the Government that may conflict, then we have annihilated the later rights.¹¹

According to Dworkin, the notion of rights as 'trumps' expresses the fundamental ideal of equality upon which the contemporary doctrine of human rights rests. Treating rights as 'trumps' is a means of ensuring that all individuals are treated in an equal and like fashion in respect of the provision of fundamental human rights. Fully realising the aspirations of human rights may not require the provision of 'state of the art' resources, but this should not detract from the force of human rights as taking priority over alternative social and political considerations.¹²

The application of Rawls' reasoning to the current talk of balance may lead to the conclusion that a trade-off between liberty and security is simply ruled out. Security would fall into the domain of the (second) principle governing social and economic goods and, due to lexical inferiority, could not be 'balanced' against the superior principle of liberty. Similarly, considering Dworkin's argument on rights being 'trumps' over societal interests, civil liberties would be practically impervious to social utility arguments. The security of the whole community would constitute a public interest which generally would not be 'balanceable' with rights since the latter stand on superior moral and legal planes.

The argument presented here rests on the assumption, of course, that civil liberties are qualitatively equal to rights. However, one may well argue that anti-consequentialist concepts of liberty and rights, as formulated by Rawls and Dworkin, cannot be applied to civil liberties straightforwardly. It is not the purpose of this chapter to get very much further into the discussion of this problem. The aim of

the brief discourse on consequentialism was merely to indicate that a simple balancing exercise may neglect significant aspects of the jurisprudential underpinnings of both liberty and security.

Security as Individual Right or State Purpose?

It has been argued that rights appear practically impervious to social utility arguments. However, even non-utilitarians acknowledge that rights can hardly be absolute in all the circumstances. As Dworkin has pointed out, 'someone who claims that citizens have a right against the Government need not go so far as to say that the State is *never* justified in overriding that right'.¹³ He has suggested that the State may override a given right when it is necessary to protect the rights of others. Accordingly, for security to be balanceable with human rights and civil liberties, it would have to be construed as an individual right, whose protection could at times necessitate overriding liberty rights. The question that thus needs to be asked is: can security constitute an individual right?

The idea of a human right to security has been debated for some time. Nonetheless, it has received particular attention in the context of anti-terrorism legislation introduced in the aftermath of the attacks on 11 September 2001. In Australia, for instance, Attorney General Philip Ruddock has invoked the right to security as a basis for introducing wide-ranging anti-terrorism laws. For Ruddock, the existence of this right was hardly questionable since it was also protected by Article 3 of the UN Universal Declaration of Human Rights (UDHR) and Article 9 of the UN International Covenant on Civil and Political Rights (ICCPR).¹⁴

In creating laws to respond to the new security environment, the Australian Government is striving towards the twin goals of security and justice. The Government does not assume that protecting national security is opposed to protecting the civil rights of Australians, particularly the most fundamental right of all—the *right to human security*. The achievement of these goals should not be

seen as separate ideals. Indeed, Australia's human rights obligations under both the ICCPR and the UDHR include the *right to security*.¹⁵

Robert Cornall, the Secretary of the Attorney-General's Department, has also invoked international human rights law to justify invasive anti-terrorism legislation. For Cornall, the right to security entitles not only the individual but also the community as a whole to government protection against terrorist attacks:

There was not much need to think about community rights in the 20th century because they were not under any obvious challenge. This allowed individual rights to flourish without regard to the broader setting of community rights. ... But things are a bit different now. Australia and Australians have been nominated as terrorist targets. We have to ensure that we take all the steps necessary to protect the safety of our community as a whole and, in the process, to protect the rights of individuals within our society. This aim is totally consistent (with) the Universal Declaration of Human Rights which states in Article 3 that every person has the right to life, liberty and security of person. Our individual rights have to sit comfortably with this overriding human right to which every one in our community is entitled.¹⁶

Both Ruddock's and Cornall's invocation of the concept of the right to security is at best misleading and at worst plainly wrong. To begin with, the notion of 'community rights' is inconsistent with the very idea of liberal democracy. In a liberal democracy, only individuals, not the society as a whole, can bear rights and legal obligations. And here is the crux and first weakness of Cornall's argument. He treats the community as an organism that makes decisions and has rights that can override those of individuals. But only individuals choose, act, and pursue interests and can bear human rights in the first place.

It is equally problematic to refer to the right to liberty and security of person as a basis for intrusive anti-terrorism laws. It is beyond question that the UDHR as well as the ICCPR and its corresponding regional instruments like the European Convention on Human Rights (ECHR) and the Inter-American Convention on Human Rights protect

the right to liberty and security of person. Article 5(1) of the ECHR states that 'everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law'. Similarly, Article 9(1) ICCPR states that everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

It is widely accepted, however, that this right does not relate to some broader right to safety or to any obligation for the State to protect with positive measures the physical integrity of its citizens.¹⁷ On the contrary, the right to liberty and security of person seeks to confine the power of the State to coerce individuals through arbitrary arrest and detention. As Monica Macovei has pointed out, the expression 'liberty and security of person' has to be read as a whole. 'Security of person' must be understood in the context of physical liberty. It cannot be interpreted as referring to different matters (such as a duty on the State to give someone personal protection from an attack by others, or right to social welfare).¹⁸ This interpretation has also been confirmed by the European Court of Human Rights in Strasbourg.¹⁹

The idea of a right to security has not only featured prominently in the recent political discourse on counterterrorism, but also in the academic debate on the matter.²⁰ The German scholar Günther Jakobs, for example, has sought to construe an individual right to security by referring to the State's obligation to protect the citizenry. In reverse, he argues, the State's duty to protect creates a positive individual right to security which includes the protection from physical harm.²¹ This argument, however, is unconvincing for both factual and dogmatic reasons. Firstly, a review of several constitutions and bills of rights of leading liberal democracies reveals the absence of any specific right to security in the sense of a right to personal protection. The classic liberal democratic constitutions of the United

States and Germany (1949), for instance, do not contain any right to security at all. Other constitutions like the ones of Austria (updated 2000, Article 1), Cyprus (1960, Appendice D, Part II, Article 11), Estonia (1992, Article 20), Hungary (1949, Article 55), Latvia (1992, Article 94), Malta (1964, Article 32), Portugal (1970, Article 27) and Spain (1978, Article 17) recognise a right to security, as does the UK Human Rights Act 1998. However, as with the international human rights instruments, these constitutions refer to the right to security in the context of personal liberty and freedom from arbitrary and oppressive State action.

The idea of an individual right to security is also problematic for systematic and dogmatic reasons. In liberal democracies, it is one of the primary purposes of the State to protect human rights and fundamental freedoms. It is the respect for and the protection of the rule of law and of human rights in their entirety which lead to and help to maintain national security.²² If, however, national security is partly a result of the State respecting, protecting and facilitating *all* human rights, it would not make sense, from a systematic and dogmatic point of view, to create or recognise a separate and/or exclusive legal title or good which allows for an individual claim to security.²³ Otherwise a situation is created in which security policy would become an end in itself rather than a means of facilitating the realisation of liberty. Security policy would then be independent of, and/or competing with, the State's duty to respect and protect human rights. It would become qualitatively equal or superior to the State's obligation to protect human rights. This would ultimately lead to an unlimited relativism where security may always trump the (then) competing interest of human rights protection. This, however, is incompatible with the very idea of liberal democracy. It is a defining characteristic of liberal democracy that security policy is normatively bound to the rule of law and to human rights and not an end in itself.

Indeed, such reasoning would resemble the political authoritarianism formulated by the German political and legal theorist Carl Schmitt during the political turmoil of the Weimar Republic.

Schmitt claimed that the 'existence of the state is undoubted proof of its superiority over the validity of the legal norm'.²⁴ Because the norms of a legal system cannot govern a state of emergency, they cannot determine when such an exceptional state holds, or what should be done to resolve it. Consequently, every legal order ultimately rests not upon norms, but rather on the decisions of the sovereign. The essence of sovereignty lies in the absolute authority to decide when the normal conditions presupposed by the legal authority exist. For Schmitt, the respect and protection of human rights and civil liberties were thus subsidiary to the security considerations of the government (as sovereign).²⁵ It is well known that several aspects of this political theory led to a defence of authoritarian dictatorship and initially to Schmitt's own personal support of National Socialism and the Third Reich.

Even if one accepts the assertion that in certain circumstances a right to security (in the sense of personal protection) may be constructible, this is all the more problematic in the case of international terrorism. In contrast to civil liberties, which are precisely defined, the public good of security is generally unspecific. Arnold Wolfers, for instance, has characterised security as 'the absence of threats to acquired values'.²⁶ Likewise, David Baldwin defined it as 'a low probability of damage to acquired values'.²⁷ Normatively speaking, security can only be negatively defined, in the sense of defence *against* dangers. As a consequence, the definition of these dangers, including their individual assignment, is essential.

The definition of these dangers and their individual assignment might have been possible in previous terrorism crises. For instance, in the cases of left-wing terrorism in Europe in the 1970s and 1980s as well as in the cases of separatist terrorism in Spain and elsewhere, the threats arose from a limited number of individuals operating in a locally confined and restricted environment. As far as the current threat of international terrorism is concerned, however, the individualisation of dangers is no longer possible. The threats and dangers arise from diffuse transnational organisations and

networks without any single sponsor or home-base. If, however, these dangers cannot be sufficiently defined and/or individually assigned, then it is imperative to consider security as a State purpose rather than as an individual right of legal subjects.²⁸ As Oliver Lepsius has noted, this positive State purpose of guaranteeing security must not be confounded with the negative legally protected right of defence against danger; otherwise the different levels get confused.²⁹ This would either lead to security demands which the State is not able to fulfil, or indicate the failure of the legal system. Security thus constitutes an objective that stands above positive law. It must not be used as an argumentative tool on the level of positive law; otherwise positive law can always be trumped by the hyper-positive idea.

Conflicting Rights and the Right to Life

It has been argued that security does not constitute an individual right of legal subjects, and that it therefore cannot be 'balanced' against individual civil liberties. A popular move by supporters of draconian anti-terrorism laws is then to invoke the right to life of victims of terrorist violence. The right to life, so the argument runs, is the supreme human right which trumps all other human rights. At first, such reasoning may appear plausible as well as compatible with the non-consequentialist idea that rights may be balanced against each other but not against social utility. After all, balancing the right to life against other rights would see rights on both sides of the equation. Nevertheless, upon closer examination, this line of argument is problematic for at two major reasons.

Firstly, it is important to realise that the sources of rights violations are different. The right to life of terrorist victims is infringed upon by terrorist action whereas violations of other civil liberties and human rights through anti-terrorism legislation find their origin in government action. A government may only be *indirectly* responsible for the violation of the right to life of terrorist victims (for example, through inaction). Thus the question to be asked is: is a government's

inaction—that is, refraining from introducing legislation or measures that *might* prevent terrorists from infringing upon the right to life of their victims—qualitatively equal to the direct action of introducing repressive laws? It is only when government inaction is regarded to be qualitatively equal to direct government action that one can justifiably invoke the right to life as a ‘balancing right’.

Secondly, while the right to life is undoubtedly one of the most fundamental human rights, it is highly questionable whether it automatically trumps all other human rights. Indeed, the business of conflicts of rights is a terribly difficult area with which legal philosophers and practitioners are only just beginning to grapple.³⁰ A concept that seems to enjoy broad acceptance, however, is that of indivisibility, interdependence and universality of all human rights. This concept, officially recognised by the UDHR, further refined by the UN Human Rights Conference in Vienna in 1993 and cited by many UN documents since, provides that human rights are based on respect for the dignity and worth of all human beings. While the right to life encompasses the right to live itself, it also includes the notion that life ought to be lived with dignity. And it is in this respect that the right to life is not as easily ‘detachable’ from other important rights such as the right to liberty and security of person. The protection of the right to life thus cannot go so far as to constitute a supreme justification for the curtailment of all other rights. Otherwise, a situation is created where other human rights would ultimately lose all effect since they always could be infringed upon in the name of protecting the right to life.

Conclusion

This idea that a ‘balance’ must be struck between national security and civil liberties is problematic for a number of interrelated reasons. From a rights-based perspective, these include particularly the jurisprudential problem of whether and to what extent civil liberties can be actually balanced against community interests at all. A further objection to the notion of balance stems from the argument that

security constitutes a 'state purpose' rather than an individual right of legal subjects. As a consequence, security cannot be legitimately balanced against individual rights and liberties. Finally, even if security is conceived as originating in a government's duty to protect the right to life of citizens, this right to life cannot be easily invoked to curtail other fundamental rights and freedoms.

When assessing the impact of anti-terrorism legislation on civil liberties it is thus imperative to avoid the simple rhetoric of 'balance'. The use of crude metaphors can never be a substitute for sound reasoning, sensible decision-making and effective policy work.

Notes

- ¹ Parts of this article have been published as 'Security against Terrorism: Individual Right or State Purpose?', *Public Law Review*, vol. 16, no. 3, 2005, pp. 78–83 and have also been submitted to the *Melbourne University Law Review* as a longer paper.
- ² Whether or not the interests of the individual are balanceable against the interest of the community at all is a highly problematical question and one that is beyond the scope of this chapter. Suffice it to note that this proposition has been challenged by several eminent scholars. Ronald Dworkin, for instance, has argued that 'the interests of each individual are already balanced into the interests of the community as a whole, and the idea of a further balance, between their separate interests and the results of the first balance, is itself therefore mysterious'. Ronald Dworkin, *A Matter of Principle*, Harvard University Press, Cambridge, MA, 1985, p. 73.
- ³ See, for example, John Stuart Mill, *Utilitarianism, Liberty, and Representative Government*, introduction by A.D. Lindsay, Dent, London, 1964.
- ⁴ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, Doubleday, Garden City, 1961, originally published in 1789.
- ⁵ For an in-depth analysis see, for example, (ed.) Samuel Scheffler, *Consequentialism and Its Critics*, Oxford University Press, Oxford, 1988; and Samuel Scheffler, *The Rejection of Consequentialism: A Philosophical Investigation of the Considerations Underlying Rival Moral Conceptions*, Oxford University Press, Oxford, 1994.

- ⁶ See also Jeremy Waldron, 'Security and Liberty: The Image of Balance', *Journal of Political Philosophy*, vol. 11, no. 2, 2003, p. 194.
- ⁷ John Rawls, *A Theory of Justice*, Harvard University Press, Cambridge, MA, rev. ed. 1999.
- ⁸ Rawls, *A Theory of Justice*, pp. 36–40.
- ⁹ Rawls, *A Theory of Justice*, pp. 214–20.
- ¹⁰ Ronald Dworkin, *Taking Rights Seriously*, Duckworth, London, 1977, pp. 189–94.
- ¹¹ Dworkin, *Taking Rights Seriously*, p. 194.
- ¹² Ronald Dworkin, 'Rights as Trumps' in (ed.) Jeremy Waldron, *Theories of Rights*, Oxford University Press, Oxford, 1984, pp. 153–67.
- ¹³ Dworkin, *Taking Rights Seriously*, p. 194.
- ¹⁴ Philip Ruddock, Address to the Sydney Institute, Attorney General's Department website, 20 April 2004, available at http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Speeches_2004_Speeches_20_April_2004_-_Speech_-_A_New_Framework:_Counter_Terrorism_and_the_Rule_of_Law, accessed 17 October 2005.
- ¹⁵ Philip Ruddock, Letter to Subhi Alshaik, 2 August 2004, Australian Muslim Civil Rights Advocacy Network website, available at <http://www.amcran.org/images/stories/replyletters/Ruddockp4.jpg>, accessed 17 October 2005. (Emphasis added). For a similar argument, see also Philip Ruddock, International and Public Law Challenges for the Attorney-General, Address to the Law Faculty, 8 June 2004, Australian National University website, (paragraph 81), available at <http://law.anu.edu.au/cipl/Lectures&Seminars/04%20Ruddockspeech%208June.pdf>, accessed 17 October 2005.
- ¹⁶ Robert Cornall, A Strategic Approach to National Security, Address to the Security in Government Conference, Canberra, Attorney General's Department website, 10 May 2005, available at http://www.ag.gov.au/agd/WWW/agdHome.nsf/Page/Departmental_Speeches_2005_Departmental_Speeches_10_May_2005_Secretary_Speech_Security_in_Government_Conference, accessed 17 October 2005.
- ¹⁷ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, N.P. Engel, Kehl, 1993, pp. 161–63. See also Jochen A. Frowein and Wolfgang Peukert, *Europäische Menschenrechtskonvention: EMRK-Kommentar*, N.P. Engel, Kehl, 1985, pp. 53–58.

- ¹⁸ Monica Macovei, *A Guide to the Implementation of Article 5 of the European Convention on Human Rights*, *Human Rights Handbooks*, No. 5, Council of Europe, Strasbourg, 2002, p. 6. This interpretation follows directly from the wording of Articles 5(1) and 9(1) of the ECHR, which both refer to 'security' in the context of protection from arbitrary State action.
- ¹⁹ See, for example, *Bozano v. France* (9990/82) [1986] ECHR 16 (18 December 1986); and *Kurt v. Turkey* (24276/94) [1998] ECHR 44 (25 May 1998).
- ²⁰ In favour of a right to security see, for example Josef Isensee, *Das Grundrecht auf Sicherheit*, Walter de Gruyter, Berlin, 1983; for an argument against a right to security, see for example Jutta Limbach, 'Ist die kollektive Sicherheit der Feind der individuellen Freiheit?', *Die Zeiti*, 10 May 2002.
- ²¹ See, for example, Günther Jakobs, 'Bürgerstrafrecht und Feindstrafrecht', *Höchstrichterliche Rechtsprechung im Strafrecht*, 2004, pp. 88–95.
- ²² See also Emmanuel Gross, 'Legal Aspects of Tackling Terrorism: The Balance between the Right of a Democracy to Defend Itself and the Protection of Human Rights', *UCLA Journal of International Law & Foreign Affairs*, vol. 6, 2001, pp. 165–67.
- ²³ See also Gerhard Robbers, *Sicherheit als Menschenrecht: Aspekte der Geschichte, Begründung und Wirkung einer Grundrechtsfunktion*, Nomos, Baden-Baden, 1987, p. 15.
- ²⁴ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. G. Schwab, MIT Press, Cambridge, MA, 1985, p. 12
- ²⁵ Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*.
- ²⁶ Arnold Wolfers, "'National Security" as an Ambiguous Symbol', *Political Science Quarterly*, vol. 67, 1952, p. 485.
- ²⁷ David A. Baldwin, 'The Concept of Security', *Review of International Studies*, vol. 23, 1997, p. 13.
- ²⁸ See also Oliver Lepsius, 'Freiheit, Sicherheit und Terror: Die Rechtslage in Deutschland', *Leviathan*, vol. 32, 2004, pp. 86–88.
- ²⁹ Lepsius, 'Freiheit, Sicherheit und Terror: Die Rechtslage in Deutschland', pp. 86–8.
- ³⁰ Frances Kamm, 'Conflicts of Rights: Typology, Methodology and Non-consequentialism', *Legal Theory*, vol. 7, 2001, pp. 239–61.

CHAPTER 4

ETHICS IN THE TIME OF ANTHRAX: BIOLOGICAL THREAT ASSESSMENT IN THE UNITED STATES

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In the weeks following the 11 September 2001 attack on the World Trade Center, five Americans died after being deliberately infected with anthrax bacteria. Although the two events were almost certainly of separate origin, in combination they generated intense fears of a future biological attack causing mass casualties. The US Government had been aware of the increasing potential for biotechnology to be misused long before the anthrax attacks, and the Clinton Administration had begun bolstering US biodefence capabilities in the late 1990s. In the post-11 September 2001 atmosphere, however, annual federal government spending on biodefence programs has increased enormously—from \$US414 million in FY2001 to \$US7.6 billion in FY2005.¹ This chapter discusses the legal and ethical questions arising from past and current US biodefence projects. Such projects might reduce the vulnerability of Americans to a biological attack, but they also pose risks to national and international security. Of particular concern are projects, conducted for ‘threat assessment’ purposes, which

investigate offensive biological weapons (BW) capabilities. The main challenge for the United States is to pursue biodefence in a way that does not endanger the norm against deliberate disease, as embodied in the 1972 Biological Weapons Convention (BWC).

Threat Assessment

At the Los Alamos National Laboratory in New Mexico, scientists build elaborate computer models of cities and then simulate the fallout from a hypothetical terrorist attack. Findings from simulations of a smallpox release in a major city have contributed to the debate in the United States over whether targeted vaccinations or mass vaccination of the entire country is preferable. In July 2005, a scientist on the smallpox simulation project, James Smith, told the *Washington Post*: 'We're trying to be the best terrorists we can be. Sometimes we finish and we're like, "We're glad we're not terrorists"'. If ever the simulations got into the wrong hands, Smith said, '[i]t would be a terrorist recipe for doing something terrible'.² Computer modelling of a smallpox event probably does not contravene the BWC, although the Los Alamos example illustrates how information obtained in the interests of defence could be used for offensive purposes.

Research and development projects on BW threat assessment involve experimenting with the offensive applications of pathogens so as to determine appropriate countermeasures—a practice known as 'red teaming'. In order to develop medical defences against a putative BW agent, it is necessary to understand (1) the underlying mechanisms for pathogenicity, including infectivity and virulence; (2) the way in which a micro-organism evades the human immune system or acquires resistance to antibiotics; and (3) the ways in which the agent may be dispersed, and its infectivity by each route. However, an understanding of these factors is also exactly what would be required for the development of BW.³

Article I of the BWC prohibits the development, production and stockpiling of BW, but the Convention is silent on the question of research. In accordance with National Security Decision Memorandum 35, issued by National Security Advisor Henry Kissinger on 25 November 1969, the United States interprets its responsibilities under the BWC as permitting 'research into those offensive aspects of bacteriological/biological agents necessary to determine what defensive measures are required'.⁴ The memorandum did not specify what types of research were justified for defensive purposes. On 23 December 1975, National Security Advisor Brent Scowcroft issued a second memorandum authorising 'vulnerability studies' as permissible under the BWC, but there was no express authority for the creation of novel pathogens or the investigation of weaponisation techniques for threat assessment purposes.⁵ In May 1989, however, in testimony before the US Senate Committee on Government Affairs, Colonel David Huxsoll, commander of the United States Army Medical Research Institute for Infectious Diseases (USAMRIID), stated that research to produce more virulent agents, to stabilise agents, and on dissemination methods, was prohibited by the BWC.⁶

Such comments by a US military officer today would not reflect the view of the Department of Defense on what constitutes 'defensive' work. At present, a number of US Government agencies are undertaking or plan to undertake research in exactly the areas cited by Huxsoll. Most prominent among these is the National Biodefense Analysis and Countermeasures Center (NBACC). Due to be completed in 2008, it is intended to provide the United States with high-containment laboratory space for biological threat characterisation and bioforensic research. NBACC will form part of the National Interagency Biodefense Campus at Fort Detrick, Maryland alongside USAMRIID and other government research facilities. Its programs will investigate the infectious properties of biological agents, the effectiveness of countermeasures, decontamination procedures, and forensic analysis. Part of NBACC is the Biological Threat Characterization Center, which will conduct

laboratory experiments aimed at filling in information gaps on current and future biological threats. The Center will also assess vulnerabilities, conduct risk assessments, and determine potential impacts in order to guide the development of countermeasures such as detectors, vaccines, drugs, and decontamination technologies.⁷

Non-government experts on biological warfare have argued that many of the activities to be undertaken by the NBACC could readily be interpreted by outsiders as the development of BW under the guise of threat assessment.⁸ In particular, weaponisation projects and the construction of novel (i.e., not previously existing) pathogens arguably constitute breaches of Article I of the BWC. In a February 2004 presentation, Lieutenant Colonel George Korch, Deputy Director of NBACC, revealed that one of his Center's research units intended to pursue a range of topics including 'aerosol dynamics', 'novel packaging', 'novel delivery of threat', 'genetic engineering', and 'red teaming'. At one point in his presentation, Korch summarised the threat assessment task areas as: 'Acquire, Grow, Modify, Store, Stabilize, Package, Disperse'.⁹ Such language is identical to that which might describe the functions of an offensive BW program.

To demonstrate exactly how a BW threat assessment project might contravene international law, the next section weighs the details of three past US projects against the prohibitions contained in Article I of the BWC.

Possible US Breaches of the BWC

In September 2001, the *New York Times* revealed the existence of three classified US projects which all appeared to contravene the legal limits laid down by the BWC:

- from 1997 to 2000, Project Clear Vision involved building and testing a Soviet-model bomblet for dispersing bacteria;
- from 1999 to 2000, Project Bacchus investigated whether a would-be terrorist could assemble an anthrax production facility,

undetected by US and foreign governments, using commercially available materials and equipment; and

- in early 2001, Project Jefferson involved the recreation of a vaccine-resistant strain of anthrax bacteria.¹⁰

Although a number of authors have already questioned the legality of these projects in general terms,¹¹ this section assesses the issue in greater detail using the precise wording of Article I of the BWC:

Each State Party to this Convention undertakes never in any circumstances to develop, produce, stockpile or otherwise acquire or retain:

- (1) Microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;
- (2) Weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.

Clear Vision

Of the three projects, the one most likely to have contravened the BWC was Clear Vision. This involved tests of bacteria bomblets, built according to a Soviet model, and conducted by Battelle, a military contractor in Columbus, Ohio. The bomblets were filled with simulant pathogens and tested for their dissemination characteristics and performance under different atmospheric conditions. Experiments in a wind tunnel revealed how the bomblets, after being released from a warhead, would fall on targets.¹² Before the testing took place, some US Government legal experts had argued the experiments were not a breach of the BWC provided they were not intended for offensive purposes. Other officials argued that a weapon was, by definition, meant to inflict harm and therefore crossed the boundary into offensive work: 'A bomb was a bomb was a bomb'.¹³

Indeed, on a close reading of Article I, there is a strong case to be made that the BWC bans delivery systems categorically, whether intended for defensive purposes or not. Article I, paragraph (1) of the Convention permits the use of biological agents or toxins of types and in quantities justified for 'prophylactic, protective and other peaceful purposes'. This is generally construed to include the development of medical defences against biological attacks. Paragraph (2), however, is worded differently. It prohibits 'weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict'. There is no provision for delivery mechanisms to be justified for 'prophylactic, protective and other peaceful purposes', and the paragraph does not contemplate delivery mechanisms being *intended* for hostile purposes. In other words, biological agents are dual use but BW delivery mechanisms are not.

The drafting of international treaties is an arduous process involving careful and deliberate choices of language. It is therefore significant that paragraphs (1) and (2) of Article I are written differently. Former US ambassador James Leonard, who led the original US negotiations of the BWC, has explained why the language of Article I with regard to delivery devices is more restrictive. According to Leonard, the BWC was never intended to legitimise the development and production of delivery devices for defensive purposes. If it were, countries would be able to develop and build the components for an entire weapon in the name of defence.¹⁴ This interpretation of Article I was also a feature of draft recommendations for a biodefence code of conduct distributed by a group of NGOs to official delegations attending the resumed session of the Fifth BWC Review Conference in November 2002. The NGOs argued that it is not permissible, even for defensive purposes, to construct delivery mechanisms *designed* for hostile use, whether or not hostile use is *intended* at the time of construction.¹⁵

Although a weaponisation project like Project Clear Vision would be outside the limits of the BWC, it could nevertheless be considered

legal under US domestic law. Under Title 18, section 175 ('Prohibition with respect to biological weapons') of the United States Code, the development, production, stockpiling, transfer, acquisition, retention, or possession of any biological agent, toxin, or delivery system for use as a weapon is prohibited. However, the legislation defines the term 'for use as a weapon' to exclude 'the development, production, transfer, acquisition, retention, or possession of any biological agent, toxin, or *delivery system* for prophylactic, protective, or other peaceful purposes' (emphasis added). The difference in wording compared to that of Article I of the BWC might well have led some US officials to believe there was nothing wrong with Project Clear Vision.

Bacchus

Project Bacchus (named after the Roman god of fermentation) built a functioning facility that turned out two pounds of *B anthracis* (anthrax) simulants—*B thuringiensis* and *B globigii*. The dried bacteria particles were one to five microns in diameter—the size most suitable for inhalation. As the journalists who revealed the existence of this project observed: 'If anthrax spores had been dropped into the fermenters, the United States could have made enough biological agent to mount a deadly attack'.¹⁶

On a favourable reading of Article I of the BWC, emphasising the words in paragraph (1), Bacchus produced a harmless *type* of biological agent in small *quantities* and therefore had a justification for the *peaceful purpose* of investigating the capabilities of potential enemies of the United States. Another reading, emphasising paragraph (2), might be that, regardless of whether the biological agents used were harmless, the United States had produced *equipment* that was *designed* (albeit not intended) to use biological agents for *hostile* (terrorist) purposes. In effect, the United States had assembled everything necessary to produce BW short of an actual micro-organism capable of causing disease in humans. This means the BWC legality of Bacchus is at least questionable.

Jefferson

Closer to being permissible under the BWC was Project Jefferson. This involved experiments to reproduce the results of Russian research, published by the journal *Vaccine* in 1997, that had created a vaccine-resistant strain of anthrax bacteria. The researchers had inserted genes from *B cereus* into *B anthracis* and showed that the engineered bacteria were highly lethal against hamsters, even when they had been inoculated with Russia's standard anthrax vaccine.¹⁷ The US officials involved in the project were mindful of the BWC and the need for defensive intent. Accordingly, Jefferson was to produce only small quantities—one gram or less—of the modified anthrax.¹⁸

The relevant BWC wording is contained in the first paragraph of Article I. On one interpretation, Project Jefferson had *produced* a biological agent capable of evading a vaccine and was therefore of a *type* which, in *quantities* however small, had no peaceful purpose. A more favourable reading of the Convention, and that which is probably most fair, is that the project reproduced a *type* of biological agent for the *protective* purpose of developing countermeasures against a *known* threat. By the same reasoning, however, there would be serious doubts about whether a *peaceful purpose* was behind any military-linked effort to produce a new agent that had not already appeared in the scientific literature. On this point turns the BWC legality of some current US biodefence research into genetically modified pathogens.¹⁹

Transparency and BW Proliferation

The above three projects were conducted in secret, and this reflects the traditional instinct of governments to associate security with obscurity. However, for the United States and any other country engaged in BW threat assessment, a policy of transparency has both legal and strategic advantages. From the perspective of international law, greater transparency would facilitate monitoring of member state compliance with the BWC. In addition, to the extent

that transparency can lessen international suspicions about a given country's biodefence program, this reduces the risk of BW proliferation.

In its endeavours to address BW threats, a key challenge for the United States is to pursue defences in a way that does not endanger the norm against deliberate disease, as embodied in the BWC. In written testimony to the US Senate Committee on Foreign Relations in 2001, Nobel laureate Joshua Lederberg argued:

We have to be careful to behave ourselves fully consistently with abhorrence at the idea of using disease as a weapon. ... A particular dilemma is how to study the BW threats in detail, how to develop vaccines and other countermeasures, without attracting such accusations [of breaching the BWC]. I believe the executive and legislative branches could develop models of entrusted transparency for oversight of such necessary studies, both for assurance to global publics, and to be certain there are no careless projects oblivious to the reputational or physical harm they could inflict on our polity.²⁰

The importance of transparency was recognised in 1986 at the Second BWC Review Conference when member states agreed to specific confidence-building measures (CBMs). These were extended and elaborated at the Third BWC Review Conference in 1991. The CBMs include:

- exchange of data on research centres and high-containment laboratories;
- exchange of data on national biological defence programs and associated facilities, as well as descriptions of the same;
- declarations on vaccine production facilities;
- exchange of information on unusual infectious disease outbreaks;
- encouragement of publication of experiment results and promotion of use of knowledge;

- active promotion of scientific contacts through international conferences, symposia, seminars and other forums for exchange; and
- declaration of legislation, regulations and other BWC implementation measures.²¹

On the whole, the annual CBM returns of BWC member states have been few in number and of poor quality. For some countries, non-participation in the CBM process might be the result of technical difficulties, insufficient personnel and limited resources. Other countries, however, might simply be eschewing transparency. In the case of the United States, there was no mention of Clear Vision, Bacchus or Jefferson in its CBM declarations before the projects were revealed by journalists in 2001.²²

If similar projects had been carried out inside a designated 'rogue state', they would undoubtedly have been viewed by the United States and other Western countries as violations of the BWC. For this reason, the latter cannot afford to be complacent about non-Western perceptions of ostensibly defensive BW activities. As the British Medical Association recently acknowledged, 'some countries may not view the West as benign in general and some biotechnology work being carried out in the West as necessarily above suspicion'.²³ Indeed, the Soviet Union might have maintained its BW program after signing the BWC in 1972 because it believed the United States intended to do likewise, notwithstanding President Richard Nixon's 1969 decision to renounce biological warfare. In his 1999 memoir *Biohazard*, Soviet defector Ken Alibek reflected:

We didn't believe a word of Nixon's announcement. Even though the massive U.S. biological munitions stockpile was ordered to be destroyed, and some twenty-two hundred researchers and technicians lost their jobs, we thought the Americans were only wrapping a thicker cloak around their activities.²⁴

The difficulty of determining BWC compliance lies in the extent to which it comes down to perceptions of a given state's intent. And

because intent is hard to judge reliably, states naturally err on the side of caution by focusing on the capabilities of potential adversaries. For a number of authors, allaying BW suspicions therefore requires as much transparency as possible regarding such capabilities as is consistent with national security.²⁵ At the 2002 resumed session of the Fifth BWC Review Conference, a group of NGOs recommended that the results of biodefence activities might need to be kept confidential, but that secrecy concerning the types and locations of such activities should be disavowed.²⁶ Similarly, Jonathan Tucker advocates publicly describing defensive BW programs in general terms while omitting technical details. This, he argues, would help to build confidence in US compliance with the BWC without making it easier for adversaries to circumvent planned defences.²⁷ A recent indication that the United States might be moving towards greater transparency is the publication online of its 2004 return on BWC CBMs.²⁸

Beyond the legal issue of BWC compliance, transparency is also important for strategic reasons. Since the end of the Cold War, and beginning with the Clinton Administration, the United States has shifted its focus away from the problem of state BW programs and towards concerns about 'bioterrorism' by non-state actors. However, the dynamics of proliferation by states are still important today. For at least three reasons, the very existence of the US biodefence program might induce other countries to imitate it—BW proliferation in a defensive guise. Firstly, to a highly suspicious military adversary, the development of medical defences might constitute an attempt to acquire protection for a nation's own military forces against a biological agent that the nation intends to use in a BW first strike.²⁹ Prior to the 1991 Gulf War, for example, one alleged reason why the US military became concerned about the use of *B anthracis* was the discovery that Iraqi soldiers captured in a covert pre-war operation had immunity against anthrax.³⁰

Secondly, any close association between 'defensive' BW work and existing military programs can create nervousness in an outside

observer. For example, the present conduct of classified biodefence research at the Lawrence Livermore and Los Alamos National Laboratories might cause other countries to be concerned about possible US offensive intent because these facilities have historically been used for nuclear weapons development.³¹ Thirdly, as discussed previously, the greatest risk of BW proliferation is stimulated by US threat assessment projects. In particular, rival nations might be concerned that American exploration of novel BW threats could generate scientific breakthroughs that put them at a strategic disadvantage.³² The result could be a BW arms race.

Conclusion

In conducting defensive work on pathogenic agents, the United States needs to be sensitive to how that work may be perceived by others. There is a particular danger that current and planned US projects on BW threat assessment could be seen as breaches, actual or potential, of the prohibitions in Article I of the BWC. And that danger appears more vivid in light of the possibility that the United States has already violated the Convention through similar projects in the past. Absent appropriate transparency measures, the development of offensive capabilities for defensive purposes poses a serious risk of undermining the international norm against BW. This in turn would exacerbate and accelerate the problem of BW proliferation. Five years on from the 2001 anthrax attacks, the United States must ensure its biological countermeasures are not counterproductive.

Notes

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CHAPTER 5

CHALLENGING JUST WAR AND DEMOCRATIC PEACE: A CRITICAL PERSPECTIVE ON KANT AND HUMANITARIAN INTERVENTION

Jeremy Moses

The legacy of Immanuel Kant for contemporary international relations is complex and contested. Over the past 25 years we have, however, seen an increasingly influential body of work put forward, usually under the moniker of 'democratic peace theory', which has claimed Kant as its philosophical progenitor.¹ Put simply, the central notion of the democratic peace theorists is that liberal-democratic nations do not fight one another and that this is best understood as the contemporary manifestation of Kant's proposed 'republican peace', put forward in his short treatise *Toward Perpetual Peace*, which was first published in 1795. The obvious corollary to such an argument, either implicitly or explicitly, is that 'we' (always referring to Western liberal-democracies) should do all in our power to convert those states that do not subscribe to this political system, either by persuasion or, if necessary, by force, in order to bring about the promise of perpetual peace for generations to come.

This paper aims to reconsider some of the assumptions about Kantian philosophy that have been adopted within the democratic peace literature, in order to demonstrate that not only are many of the arguments put forward contrary to Kantian theory, but further, that Kant's warnings against adopting such a posture in international relations offer some salutary lessons as to why Western liberal-democracies should *not* become involved in transforming the world in its own liberal-democratic image.

Kant and Just War Theory

The first serious point of tension for those who want to use Kant as the basis for a pro-interventionist position arises in relation to the conflict between sovereignty and intervention. On this issue, it is fair to say that the current 'legal' prohibition on intervention under the UN Charter seems to be very much in keeping with the central tenets of Kant's *Perpetual Peace*. Indeed, it is clear that Kant supported a very strong notion of non-intervention, arguing that people of different nations need to come to the principles of freedom through the reasoned adoption of a republican constitutionalism *without outside interference*. The 'Fifth Preliminary Article' of *Perpetual Peace* covers this very issue, with Kant insisting on the sanctity of state sovereignty and rejecting the possibility that any 'scandal' caused by one state can provide justification for another state to intervene.² Further, no state had any right to 'punish' another state for poor behaviour toward its own citizens, as:

Punishment presupposed a relationship obtaining between a superior and an inferior. However, no such relationship obtained as between independent states, with the consequence that no state could be thought of as waging a war whose justification and objective were understood to concern the punishment of another state.³

The only exception to this strict rule of non-intervention arises when civil war breaks out and leaves a country without any effective form of government at all, meaning that 'a foreign state could not be charged with interfering in the constitution of another state if it gave

assistance to one of them (for this is anarchy)'.⁴ Given that humanitarian intervention is aimed at the prevention of human rights abuses by an existing government, it would seem difficult to use this rationale as a logical and legitimate basis for the legalising of such intervention.

Yet for contemporary proponents of humanitarian intervention, such a prohibition on interference in the affairs of other states is seen as limited and inapplicable in the contemporary context. Fernando Tesón, for example, argues that the strong rule against intervention set down by Kant was intended to apply *only* to states that have a liberal democratic constitution and which respect human rights. Thus:

Because members of the liberal alliance are in compliance with the First Definitive Article, force will never need to be used to exact compliance with their international obligations. However, force will sometimes have to be used against non-liberal regimes as a last resort in self-defense or in defense of human rights ... violence may be the only means to uphold the law and to defend the liberal alliance against outlaw dictators that remain non-members. Such, I believe, is the proper place of war in Kantian theory.⁵

The argument here is that defence of human rights everywhere is somehow akin to *self*-defence of the moral and legal alliance of liberal-democratic states, insofar as individual human rights rank higher than state rights. By extension, the protections of the UN Charter should also only extend to those states that respect human rights and operate in a liberal-democratic fashion or, in Tesón's words:

Noninterventionism ... follows from whatever theory of internal legitimacy one adopts. If the only just political arrangement is the republican constitution, state sovereignty reacquires its shielding power only in states that have adopted and implemented such a constitution. Sovereignty is to be respected only when it is justly exercised.⁶

This idea has had a heavy and influential presence in the debates surrounding the Kosovo intervention in 1999 and the launching of

war against Iraq in 2003, where the principle of state sovereignty was viewed by pro-interventionists as nothing more than an archaic hindrance to the spread of human rights and freedom. This was precisely the argument put forward by Czech President Vaclav Havel in establishing his support for the NATO action in 1999:

This war places human rights above the rights of the State ... although it has no direct mandate from the UN, it did not happen as an act of aggression or out of disrespect for international law. It happened, on the contrary, out of respect for a law that ranks higher than the law which protects the sovereignty of states. The alliance has acted out of respect for human rights as both conscience and international legal documents dictate.⁷

While not a universally accepted position, this argument is the product of a long debate within philosophy and international relations circles. It puts forward the supremacy of individual rights as an unquestionable fact, and bases this upon 'conscience', the definition of which has long been the self-appointed domain of 'civilised' international lawyers.⁸ Even if we add to this the extremely dubious argument that 'international legal documents dictate' the supremacy of human rights, neither of these elements, despite the confidence with which they are argued, provided a clear, universally agreed, legal mandate to wage war against Serbia.⁹

However, despite the publication or presentation of many well-founded political, legal, or moral objections to the NATO attack, the 'conditional sovereignty' argument remained potent and influential. This was most clearly demonstrated in early 1999 when, as NATO's bombing campaign over Serbia continued, the Secretary General of the United Nations, Kofi Annan, made an important statement on this matter in arguing that:

As long as I am Secretary-General, the United Nations as an institution will always place human being at the centre of everything we do. *No government has the right to hide behind national sovereignty in order to violate the human rights or fundamental freedoms of its peoples.* Whether a person belongs to the minority or the majority, that person's human rights and fundamental freedoms are sacred.¹⁰

Similarly, when US Secretary of State Madeleine Albright argued that 'the crisis in Kosovo should cause a re-examination of the paradigms of the past',¹¹ it was clear that she was referring to the paradigm of sovereign immunity which would normally prevent such an intervention.

Others, such as international lawyer Geoffrey Robertson, have argued that 'superpower irresponsibility', particularly on the part of Russia and China, in failing to act against human rights abuses within other states, has led to the point where the UNSC can no longer be relied upon as the authority for determining what is and what is not a legal war.¹² Thus, for Robertson:

The radical possibility occurs that human rights might have a healthier future if it parted company with the United Nations, if that body were replaced or marginalized by a democratic 'coalition of the willing': an organization comprising only countries which are prepared to guarantee fundamental freedoms through representative government, independent national courts and by pledging to support an independent international justice system... Might it now be worth constituting a world government of 'parliamentary peoples' which would safeguard human rights by being premised upon them, a kind of global NATO, no longer lumbered with backward or barbaric states...?¹³

So this first problem, of whether intervention is permissible as against sovereign immunity, has generally been resolved by asserting the natural supremacy of liberal democratic powers over those that abuse their own citizens. These liberal-democratic states, usually led by the United States and the United Kingdom, are then considered (or consider themselves), as a result of their 'advanced' status, as being entitled to intervene against the 'failed' or 'rogue' states in order to protect human rights and expand the peaceful international community.

Yet despite the obvious attempts to fit such an approach into a Kantian schema, I believe that a number of serious objections can and must be made to this pro-interventionist position. The most obvious of these is the point that I have already made: Kant clearly

rejected any notion of a right to intervene in the affairs of another sovereign state. Was this limited to liberal-democratic states? Not at all, and this point seems to come across quite explicitly in his argument, in the 'Fifth Preliminary Article' of *Perpetual Peace*, that:

The example of the great troubles a people has brought upon itself by its lawlessness; and, in general, the bad example that one free person gives another (as *scandalum acceptum*) is no wrong to it. ... *such interference of foreign powers would be a violation of the right of a people dependent on no other and only struggling with its internal illness; thus it would itself be a scandal given and would make the autonomy of all states insecure.*¹⁴

The domestic social contract, in other words, was not something that could be imposed from outside. On the contrary, it had to come from within, through a process of struggle followed by rational consideration and agreement on the part of the people within the state. Contrary to the formulations of neo-Kantian interventionists, Kant saw sovereignty not as a hindrance to the spread of human rights, but as a *necessary condition* for the spread of human rights. As I will argue below, this is an issue that must be taken seriously in debates about the legitimacy of humanitarian intervention, particularly considering the dislocated, violent mess that has been left behind in both Kosovo and Iraq as a result of such interventions.

Kant and Democratic Peace Theory

The second major point of contention concerns the role played by Kantian theory in the production of 'democratic peace theory'. Since the publication of two articles by Michael Doyle in 1983, which sought to provide statistical evidence in support of the idea that democratic nations do not fight each other, and specifically linked this 'democratic peace' to Kant's *Perpetual Peace*, a whole sub-discipline of international relations has formed which has sought to reinforce this idea with mountains of dubious statistical evidence and sweeping claims about the inherent peacefulness of inter-democratic international relations.¹⁵ The consequence of such faith in democracy is, for many writers in the area, that the spread of democracy will

lead to the spread of peace. From this point, it is a very small step to arguing in favour of military interventions that may bring democracy to nations that have not adopted it. Democratic peace theory has, as a consequence, been prevalent in the arguments in favour of humanitarian intervention and the 'war on terror'.

While there is no doubt that Kant believed in the potential of a liberal 'republican' peace as the best possible outcome for international relations, is it right to conclude that this is the same thing as a 'democratic peace'? Many writers in the field of democratic peace theory have concluded that 'there is nothing within *Perpetual Peace* which specifically rejects the idea that democratic processes must be present alongside constitutional protection for individuals against governmental power'.¹⁶ Fernando Tesón, for example, argues that 'By 'republican', Kant means what we would call today a liberal democracy, a form of political organization that provides full respect for human rights'.¹⁷ Yet such interpretations appear to fly in the face of Kant's argument in the 'First Definitive Article' of *Perpetual Peace*, where the rejection of democratic government is clearly set out 'So that a republican constitution will not be confused with a democratic constitution (as usually happens)'. The main problem identified by Kant is that democracy

is necessarily a *despotism*, because it establishes an executive power in which all decide for and, if need be, against one (who thus does not agree), so that all, who are nevertheless not all, decide; and this is a contradiction of the general will with itself and with freedom.¹⁸

It is amazing that such a clear and definitive dismissal of the 'liberating' potential of democracy has been so comprehensively ignored within a discipline that claims to be an heir of Kantian thought. Where Kant's objections to democracy are noted at all, they are generally dismissed as being a relic of Kant's times, no longer relevant to international politics, or they are adapted to suit the needs of those who seek to use *Perpetual Peace* as an authority for the promotion of humanitarian intervention, *a la* Tesón.

Indeed, the influence of democratic peace theory in the political rhetoric surrounding humanitarian intervention and the war on terror has been dramatic and sustained. During the bombardment of Serbia in 1999, Madeleine Albright suggested that:

Our intent is to move ahead on all fronts to assist the nations of Southeast Europe in their efforts to strengthen democratic institutions, reform their economies, promote the rule of law and integrate themselves into the mainstream of the Euro-Atlantic community. The door to participation in this strategy will be open to every nation in the region that is willing to walk through it, including Serbia, when it has leaders who are democratic, law-abiding and desirous of living in peace.¹⁹

Implicit in this statement is the notion of 'conditional sovereignty' that I discussed earlier, with the insinuation that states can only achieve status as equal members of the international (legal) community if they adopt certain Western standards and practices. This was a message that would be repeated *ad nauseum* over the whole period of intervention.

Likewise, particularly following the failure to find WMD in Iraq, emphasis has been placed upon the potential 'peace dividend' that will come from the democratisation of that devastated country. In his 2005 inauguration address, George W. Bush stated: 'it is the policy of the United States to seek and support the growth of democratic movements and institutions in every nation and culture, with the ultimate goal of ending tyranny in our world'.²⁰ Previously he had declared the war in Iraq to be a part of a 'global democratic revolution'.²¹ Again, the argument is that the horrendous violence now being played out in Iraq is 'worth it' as the country will soon be able to take its place amongst the 'democratic' and 'peaceful' international community.

Yet the problem of democratic reform is, I would argue, an issue that should be taken very seriously by those who seek to understand the problems of humanitarian intervention, for there is no doubt that the difficulties of democracy pointed out by Kant remain important,

and never more so than in states like Serbia and Iraq. The problem in both of these countries is that the intervening powers have based their faith in democratic success on the political unity of 'ethnic majorities', composed of individuals who will supposedly share the same political goals and the same electoral preferences. So, in the case of Serbia, the whole rationale for intervention focused upon the notion of 'self-determination' for the Kosovar Albanians, who, it was claimed, deserved the right to govern Kosovo simply because they were a majority in that province.²² Needless to say, such a simplistic approach neglected the political conflicts within the Kosovar Albanian society, as well as marginalising the remaining Serb population, who have since refused to take part in elections in the province.²³ This, of course, is precisely the danger of democracy pointed out by Kant in *Perpetual Peace*, where the assumption of 'majority rules', and the inevitable suppression of the 'universal will' that follows, prevents the formation of a truly free liberal republic. Major riots in March 2004, which killed around thirty people in Kosovo, are indicative of the lack of progress in integrating the *whole* Kosovar population into a stable liberal republic, with some commentators now referring to 'reverse ethnic cleansing' against the Serb population.²⁴ This is not even to mention the fact that the final status of Kosovo is yet to be determined. Will it be an autonomous province of Serbia? Will it be an independent sovereign nation? Will NATO forces depart and again allow the intermingling of the warring ethnic groups? What will become of the minority Serb population under an Albanian democratic majority? All of these questions raise serious doubts about the potential for peace offered by a forced transition to democracy in any divided society.

Many of the same questions are now being raised in Iraq, where ethnicity is again being seen as the determining factor.²⁵ Will the Shi'ite population dominate? How will the Kurds make their presence felt? What about the formerly dominant Sunni minority? If the principles applied to Kosovo were applied in Iraq, the country would have to be split into at least three separate sectors, with a self-determining ethnic majority in each. Yet this would still not solve the

problem of minorities within those sectors, again raising the question as to whether a democratic system can adequately represent all the people of Iraq without descending into majoritarian despotism.²⁶ Despite these serious questions and dilemmas, there remains an almost blind faith in the idea of democratic peace, and the argument that military intervention can and should be used in order to bring it to fruition. It is a faith, I would argue, that has little in common with Kant's *Perpetual Peace* and which could, indeed, take some salutary lessons from that text.

Conclusion

Given the dramatic inconsistencies between the work of Kant and the interpretations of that work offered by contemporary proponents of humanitarian intervention and democratic peace theorists, we might ask: Why Kant? There are many possible answers to this puzzle. Perhaps it is the sheer esteem and gravity that such a figure lends to the cause of 'democratic peace' that causes its adherents to overlook the incompatibilities. Or perhaps it is the force of Kant's universal theory of reason that, as Martti Koskeniemi has argued, 'leads automatically to expansionism in practice'.²⁷ In other words, perhaps it is Kant's theorising of justice as a knowable product of natural reason that gives those who wish to justify wars of intervention all the requisite moral certainty and rhetorical ammunition to undertake such a task.

Yet even if we accept Kant's role in the contemporary manifestation of humanitarian intervention, this does not dispel the need for critical enquiries into the coherence of such arguments, particularly when they appear to contradict the very principles upon which they claim to be based. In this regard, I have demonstrated above that there are some serious divergences of opinion between Kant and contemporary proponents of humanitarian intervention on fundamental questions such as the right to intervene, and the usefulness of democratic transformation as a path toward perpetual peace. It is to be hoped that such challenges to the logic of humanitarian intervention and democratic peace will lead to a more

critical and less permissive approach to wars fought in the name of human rights and freedom, in order that we might avoid the potential horror of perpetual war.

Notes

- ¹ Two articles by Michael Doyle in 1983 are generally viewed as the starting point for this approach: Michael Doyle, 'Kant, Liberal Legacies, and Foreign Affairs', *Philosophy and Public Affairs*, vol. 12, no. 3, 1983, Michael Doyle, 'Kant, Liberal Legacies, and Foreign Affairs, Part 2', *Philosophy and Public Affairs*, vol. 12, no. 4, 1983. For the purposes of this chapter, I will focus largely on the interpretation of Fernando Tesón in Fernando R. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality*, Transnational Publishers, Dobbs Ferry, NY, 1988; Fernando R. Tesón, 'The Kantian Theory of International Law', *Columbia Law Review*, vol. 92, no. 53, 1992; and Fernando R. Tesón, *A Philosophy of International Law*, Westview Press, Boulder, CO, 1998.
- ² Immanuel Kant, 'Toward Perpetual Peace' in *Practical Philosophy*, (ed.) Mary Gregor, Cambridge University Press, Cambridge, 1999, p. 319.
- ³ Charles Covell, *Kant and the Law of Peace : A Study in the Philosophy of International Law and International Relations*, MacMillan Press, NY, 1998, p. 113.
- ⁴ Kant, 'Toward Perpetual Peace', p. 319.
- ⁵ Tesón, 'The Kantian Theory of International Law', pp. 89–90. Emphasis added.
- ⁶ Tesón, 'The Kantian Theory of International Law', pp. 89–90.
- ⁷ Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice*, The New Press, NY, 1999, p. 407.
- ⁸ For an excellent account of the development of European international law as the domain of 'civilised conscience', see Martti Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960*, Cambridge University Press, Cambridge, 2001.
- ⁹ For discussion and assessment of the legal arguments, see Antonio Cassese, 'A Follow-Up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*', *European Journal of International Law*, vol. 10, no. 4, 1999, and Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects', *European Journal of International Law*, vol. 10, no. 1, 1999.

- ¹⁰ Kofi Annan, 'Secretary-General to Commission on Human Rights: I Have Made Human Rights a Priority in Every United Nations Programme' (paper presented at the Commission on Human Rights, Geneva, 7 April 1999). Emphasis added.
- ¹¹ Madeleine Albright, 'To Win the Peace...', *Wall Street Journal*, 14 June 1999.
- ¹² Robertson, *Crimes against Humanity*, p. 411.
- ¹³ Robertson, *Crimes against Humanity*, p. 447.
- ¹⁴ Kant, 'Toward Perpetual Peace', 319–20. Emphasis added.
- ¹⁵ See, for example, Doyle, 'Kant, Liberal Legacies, and Foreign Affairs'; Doyle, 'Kant, Liberal Legacies, and Foreign Affairs, Part 2'; Francis Fukuyama, 'The Ambiguity of National Interest' in *Rethinking Russia's National Interests*, (ed.) Stephen Sestanovich, Center for Strategic and International Affairs, Washington DC, 1994, p. 17; J. R. O'Neal et al., 'The Liberal Peace: Interdependence, Democracy, and International Conflict, 1950-85', *Journal of Peace Research*, vol. 33, no. 1, 1996; and B. Russett, *Grasping the Democratic Peace: Principles for a Post-Cold War World*, Princeton University Press, Princeton, 1993. For statistical analyses which seek to 'prove' the existence of a democratic peace, see Nils Petter Gleditsch, 'Geography, Democracy, and Peace', *International Interactions*, vol. 20, no. 4, 1995, Margaret G. Hermann and Charles W. Kegley, 'Rethinking Democracy and International Peace: Perspectives from Political Psychology', *International Studies Quarterly*, vol. 39, no. 4, 1995.
- ¹⁶ Patrick Capps, 'The Kantian Project in Modern International Legal Theory', *European Journal of International Law*, vol. 12, no. 5, 2001, p. 1006.
- ¹⁷ Tesón, 'The Kantian Theory of International Law', p. 61.
- ¹⁸ Kant, 'Toward Perpetual Peace', p. 34.
- ¹⁹ Albright, 'To Win the Peace...'
- ²⁰ The full text of the speech is available at: George W. Bush, President Sworn-in to Second Term, White House website, 20 January 2005, available at <http://www.whitehouse.gov/news/releases/2005/01/20050120-1.html>, accessed 14 June 2005.
- ²¹ Bush's most recent use of the term came on his trip to Georgia: 'George and Georgia', *The Times*, 11 May 2005. However, he had used it earlier in the year in an address to troops at Fort Worth, Texas: Marc Sandalow, 'Bush More Certain Than Ever on Iraq War', *San Francisco Chronicle*, 24 April 2005.

- ²² This argument is advanced by Geoffrey Robertson, who also makes the 'ethnic majority' one of the key conditions for intervention: Robertson, *Crimes against Humanity*, p. 421.
- ²³ See, for example, AFP Newswires, 'Serb Boycott Fails to Derail Kosovo Vote', *The Australian*, 26 October 2004, and Nick Hawton, 'Serbs Send out "Unanimous Message" with Poll Boycott', *The Times*, 25 October 2004.
- ²⁴ Jonathan Steele, 'A Balkan Question', *The Guardian*, 24 May 2005.
- ²⁵ See, for example, Thanassis Cambanis and Anne Barnard, 'Divisions Glaring as New Iraq Leaders Convene Today', *The Boston Globe*, 3 April 2005.
- ²⁶ Some of these issues are dealt with in Liam Anderson and Gareth Stansfield, *The Future of Iraq: Dictatorship, Democracy, or Division?*, Palgrave Macmillan, NY, and Houndmills, UK, 2004.
- ²⁷ Koskenniemi, *The Gentle Civilizer of Nations*, p. 489.

CHAPTER 6

CULTURAL EQUALITY AND ITS SOFT POWER AGAINST TERRORISM

Baogang He

When considering the issue of terrorists, a common attitude and reaction is to blame and condemn them without ever questioning whether we have some responsibility in the matter. We seldom challenge ourselves about our culturally biased assumptions and we fail to take the view of other cultures seriously. We stay within our cultural comfort zone and rarely explore the issue of cultural equality as a fundamental solution to the terrorism problem.

One might argue that the events of 11 September 2001 make it imperative to take cultural equality seriously because the United States has failed to respect Muslim culture adequately in its foreign policy. Among other things, one root problem is that the cultural motivation and incentive structure of terrorism have not been properly understood. If equal concern with Muslim culture were in practice, this would reduce the opposition of the Muslim world to the American war against Iraq and undermine terrorist ideology, thus providing a cultural foundation for national security. The more we understand Muslim culture, and the more respect we pay to it, the less will be

the opposition from Muslim world to the United States, and the more the tension between Islam and the United States will be diminished.

Cultural Sources of Terrorism

The question concerning cultural sources of terrorism is a politically charged and intellectually contested one. The events of 11 September 2001 can be seen as a manifestation of Samuel Huntington's thesis of clashes of civilisations; in particular, between the Western and Muslim worlds.¹ According to Bin Laden's interpretation, 'this war will not only be between the people of the two sacred mosques and the Americans, but it will be between the people of the Islamic world and the Americans and their allies because their war is a new crusade led by America against the Islamic nations'.² The Bush Administration, however, has rejected the clash of civilisations thesis. John Gray has also argued that international conflicts come from the conflicting interests and policies of states, rather than from clashes of civilisation.³

Certainly, there are arguments against a cultural explanation. First, multiple factors have led to and intensified terrorist activities. Rama Mani examines three causal axes: poverty/despair, failed states, and 'clash of civilisation'.⁴ Desperate people in extreme poverty resort to desperate means.⁵ Failed and rogue states support terrorism in providing a base, funding and safe operation. And all the perpetrators were Muslim. Among these factors, culture is clearly not the primary one. Second, what seems to be 'cultural cause' may well be a product of propaganda instilled by Bin Laden who uses it to justify terrorist acts and is determined to fight for Muslim cultural hegemony rather than any idea of cultural equality.

One might regard Bin Laden as a cause of terrorism. Yet large sections of the population of the Muslim world do not accept this argument. According to Christopher Reuter, in an online survey conducted by Al-Jazeera, only 8.7 percent of 4,600 respondents considered Osama Bin Laden to be a terrorist. Most of them regarded him as a mujahid, a freedom fighter in a holy war.⁶ Yet, in an Internet

poll taken on 21 November 2001, 70 percent of some 200,000 responses supported summary execution, as opposed to legal trial, of Bin Laden if he were captured.⁷

The sympathetic and even celebrated responses to the events of 11 September 2001 in the Arabic world, so different from the widespread condemnation in Western advanced societies, clearly indicate that these events cannot be attributed to the individual psychological character of Bin Laden. Bin Laden is a conservative in his religious faith and practice, a sort of Muslim Right believer in his views about the 'evil' of capitalism, a radical in adopting violent methods, but nevertheless a cosmopolitan Islam activist beyond nation-states. Bin Laden grew up in the terrorist culture in which terror has been justifiably the weapon of the weak. Terrorist means have been a normal daily affair for him. Indeed, his father was killed in a plane-crash, his mentor was assassinated in a car, and there have been several assassination attempts on his own life in the Sudan and other places.⁸

Jean Baudrillard argues that we need to take account of Muslims' explanations of terrorist motivation and become aware of the biased, or 'bad faith' exposition of our explanation. Take an example of such a bad faith argument:

These terrorists exchange their death for a place in Paradise. Their act is not gratuitous, thus it is not authentic. It would be gratuitous only if they did not believe in God, if their death was without hope, as is ours (yet Christian martyrs assumed just such sublime exchange). Thus, again, they do not fight with equal weapons if they have the right to a salvation we can no longer hope for. We have to lose everything by our death while they can pledge it for the highest stakes.

Baudrillard argues that this argument is an attempt to discredit the actions of terrorists but from a mistaken perspective because 'ultimately, all that—causes, proofs, truth, rewards, means and ends—belongs to typically Western calculation'.⁹

Several cultural factors contributed to the growth of Bin Laden as a political force. First, in the wake of the Cold War, the decline of Marxism created an ideological vacuum which Bin Laden attempted to fill. This vacuum provided Bin Laden with an opportunity to develop fundamentalist Islam as an alternative to liberal democracy.

Second, one root of terrorism lies in unequal power relations; the weaker adopt a radical means to struggle against the stronger and more powerful who are perceived by terrorists as threatening their traditional culture and life. As the processes of cultural and economic globalisation march on, capitalist culture has come increasingly to prevail over and so undermine traditional cultures, albeit without the use of force, giving rise to what Benjamin Barber refers to as 'McWorld'.¹⁰ This tendency for global capitalist culture to threaten the survival of small cultures provides terrorists with a rich resource to justify their radical actions and mobilise support. Some Muslim believers feel that their culture has not been respected and they have developed a culture of hatred against the United States. This is the cultural basis for Bin Laden's war.

Third, many members of Bin Laden's al Qaeda organisation have been living in Western societies for many years, studying and gaining Western university degrees. Why has the Western educational system failed to convince them to accept Western culture? Has Western cultural arrogance contributed to their hatred against Western culture, and pushed them to become determined perpetrators of terrorism? Do terrorists, their supporters and sympathisers feel they are being treated unequally in Western countries? Does this perception of unequal cultural practices constitute a cultural source for the 'holy' war against the United States?

The discrimination, humiliation and frustration that Muslims experience could be central to their adoption of the terrorist cause. The smashing of mosque windows after the July 2005 London bombings, and a higher chance of Muslim people than others being

thoroughly searched at airports, or taunts like 'here comes Osama', are just a few examples of such discrimination and humiliation.

When the Koran was said to have been flushed down the toilet in Guantanamo Bay in Cuba, there were widespread protests in the Muslim world. A specific example of the reaction to such alleged abuses is the case of Shehzad Tanweer, one of the 7 July 2005 London bombers. On his last visit to relatives in Pakistan in 2005, he argued with family and friends about the necessity of violent retaliation over the US abuses of Muslim prisoners at Guantanamo Bay. He became very emotional when he heard about the sufferings of Muslim prisoners and incidents like the desecration of the Koran.¹¹ One terrorist has also reportedly also said that 'they [the West] push people to commit attacks by suspecting all Muslims like that'.¹² Religious indoctrination about the glorious status of martyrs, the cultural practice of inequality in daily life, and personal experiences of being discriminated against all have the potential to lead toward a terrorist road.

It should be emphasised that the practice of cultural inequality is not a *primary* cause for terrorism. It is an indirect and minor causal factor in terms of feeding terrorists, strengthening their cultural identities, and providing a sort of excuse for them. Unequal treatment has been and continues to be used by terrorists to justify radical means in their search for 'justice'. The reason given by al Qaeda for proclaiming jihad, for example, was 'the injustice which Muslims suffer throughout the world' as claimed by Karim, a terrorist.¹³

Islamic fundamentalism may be partially explained by the resentment caused by a sense of cultural inferiority vis-à-vis the West's economic and political domination. If all cultures were treated and respected equally, the cultural basis for terrorism would have been undermined and Bin Ladin would have difficulties in recruiting terrorist members. Were the Muslim world to experience a sense of cultural equality, the resentment against Western culture would likely be reduced. Just as a relatively equal distribution of wealth has

diminished the probability of a working class revolution, so might a wider practice of equal respect for different cultures and civilisations undermine the ideological campaign for an 'Islamic cultural revolution'. Cultural equality promotes and enhances cultural coexistence, and reduces the chance of the 'clashes of civilisation thesis' being employed as a terrorist tool. In the struggle against terrorism, one must take cultural equality seriously, addressing the questions concerning equal cultural rights, and equality between civilisations.

Multiculturalism and Cultural Equality

In industrially and democratically advanced countries, policymakers and academics around the world have placed particular emphasis on the notion of multiculturalism. It has spread from North America and Europe to Asia and Africa. Nevertheless, the events of 11 September 2001 seem to have stalled this trend, undermining the value of cultural equality and perhaps rendering it impossible because of a supposed civilisational conflict between Western and Islamic cultures. Now national security overrides the claims of cultural rights and the fear of terrorist attack overrides concern for the equality of cultures. A right to survival, in particular the state's right to exercise a pre-emptive strike, prevails in the United States and Australia. Consideration of multiculturalism itself seems to be closed or marginalised, let alone discussion of the associated concept of cultural equality.

In particular, after the 7 July 2005 London bombings, multiculturalism was accused of failing to create *one* community, overemphasising the toleration of multiple cultural communities, and even providing resources for home-grown terrorists in the United Kingdom. Nick Cass, a regional organiser for the fiercely anti-immigration British National Party, claimed that 'the fact that they were home-grown, not just asylum-seekers or something like that, proves that the multicultural society doesn't work'.¹⁴ In Australia, it has been argued that multiculturalism cultivates intolerance and beliefs that justify the slaughter of innocents.¹⁵

Adherents to the idea of cultural equality may well think certain forms of multiculturalism insufficient because it recognises cultural diversity but not cultural equality. While multiculturalism aims to 'resolve' minority culture problems by granting minority rights, it does not attempt to do anything with the taken-for-granted privileged position of the majority culture. Thus, to be fully effective as a tool of cultural equality, multiculturalism needs to be based upon the principle of equal respect.

To counteract terrorism, the project of realising cultural equality is urgently required. One way to deal with global structural inequality is to push the idea of world citizenship in the direction of democratic citizenship. That is, if one understands democracy as primarily concerned with equality, then global citizenship must address the issue of cultural equality. Global cultural citizenship transcends national borders and is concerned with cultural equality between different civilisations and cultures. To be effective, the agenda directed to the democratisation of global culture must take cultural equality seriously. Those opposed to terrorism will always encounter different cultures and be faced with the question of whether to treat the cultures of strangers and refugees as equal or inferior.

Equal respect for cultures should be taken into account in institutional design, although its incorporation may take different forms where circumstances dictate. Huntington, for example, has proposed that all major civilisations should be represented in the UNSC. At the moment, the Islamic civilisation is not represented, while the Western civilisations are overrepresented. To achieve an equal representation, one Muslim state must become a permanent member of the UNSC, while the two seats of France and England can be merged into one as the seat of the European Union and alternate between France and England each year.¹⁶ Of course, it should be noted that Huntington took for granted that major civilisations enjoy greater power status such as the United States, Europe, Japan, India and China. For him, small cultures or civilisations do not account for much in world politics.

Cultural Dialogue and an Epistemological Equality

Barber characterises the international order as the clash of the two axial principles of our age—tribalism and globalism. The first is symbolised by 'jihad', in which culture is pitted against culture. The second is 'a busy portrait of onrushing economic, technological, and ecological forces that demand integration and uniformity ... one McWorld tied together by communications, information, entertainment, and commerce'.¹⁷

Rather than polarising the two extremes of Jihad and McWorld, one might explore the possibility of some sort of coexistence between the two that furthers an intercultural ethic which encourages mutual tolerance rather than mutual threat. Robert Hefner argues that civil Islam can coexist with globalism because both of them promote pluralism and tolerance.¹⁸ John Gray's idea of 'radical toleration' is of a pluralist regime in which the rivalries of ideas and values will form the basis for toleration and mutual coexistence of warring communities. Liberal democracy is seen as one set of cultural forms among others. Gray even calls for the abandonment of the liberal enlightenment project of universal civilisation. There are no definite or universal points. The postmodern world of the late 20th and early 21st century involves diversity, discontinuity, and difference.¹⁹

Take an example of different interpretations of 'jihad'. Barber uses the word to describe 'a retribalization of large swaths of humankind by war and bloodshed: a threatened Lebanonization of national states in which culture is pitted against culture, people against people, tribe against tribe'.²⁰ Yet there are multiple meanings of jihad. According to Patricia Martinez, jihad should be understood as the struggle with one's own heart and the attempt to bring oneself into accord with the will of God. The means appropriate to this struggle are prayer, study, and various forms of inner-worldly asceticism.²¹ A more nuanced and perhaps sympathetic understanding of jihad is crucial to realising any sort of coexistence with McWorld, and to enhancing mutual tolerance.

The cultural dialogue, cultural encounter, fusion, and convergence should start with a presupposition of equal respect for different cultures. According to Charles Taylor, equal respect for all cultures should be 'a starting hypothesis with which we ought to approach the study of any other culture'.²²

Cultural dialogue must be established on the basis of equality. Any discussion of the relationship between Islam and liberalism should be based on the assumption that the two traditions exist on an equal footing because all civilisations have the right to respect. And because of that equal footing, Islam can be seen as a theoretical framework that offers an alternative way of thinking. Such an assumption is obviously implied in the universal discourse of human rights, where all human beings regardless of their cultural background deserve the right to equal respect, and where consideration of their humanity is an end in itself. Thus, a necessary step towards cultural equality in this case would be to separate Islam from its association with terrorism—which has given it an inferior status to liberalism. It is often assumed that Islam has provided a cultural basis for terrorism. Nevertheless, to posit a necessary relationship between Islam and terrorism is to be biased. We need to recognise that terrorism occurs not only in and through Muslim culture but also in and through Western and Confucian cultures. Nevertheless, any such recognition cannot be used to legitimise terrorism. It cannot be argued, for instance, that because 'your culture has terrorism, the practice of terrorism in my culture can be tolerated!' Clearly all forms of terrorism must be condemned, no matter its justification.

Of course, for two cultures to recognise and respect each other, each must be prepared to engage in mutual criticism. Just as genuine friendship involves open and frank criticism and advice, mutual criticism between cultures is a crucial element of cultural equality and a fruitful way to develop mutually successful relationships. Importantly, each culture must be prepared to subject itself to both external and internal criticism in order to help overcome cultural bias and prejudice and thus improve its cultural practice. In

short, each culture must maintain a stance of critical self-reflection and criticism, without which its claims to equal status lack legitimacy.

Most importantly, we must resist the ridiculous version of 'equality', in the sense of an equal distribution of harm. It is argued by terrorists that the number of deaths caused by their acts should be the same or similar to those caused by the US-led coalition forces in Iraq. This is a distorted sense of 'natural justice' and has nothing to do with cultural equality. Such a notion is, however, used to justify terrorist actions—the death of innocent people in the West is portrayed by terrorists as justice having been done. Bin Laden provided such a justification for killing innocent people in the United States:

You may have heard these days that almost three-quarters of the US people support Clinton's strikes on Iraq. They are a people whose president becomes more popular when he kills innocent people. They are people who increase their support for their president when he commits some of the seven cardinal sins. They are a lowly people who do not understand the meanings of principle.²³

Equal Esteem

The idea of cultural equality rejects traditional categories of high versus low cultures, thereby challenging cultural and racial superiority. If one accepts the view that the Anglo-Saxon race is destined to 'spread itself over the earth' or that it is the mission of 'the American people as [God's] chosen nation to finally lead in the regeneration of the world', there seems little room for cultural equality and plenty of scope for racial inequality.²⁴

This assumption challenges the master concept of liberty in international trade and within the cultural sphere. Given its claims to openness, tolerance, and plurality, liberalism promises genuine dialogues between different cultures; but, by viewing equality as secondary to liberty, liberalism can come to regard as inferior other

cultures that seek equality first. So, while the voice from the 'South' may be heard, it is not generally taken seriously in the area of transnational activities such as international conferences and publications. Occasionally, organisers of global or international conferences will include people from developing countries or the South as token 'representatives', but seldom are they taken seriously as equal participants.

Bhikhu Parekh argues that liberalism 'represents a particular cultural perspective and cannot provide a broad and impartial enough framework to conceptualise other cultures or their relations with it'.²⁵ Indeed, we can say that liberalism is neither salient nor predominant in the Middle East and in East Asia. This raises the question of whether liberals can in fact ultimately impose their liberal mode of thinking on others or whether they must recognise the legitimacy of alternative modes of normative thought. Should liberals listen and think about non-liberal questions arising from non-liberal societies and even make a concession to non-liberal practices that can be shown to have some normative validity?

While Amy Gutmann raises a difficult question of whether a liberal democratic society should respect cultures that hold themselves ethnically or racially superior to others, there are in reality few if any non-democratic cultures that hold superior positions in the face of Western domination.²⁶ Rather, the urgent question is to deal with the 'taken for granted' superiority of the West and Western democratic traditions. In fact, President George W. Bush's cultural superiority, his belief that the United States occupies the moral high ground, underpinned by American military might, justifies the exercise of a new form of discipline upon the 'barbarian and backward' Middle East, while Bin Laden's assertion of 'Islamic superiority' is reflective of the inferior position allocated to Islam by American cultural dominance.

Conclusion

In the current climate, the major barrier to achieving cultural equality is that attempts to preserve certain cultures against the threats of Western domination are all tied up in a vicious cycle driven by terrorism and the war against it. Extremists adopt the role of martyr as their life mission and they remain hidden until they can suddenly seize their opportunity for martyrdom. To deal with this expected but unpredictable event of terrorist attack, a worst case scenario strategy has to be adopted. Australian Prime Minister John Howard must not and cannot rule out the possibility of a suicide bombing in Australia, but Muslim cleric Sherik Zoud argues that such a refusal to rule out a suicide bombing in Australia would 'marginalize the Muslim community and make that kind of fear towards the community at large'.²⁷ A vigilance policy, if not implemented properly, may marginalise and discriminate against Muslim people. The daily experience of discrimination and frustration is likely to compromise multiculturalism and cultural equality, and continue the unequal treatment of the Muslim community which, in turn, will strengthen the ideology of the terrorists.

The official investigation in the United States of the 11 September 2001 attacks has narrowly focused on the failure of American intelligence services.²⁸ Such an agency-based approach is inadequate in developing a full and deepening understanding of terrorism. It is misleading to direct so much attention toward the area of intelligence. It is certainly deficient in providing an effective means of dealing with terrorism. While violence and terrorism are not the civilised way to defend the existence of a culture, a military war against terrorism is most likely to prove unproductive and ineffective in fighting terrorism and is likely, in the long run, to provoke more of it.

An alternative lies in a 'cultural solution' to the terrorist campaign against the West. Terrorists have transnational networks and global agenda. A war against terrorism must be global in nature, and must

have global cultural strategies, one of which is to endorse cultural equality.

A military solution provides only temporary relief; a cultural solution promotes permanent relief by getting at the root of the problem. Governments have spent too much money on military intelligence and military weapons and too little on community and culture. Adequate funding is required to build an equality-based community, and to make Muslim people feel part of the larger community. In order to win the war against terrorism, soft power must be used to win the hearts of people, not only those within national borders, but also those from other cultural traditions throughout the world.

Notes

- ¹ Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order*, Simon and Schuster, NY, 1996, p. 312.
- ² Osama Bin Laden, cited in Adam Robinson, *Bin Laden: Behind the Mask of the Terrorists*, Mainstream Publishing, Edinburgh, 2001, p. 265.
- ³ See John Gray, 'Global Utopias and Clashing Civilizations: Misunderstanding the Present', *International Affairs*, vol. 74, no. 1, 1998, pp. 149–63.
- ⁴ Rama Mani, 'The Root Causes of Terrorism and Conflict Prevention' in (eds.) Jane Boulden and Thomas G. Weiss, *Terrorism and the UN: Before and After September*, Indiana University Press, Bloomington, 2004.
- ⁵ In Pakistan 13,000 madrassahs schools offer free religious education, lodgings and meals for the pupils from the poorer sections of society.
- ⁶ Christopher Reuter, *My Life as a Weapon: A Modern History of Suicide Bombing*, Princeton University Press, Princeton, 2002, p. 20.
- ⁷ Trudy Govier, *A Delicate Balance: What Philosophy Can Tell Us about Terrorism*, Westview Press, Bolder, CO, 2002, p. 74. Given that only 15 percent of the world's population has access to the Internet, it is a reasonable assumption that most of the respondents were Westerners.
- ⁸ See Robinson, *Bin Laden*.
- ⁹ Jean Baudrillard, 'The Spirit of Terrorism', *Le Monde*, 2 November 2001.

- ¹⁰ B. R. Barber, *Jihad vs. McWorld: How Globalism and Tribalism are Reshaping the World*, Ballantine Books, NY, 1996.
- ¹¹ *Weekend Australian*, 23–24 July 2005, p. 14.
- ¹² Mohamed Sifaoui, *Inside Al Qaeda*, Granta Books, London, 2003, p. 126.
- ¹³ Sifaoui, *Inside Al Qaeda*, p. 71.
- ¹⁴ *Weekend Australian*, 16–17 July 2005, p. 12.
- ¹⁵ Roy Eccleston, 'Price of Freedom', *Australian*, 20 July 2005, p. 13.
- ¹⁶ See Huntington, *Clash of Civilizations*.
- ¹⁷ Barber, *Jihad vs McWorld*, p. 4.
- ¹⁸ Robert W. Hefner, *Civil Islam: Muslims and Democratization in Indonesia*, Princeton University Press, Princeton, 2000.
- ¹⁹ John Gray, *Two Faces of Liberalism*, The New Press, NY, 2000.
- ²⁰ Barber, *Jihad vs McWorld*, p. 4.
- ²¹ Patricia Martinez, 'Deconstructing Jihad', paper presented at the Workshop on 'After Bali: the Threat of Terrorism in Southeast Asia', organised by the Institute for Defence and Strategic Studies, Nanyang Technological University, Singapore, 27–28 January 2003.
- ²² Charles Taylor, 'The Politics of Recognition' in (ed.) Amy Gutmann, *Multiculturalism*, Princeton University Press, Princeton, 1994, p. 66.
- ²³ Cited in Robinson, *Bin Laden*, p. 215.
- ²⁴ James Chace, 'Book Review: The First Great Triumph: How Five Americans Made Their Country a World Power by Warren Zimmerman', *New York Book Review*, 21 November 2002, p. 34.
- ²⁵ Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory*, Macmillan, Basingstoke, 2000, p. 14.
- ²⁶ Amy Gutmann, 'Introduction' in Amy Gutmann (ed.), *Multiculturalism*, Princeton University Press, Princeton, 1994, p. 5.
- ²⁷ Annabelle McDonald and Trudy Harris, 'Sheik's fury at "alarmist" PM', *Weekend Australian*, 16–17 July 2005, p. 11.
- ²⁸ See Steven Strasser (ed.), *The 9/11 Investigations: Staff Reports of the 9/11 Commission*, Public Affairs, NY, 2004.

CHAPTER 7

FAILED STATES, ROGUE STATES AND THE SOURCES OF TERRORISM: HOW THE NORTH VIEWS THE SOUTH

Richard Devetak

The foreign policy and security discourses of the North have increasingly come to focus on two types of states: failed and rogue states. Failed states signify the descent into lawless violence, a kind of post-sovereign nightmare within the territorial boundaries of an erstwhile state. Rogue states, by contrast, denote the willful defiance by a sovereign state of international law's rules and norms. While the former type of state calls for international assistance, the latter demands punishment. Failed and rogue states thus represent two different problems and two different responses. But for all the differences exhibited by the two types of state, there are some significant commonalities in the way the North views these states, largely because they are identified with the South. This paper seeks to elaborate some of the distinctive features that characterise how the North views the South.

I begin by offering a sketch of changes introduced by the Cold War's close. In particular, I want to show how the North began to

see the South essentially as a *distant problem*. Let me dwell on that emphasised noun and accompanying adjective for just a moment. A 'problem' because the South came to represent enduring social, economic and political crises: from chronic famine and massive refugee flows to 'new wars' and 'complex emergencies'. If the North represented a model of social, economic and political development, the South came to embody the continuing lack of all the North's virtues and achievements. 'Distant' in the sense that the North felt safely removed from the violence associated with the South, spatially and temporally. I will elaborate on this point below. Next, I will briefly comment on how the terrorist attacks of 11 September 2001 called for a rethinking of this conception of the North-South relationship. To put it bluntly, no longer a distant problem, the South became the North's problem; I am even tempted to say a problem 'internal' to the North. The remainder of the chapter will then try to elaborate some of the political rationalities and practices that govern the North's conception of and interaction with the South. This will revolve primarily around the North's dealings with rogue and failed states. In essence, the North has come to see the South as a direct and immediate source of threats to its own well-being, though without acknowledging its complicity in the South's problems. In particular, it has come to associate the South with terrorism, of both state and non-state varieties. I will need to qualify this statement, but I think that is the reason why the North no longer sees the South as a distant problem, but a pressing and adjacent one.

Strategic Cartographies: The Changing Character of the North/South Divide

In this section I want to outline the changing contours of international security. In particular I want to draw attention to the emergence of new threat conceptions in the post-Cold War, post-11 September 2001 world and their connection to the division of the planet into zones of war and zones of peace. Though I can't make the argument here, I want to endorse the view that, as Michael Shapiro puts it: 'All geographies are, in the last analysis, moral geographies'.¹

Widening the North-South Gap: After the Cold War's Collapse

The end of the Cold War and the terrorist attacks of 11 September 2001 are obvious markers in the transformation of the international security agenda as conceived by Western states. I think we need to understand the post-Cold War changes before grafting the post-11 September 2001 changes onto them. So in this section I will provide a brief overview of these changes with the intention of outlining the conditions that govern how the North views the South. The North's image of the South is politically important because it shapes how the North interacts with and acts towards the South. It also helps reinforce the idea that the planet can be neatly divided between distinct zones of war and peace.

Let me simply list some key factors in the post-Cold War international security agenda:

- Strategic rivalry between Russia and the United States diminished.
- The superpowers disengaged from the periphery which, accordingly, declined in political importance.
- Perceptions grew of US hegemony and invulnerability.
- In the developed world, 'geo-economics' was elevated vis-à-vis geopolitics.
- In the underdeveloped world, the phenomena of 'complex emergencies' and 'new wars' multiplied.

In the immediate aftermath of the Cold War, many commentators and scholars saw world order divide between a core and a periphery rather than between East and West. James Goldgeier and Michael McFaul, for example, tell a 'tale of two worlds'. In one world, the major powers converge around an agreed set of norms; by contrast, in the other, no such consensus exists and violent conflict is

prevalent.² Some years later, Robert Kagan would call these the Kantian and Hobbesian worlds.³

Differences between states in the core and periphery were said to revolve around the goals and the behaviour of states. Goldgeier and McFaul assert that core states will not need to remain 'essentially war making machines', to use Robert Gilpin's words. They may put wealth ahead of power as national interests. By contrast, peripheral states will persist in their preference for power over wealth. In the 'core', realist theory is no longer a powerful explanation because it is believed that core states have moved beyond war. In the periphery, however, where the security dilemma is still central, realism remains as powerful as ever because wars continue unabated.⁴

By the late 1990s, however, even the continuing violence in the periphery was thought to be beyond realism's account. Mary Kaldor's 1999 book *New and Old Wars* made a strong case for seeing the violence in the periphery as novel and a departure from the violent conflicts associated with the Cold War. She identified several characteristics of the 'new wars' which, again, I simply list below:

- Lack of a decisive Clausewitzian battle between two state militaries.
- Absence of declarations of war or peace treaties.
- Targeting of civilians (ethnic cleansing and genocide).
- State's monopoly over instruments of violence is broken.
- Non-state violent actors (mercenaries, warlords, terrorists).
- Humanitarian emergencies (refugee exodus).
- Calls for humanitarian intervention (war as continuation of morality by other means).⁵

The purpose of Kaldor's argument was to mark a temporal break between the Cold War and post-Cold War period on the basis of the transformation of organised violence. Interestingly, this 'new wars' discourse may be seen to reinforce the sense of distance between North and South. Even humanitarian intervention could be interpreted as a means by which the North reaffirmed the gap between itself and the South. Dispatching troops to faraway places would help confirm the view of an orderly, civilised North in contrast to the South's chronic underdevelopment and violence—in the same way that colonial discourses would emphasise the difference and distance between the European core and its non-European periphery. This also underpinned the distinct set of rules that governed the relationships within Europe as opposed to those that governed Europe's relations with outsiders.

There are two points I wish to make about the post-Cold War discourses. First, as Anne McClintock observes in her analysis of 19th century imperialism, 'geographical difference across *space* is figured as a historical difference across *time*'.⁶ The zones of war/chaos are figured as 'anachronistic spaces', zones which are 'perpetually out of time in modernity, marooned and historically abandoned'.⁷ In Francis Fukuyama's Hegelian terms, they remain 'mired in history', as opposed to the West/North which has reached history's end. Secondly, the North perceives itself as essentially a spectator watching tragedies unfold in the South's zones of chaos. Though it occasionally participates in the South's politics, it does so through selective humanitarian intervention only, thus preserving its sense of distance, and of course superiority. In sum, the North assumed itself to be secure against the South's problems, and against the dangers of its anachronism.

All of this has helped to create a sense of distance between the North and the South. The strategic and economic imperatives of the North were increasingly less dependent on political dynamics in the South. The problems of the South, often viewed as chronic—think for example of enduring 'Afro-pessimism'—were relegated to the

bottom of the security agenda. A safe distance was thought to separate the North's prosperity and security from the South's poverty and insecurity, despite the liberal optimism associated with neoliberal globalisation.

Collapsing the North-South Gap: After 11 September 2001

The terrorist attacks of 11 September 2001, however, caused a dramatic upheaval of this assumption. The world's strongest military and economic power was struck in its greatest city, New York, and in its capital, Washington DC. The United States was, it turned out, more vulnerable than at first thought. Most importantly for my purposes here, the strategic cartography was profoundly re-ordered. The distance between North and South narrowed considerably on that day in September; two cities, which in various ways are imagined as ahead of the times, became mired in history, struck by the South's anachronism.

As Michael Ignatieff remarks, 'terror has collapsed distance, and with this collapse has come a sharpened focus in imperial capitals on the necessity of bringing order to the barbarian zones'.⁸ While the North could rest content with occasional humanitarian interventions into the South during the 1990s, Western capitals—especially Washington, London and Canberra—came to the conclusion that their own security could no longer be abstracted from the South. Geographical distance presented no obstacle to those intent on harming Westerners, Western interests or Western cities. The North was no longer an external observer or spectator of events in the South—instead, it became a participant. Alternatively, we might say that the North was drawn into the South's orbit, perhaps even became part of the South. But, as we shall see, this is a reality that the North seeks to resist vigorously. Its response to the attacks of 11 September 2001 has been to try and put as much distance between itself and the South as possible through two particular strategies that I return to below. For the moment, however, I simply want to identify one of the key functions performed by this

cartography, which is to spatialise the sources of violence and, in particular, terrorism.

Many post-Cold War analyses of international relations, as we have noted, divided the world into zones of peace and war, a division that was intended to coincide with the distinction between liberal and non-liberal states. Liberal states resided in the North, whilst the South's zones of chaos were coterminous for the most part with non-liberal states. Liberal international relations theorists such as Anne-Marie Slaughter believe that liberal theories actually demand discrimination between states based on their liberal democratic credentials. 'The most distinctive aspect of Liberal international relations theory', she says, 'is that it permits, indeed mandates, a distinction between types of states, based on their domestic political structure and ideology'.⁹

The zones of chaos comprise at least two types of states: failed and rogue. In the following section, I want to focus on the ways that liberal discourses of international relations tend to identify the sources of terrorism with failed and rogue states in such a way that the North's preferred strategic cartography and the moral assumptions it entails remain fundamentally unaltered. As we shall see, the 'failed states' and 'rogue states' discourses are intended to reinforce distinctions between the 'civilised' and the 'barbaric'. However, the intentions are ultimately outflanked by the contradictions between ideals and reality. The North's credentials, as the repository of civilisation, liberalism and even democracy, are eventually undermined by the foreign policy strategies it adopts.

States of Exception: From Schmitt to Agamben

In this section I want to introduce some of Giorgio Agamben's key ideas in *Homo Sacer: Sovereign Power and Bare Life*.¹⁰ I cannot do justice to the historical richness and theoretical complexity of his arguments here, but I do want to sketch some of the ways his thought may be turned to an analysis of rogue and failed states.

To understand Agamben's argument, however, we must first revisit Carl Schmitt's argument about sovereignty and the political. Schmitt, it should be recalled, argued that 'he who decides on the exception' is sovereign.¹¹ Sovereignty denotes the power and authority to make ultimate political decisions and to declare a state of exception, that is, to suspend the normal workings of the constitution. This needs to be understood alongside another key assumption of Schmitt—that the fundamental distinction in politics is between friend and enemy. It defines the political in the same way that right and wrong define law, and beautiful and ugly define aesthetics.

Agamben makes two departures from Schmitt. First, he argues, following Walter Benjamin, that the exception has become the rule in modern times. This would appear to be especially true in the war on terrorism where, in the name of security, the rule of law has been notoriously suspended in Guantanamo Bay and Abu Ghraib, as well as through extraordinary rendition practices. Second, he argues that the key distinction is not between friend and enemy, but between 'bare life' and political life.

Agamben questions Schmitt's emphasis on the friend/enemy distinction as the key to politics. He argues instead, by a detour to Aristotle, that the fundamental distinction is between 'bare life' and 'political existence'. Aristotle distinguished *zōē* and *bios*—natural and political life. Natural life, for the Greek political philosopher, was excluded from or outside the *polis*. The politically qualified life was opposed to and elevated above the simple biological fact of living. The political life involved, or presupposed, language, the capacity to communicate, to engage in dialogue, to negotiate, to respect rules and to disagree without resort to violence. Bare life, on the other hand, was about survival, mere existence, bodily and species reproduction.

Michel Foucault and Hannah Arendt both examined the way natural life intruded upon political life in modernity. In fact, to use one of Foucault's terms, politics became *biopolitics*. A nation's health and

biological life acquired greater significance in the modern state. This 'politicisation of bare life' constitutes the decisive event of modernity according to both Foucault and Arendt, as politics comes to coincide with bare life.

Failures, Rogues and Terrorists

In this final section of the chapter, I want to suggest that Agamben's analysis may be usefully applied to the study of the North's view of the South. Both rogue states and failed states, we shall see, are situated *outside* politics by the North; they are both marked as 'bare life'. Rogue states lack political language, failed states reduce politics to bare life. Each instance evokes a different response from the North. In the case of rogue states, a more Schmittean response is developed—one that suspends the rule of law and operates in a state of exception. Rogue states are incorrigible, they cannot be civilised, and they must therefore be eliminated. They are 'hopeless cases' to use Barry Hindess's terms from another context. In the case of failed states, the North applies biopolitical governmental practices developed around health, wealth, poverty, security, migration and structures of governance—in short, 'good governance'. These states are, in contrast to rogues, redeemable. They are what Hindess would call 'subjects of improvement', capable of being civilised as long as they are subjected to the North's disciplinary measures.¹² Both rogue and failed states are rendered external to the political realm, outside international society.

Rogue States as/and Terrorists

Rogue states exist outside the political because they are deemed to reject international society's rules and norms. This was US President George W. Bush's point in his infamous State of the Union address in 2002 where he invoked the 'axis of evil'. Rogue states are condemned for sponsoring terrorism and/or committing terrorist acts against their own citizens. Iraq under Saddam Hussein, of course, was the rogue state *par excellence*.

I do not intend to get into a detailed discussion of what makes a state a rogue. Rather, I simply want to highlight the political function of the adjective 'rogue'; a word which can function as either an attribute or a substantive. Jacques Derrida remarks that the adjective 'rogue' can sometimes be applied to a subject who is occasionally, rather than substantively, a rogue.¹³ We might then speak of someone acting the rogue, or we may even refer to someone as a 'loveable rogue', a point made to me in conversation by Gavin Mount. 'Rogueness' here is an aspect of the subject's identity, though it does not determine or define it; it is one among many attributes.

On the other hand, 'rogueness' may be a quality that defines a subject's identity through and through. To name someone or something rogue here is to make an accusation or denunciation, and thence prepare the way for, and justify, some kind of sanction. A rogue state will need to be 'punished, contained, rendered harmless, reduced to a harmless state, if need be by the force of law [*droit*] and the right [*droit*] of force'.¹⁴ This is, of course, precisely the manner in which 'rogue state' has come to be used in contemporary international relations. It leads to the conclusion, to 'the armed conclusion', as Derrida says, 'to use force to confront them, in the name of a presumed right and the reason of the strongest'.¹⁵

It has the effect of not just characterising the other state as substantively rogue, but suggesting, if only by implication, that the denouncing state is substantively *not* rogue. Roland Bleiker makes a similar point, showing how the concept of rogue state draws upon a Manichean distinction between good and evil. Moreover,

the rhetoric of evil moves the concept of rogue states into the realm of irrationality. "Evil" is in essence a term of condemnation for a phenomenon that can neither be fully comprehended nor addressed other than through militaristic forms of dissuasion and retaliation.¹⁶

Responding to Rogues: The Language of Force

On 4 February 1999, just prior to the Rambouillet meeting on Kosovo, US Secretary of State Madeleine Albright said:

We learned in Bosnia, and we have seen in Kosovo, that President Milosevic understands only the language of force. Nothing less than strong engagement from NATO will focus the attention of both sides; and nothing less than firm American leadership will ensure decisive action.¹⁷

Rogue states, it is commonly said, understand only one thing: the use of force. Assigning rogue status to another state thus opens the path to the use of force. In this way, states such as Serbia under Milosevic or Iraq under Hussein are said to differ from liberal democracies, which value civility, dialogue, and the peaceful resolution of conflict. Liberal democratic states can therefore legitimately suspend their commitment to liberal democratic principles and the rule of law because rogue states signal an exception.

Interestingly, but perhaps not surprisingly, Osama bin Laden appears to hold the same view about the language of force. A month after the attacks of 11 September 2001, in a filmed interview given on 20 October 2001, he said:

Bush and Blair ... don't understand any language but the language of force. Every time they kill us, we kill them, so the balance of terror can be achieved.¹⁸

Such assertions as these uttered by Albright and bin Laden rest on a notion that force is a kind of language.¹⁹ Diplomacy, language, communication, though apparently favoured by liberal democracies, are thought to be useless in dealing with rogues. Their stubborn refusal to understand their interlocutor means that negotiations will always breakdown. Patient diplomacy and conventional communication will never succeed in negotiations with rogue states, as President Bush has emphasised.²⁰ Where missives fail however, missiles work. Unlike words, which always carry the potential for

misunderstanding, weapons are thought to be devoid of ambiguity; they cannot be misinterpreted, even by rogue states. The view of language expressed by the assertion that rogue states 'only understand the use of force', is that force is itself actually a language too. It communicates. In fact, it communicates effectively, especially to rogue states who are inveterately unable or unwilling to engage in dialogue. In a sense, force is a pure language of communication, according to this viewpoint. While weapons may sometimes miss their intended target, as we know, their meaning is thought never to be in doubt, unlike words. This point of view 'leaves no room for equivocation, confusion, misunderstanding; no room for any others at all, for any back and forth, for exchange, for the delays and relays of a dialogue or a conversation'.²¹ To use force is, to use the title of Tom Keenan's fascinating paper, 'to speak in a language that needs no translation'.

Adopting this viewpoint has the effect, intended or not, of avoiding dialogue and negotiation. Rogue states, because they are evil and because they misunderstand or distort normal communication, can only be communicated with by force. However, as Bleiker shows, a residual belief in the capacity of rogue states to understand normal communication persists. Though Bush sees North Korea firmly lined on the 'axis of evil', he does not preclude the possibility of engaging it in dialogue. 'Indeed, the assumption is that threats will induce dialogue'.²² Once the threat of force has communicated the point to the rogue, the rogue will thenceforth be able and willing to negotiate with the United States. This marks a slight twist on the original supposition that rogue states only understand the language of force: after the deployment of force, *après coup*, normal communication can be resumed.

All of this simply functions to reinforce the strategic cartographies I elaborated earlier. The barbarians, those beyond the North's frontiers, mired in history and the zone of chaos, do not speak *our* language. They speak only the language of force, not our native (liberal democratic) tongue; but, as the United States has made clear, even the North is capable of speaking the language of force when necessity

demands. This 'bilingualism' bespeaks an ambivalence in the North's identity: it is capable of being both rogue and non-rogue.

Failed States as Incubators of Terrorism

In this section, I want to show how failed states too have become closely aligned with the terrorist threat. In short, they have come to be viewed as 'incubators' or 'breeding grounds' of terrorism. This is a point made by leading scholars such as Stephen Krasner and Robert Rotberg, as well as politicians from George W. Bush to John Howard.

Rotberg, one of the leading scholars on the subject, defines failed states as 'incapable of projecting power and asserting authority within their borders, leaving their territories governmentally empty'.²³ Various economic and political factors lead to state failure, but I shall not discuss them here. I merely want to point to the consequences. As violent conflict and lawlessness escalate, human insecurity deepens; a kind of Hobbesian *bellum omnium contra omnes* develops, or at least some against some. As Rotberg explains, the humanitarian disasters generated by failed states, including large-scale human rights violations, human displacement, and continuing violence, have created critical difficulties for international society. But the critical difficulties are not simply reducible to humanitarian disaster. 'In the wake of September 11, the threat of terrorism has given the problem of failed nation-states an immediacy and importance that transcends its previous humanitarian dimension'.²⁴

Failed states have become critical features of the new strategic imperatives governing Western nations:

In less interconnected eras, state weakness could be isolated and kept distant. Failure had fewer implications for peace and security. Now, these states pose dangers not only to themselves and their neighbors but also to peoples around the globe.²⁵

But the key proposition is this: 'Failed states have come to be feared as 'breeding grounds of instability, mass migration, and

murder' (in the words of Stephen Walt), as well as reservoirs and exporters of terror'.²⁶

Krasner and Pascual rehearse the same argument. Echoing Rotberg's claim about the changed strategic environment, they say that, 'in today's increasingly interconnected world, weak and failed states pose an acute risk to US and global security'.²⁷ They also believe that 'when chaos prevails, terrorism, narcotics trade, weapons proliferation, and other forms of organized crime can flourish'.²⁸ Afghanistan, they say, was a prime example of a failed state generating a terrorist problem for the United States. 'Left in dire straits, subject to predation, and denied access to basic services, people become susceptible to the exhortations of demagogues and hatemongers'.²⁹

Such arguments are not confined to academia. George W. Bush in his Preface to the 2002 *National Security Strategy of the United States of America* observed:

The events of September 11, 2001, taught us that weak states, like Afghanistan, can pose as great a danger to our national interests as strong states. Poverty does not make poor people into terrorists and murderers. Yet, poverty, weak institutions, and corruption can make weak states vulnerable to terrorist networks and drug cartels within their borders.³⁰

The *National Security Strategy* goes on to say that the United States 'will stand beside any nation determined to build a better future by seeking the rewards of liberty for its people'. So the United States promises to assist those countries that choose 'free trade and free markets', the economic arrangements that 'lift whole societies out of poverty'. All nations have responsibilities, says Bush. They must 'actively fight terror', 'help prevent the spread of weapons of mass destruction', 'govern themselves wisely', and be accountable for themselves and their actions. Bluntly, he declares: 'America is now threatened less by conquering states that we are by failing ones'.³¹

In a recent article published in the *Australian Journal of International Affairs*, Alexander Downer, Australia's foreign minister, adopts a similar perspective, outlining the new and heterogeneous threats to international peace and security. These threats, he said

are generated by much more than disputes between nation states and are not readily confined by state borders. Transnational terrorism, threats posed by the proliferation of weapons of mass destruction, increased intra-state conflict and the weakening of states by poor governance demonstrate this.³²

In a speech delivered to the World Affairs Council in Los Angeles in January 2004, Downer explained that two key challenges confront the world today: global poverty and global insecurity. The latter comprises, according to Downer, three elements: 'the murderous fanaticism of international terrorism, the nightmarish potential of the proliferation of weapons of mass destruction, [and] the incubators of future threats in failed states'. Moreover, 'we cannot afford to ignore those societies that have ceased to function through a failure of political order, economic growth or social cohesion. Terrorism has underlined the threat to international security posed by weak and failed states'.³³

Australian Defence Minister Robert Hill argued in a 2005 speech that the changing strategic environment raises new challenges for Australia:

Terrorist networks present a particular challenge for those countries in the region which have limited capabilities in areas such as law enforcement, intelligence and border control. The risk is that terrorists will see some countries, or regions within countries, as attractive places to plan and operate with low risk of detection or disruption.³⁴

I do not want to assess the validity of these claims so much as reflect on the political implications. Suffice to say, however, that several scholars and analysts have cast doubts on the idea that failed states offer the right environment for terrorists.³⁵

Responding to Failed States: Good Governance

These ideas are not exactly new—aid and development have always been susceptible to foreign policy interests—but the precise instruments and the mode of operation have changed. Global liberal governance has been subsumed by a *biopolitics* which finds its organising principles in the administration and production of life, rather than in threatening death/violence. It operates on populations and seeks to promote conditions intended to secure liberty and security by investing life through and through. Biopolitics thus becomes a means of strategically ordering the periphery, of bringing order to the zones of chaos.

Mark Duffield's idea of 'the securitisation of development' seems useful here. By this phrase, Duffield means that the security concerns of the core states have merged with the socio-economic concerns of aid agencies.

If poverty and institutional malaise in the borderlands encourage conflict and undermine international stability, then the promotion of development with its intention of eliminating these problems simultaneously operates as a *security strategy*.³⁶

This approach is evident in the growing amount of aid that the United States has committed to development. The US aid budget has tripled since 2002, having risen from \$12.9 billion to \$33.2 billion annually. The bulk of this aid flows to strategically important countries in the Middle East such as Israel, Egypt, Jordan, and Iraq, as well as countries in or on the edge of the zones of chaos: Afghanistan, Pakistan, and Uzbekistan. Interestingly though, only about \$2 billion of this aid has come through the standard appropriations process; most instead comes through supplemental appropriations.³⁷

Humanitarian aid agencies are thus being integrated into strategies designed to bring order to the so-called 'zones of chaos'. Aid has become a 'technology of security', according to Duffield, as networks joining governments, NGOs, and UN agencies have been established to deliver development and humanitarian assistance

where states fail.³⁸ These networks are part of a broader framework of emerging global governance that sees the sources of economic failure, social instability, and ethnic conflict largely in the absence of a functioning market economy and democratically governed polity. The development malaise thus requires remedial treatment in the form of 'good governance'. This is an argument advanced by scholars such as Krasner as well as governments like Australia, for whom 'good governance is now the largest sectoral focus of Australia's aid program'.³⁹

Conclusion

The argument presented here is that the North has tended to see the South as comprised of failed states and rogue states, both of which are identified as sources of terrorism. The association of the South with terrorism is prepared through a strategic cartography whereby a boundary is firmly inscribed between North and South—one which by and large assigns civilisation to the North and barbarism to the South. Although the distance between North and South has undergone change as a consequence of the Cold War's end and the terrorist attacks of 11 September 2001, one thing has remained unchanged. The North continues to spatialise the sources of terrorist violence in such a manner that its origins appear to be exclusive to the South. This helps shore up a deeper assumption held by the North, that it remains the sole source of good governance and civilisation.

Notes

- ¹ Michael J. Shapiro, 'Moral Geographies and the Ethics of Post-Sovereignty' in (eds.) Mark E. Denham and Mark Lombardi, *Perspectives on Third-World Sovereignty: The Postmodern Paradox*, Macmillan, London, 1996, p. 58.
- ² James Goldgeier and Michael McFaul, 'A Tale of Two Worlds: Core and Periphery in the Post-Cold War Era', *International Organization*, vol. 46, no. 2, 1992, pp. 467–91.

- 3 Robert Kagan, *Paradise and Power: America and Europe in the New World Order*, Atlantic Books, London, 2003.
- 4 Goldgeier and McFaul, 'A Tale of Two Worlds'.
- 5 Mary Kaldor, *New and Old Wars*, Polity Press, Cambridge, 1999.
- 6 Anne McClintock, *Imperial Leather: Race, Gender and Sexuality in the Colonial Conquest*, Routledge, NY, 1995, p. 40.
- 7 McClintock, *Imperial Leather*, p. 41.
- 8 Michael Ignatieff, *Empire Lite: Nation-Building in Bosnia, Kosovo and Afghanistan*, Vintage, London, 2003, p. 21.
- 9 Anne-Marie Slaughter, 'International Law in a World of Liberal States', *European Journal of International Law*, vol. 6, 1995, p. 504.
- 10 Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, Stanford University Press, Stanford, CA, 1998.
- 11 Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, MIT Press, Cambridge, MA, 1985, p. 5.
- 12 See Barry Hindess, 'The Liberal Government of Unfreedom', *Alternatives*, vol. 26, no. 2, 2001, pp. 93–111.
- 13 Jacques Derrida, *Rogues: Two Essays on Reason*, Stanford University Press, Stanford, CA, 2005, p. 79.
- 14 Derrida, *Rogues: Two Essays on Reason*, p. 79.
- 15 Derrida, *Rogues: Two Essays on Reason*, p. 80.
- 16 Roland Bleiker, 'A Rogue is a Rogue is a Rogue: US Foreign Policy and the Korean Nuclear Crisis', *International Affairs*, vol. 79, no. 4, 2003, p. 732.
- 17 This quote can be found in Linda Kozarin, 'Albright Says Kosovo Matters to United States', American Forces Information Service, US Department of Defense website, available at http://www.defenselink.mil/news/Feb1999/n0208199_9902084.html, accessed 1 December 2005.
- 18 See #66 in the dossier put together by the British Government, Responsibility for the Terrorist Atrocities in the United States, 11 September 2001—An Updated Account, 10 Downing Street website, available at <http://www.number-10.gov.uk/output/page3682.asp>, accessed 1 December 2005.
- 19 This paragraph draws heavily upon Thomas Keenan, 'To Speak in a Language that Needs no Translation', 2004, unpublished paper in author's possession.

- ²⁰ George W. Bush, 'Interview with President George W. Bush', NBC 'Meet the Press' website, transcript for 8 February 2004, available at <http://msnbc.msn.com/id/4179618>, accessed 1 December 2005.
- ²¹ Keenan, 'To Speak in a Language that Needs no Translation'.
- ²² Bleiker, 'A Rogue is a Rogue is a Rogue', p. 732.
- ²³ Robert Rotberg, 'Failed States in a World of Terror', *Foreign Affairs*, vol. 81, no. 4, 2002, pp. 127–40.
- ²⁴ Rotberg, 'Failed States in a World of Terror', p. 127.
- ²⁵ Rotberg, 'Failed States in a World of Terror', p. 127.
- ²⁶ Rotberg, 'Failed States in a World of Terror', p. 128.
- ²⁷ Stephen Krasner and Carlos Pascual, 'Addressing State Failure', *Foreign Affairs*, vol. 84, no. 4, 2005, p. 153.
- ²⁸ Krasner and Pascual, 'Addressing State failure', p. 153.
- ²⁹ Krasner and Pascual, 'Addressing State failure', p. 153.
- ³⁰ *National Security Strategy of the United States of America*, September 2002, White House website, available at <http://www.whitehouse.gov/nsc/nss.html>, accessed 1 December 2005.
- ³¹ *National Security Strategy of the United States of America*, September 2002, White House website, available at <http://www.whitehouse.gov/nsc/nss.html>, accessed 1 December 2005.
- ³² Alexander Downer, 'Securing Australia's Interests—Australian Foreign Policy Priorities', *Australian Journal of International Affairs*, vol. 59, no. 1, 2005, p. 7.
- ³³ Alexander Downer, 'Meeting the Challenges of a Changing Regional and Global Security Outlook', Speech to the World Affairs Council, Los Angeles, 15 January 2004, Alexander Downer website, available at http://www.foreignminister.gov.au/speeches/2004/040119_global_security.html, accessed 1 December 2005.
- ³⁴ Robert Hill, 'Terrorism and the New Global Security Environment', Speech at Murdoch University, Perth, 18 May 2005. James Kelly (US Assistant Secretary of State for East Asia and Pacific Affairs) warned, on 24 August 2004, that South Pacific island states could be 'soft targets' for terrorists. Although he knew of no evidence suggesting that Jemaah Islamiyah was active in the Pacific, he advised that 'we must be constantly alert' because they 'are not far in time or space from the Pacific': 'Pacific a Soft Terror Target: US', Port Vila Presse website, available at <http://www.news.vu/en/>

news/RegionalNews/pacific-a-soft-terror-tar.shtml, accessed 1 December 2005.

- ³⁵ See the arguments of Ken Ross on the Pacific islands and Ken Menkhaus on Somalia. Both express reservations about the premise that failed states breed terrorism. Ross, for example, rightly observes that this type of argument resembles Cold War concerns that weak states in the region would make them vulnerable to communism. 'It is a seriously misjudged perspective—for these states lack the necessary oxygen for would-be terrorists, for whom the concept "terror is theatre" is all important. This region lacks the facilities': Ken Ross, 'Globalization, Governance and Guns: Some Reflections on the South Pacific in the 1990s', *The Round Table*, no. 372, 2003, p. 694. Menkhaus offers a similar assessment: 'In fact, transnational criminals and terrorists have found zones of complete state collapse like Somalia to be relatively inhospitable territory out of which to operate', Ken Menkhaus, *State Collapse and the Threat of Terrorism*, Adelphi Papers no. 364, 2004, p. 71.
- ³⁶ Mark Duffield, 'Governing the Borderlands: Decoding the Power of Aid', *Disasters*, vol. 25, no. 4, 2001, p. 312.
- ³⁷ Ngaire Woods, 'The Shifting Politics of Foreign Aid', *International Affairs*, vol. 81, no. 2, 2005, p. 397.
- ³⁸ Mark Duffield, 'War as a Network Enterprise: The New Security Terrain and its Implications', *Cultural Values*, vol. 6, no. 1 & 2, 2002, p. 154.
- ³⁹ See 'Overview', *Advancing the National Interest: Australia's Foreign and Trade Policy White Paper*, Department of Foreign Affairs and Trade Web Site, 2002, available at http://www.dfat.gov.au/ani/dfat_white_paper.pdf, accessed 1 December 2005.

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