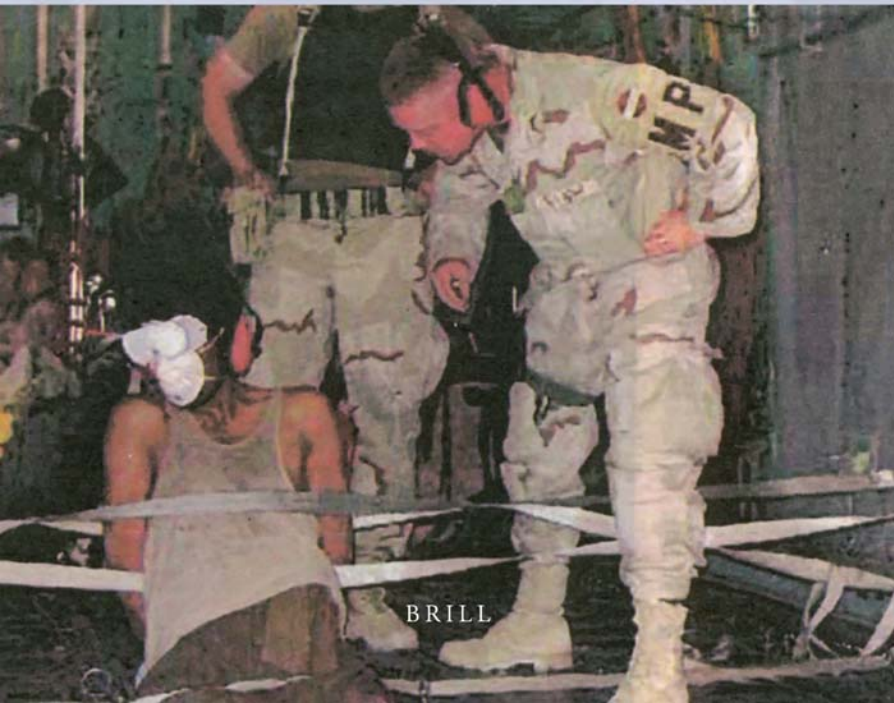
Studies in Critical Social Sciences

Laura Westra

Faces of State Terrorism



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Faces of State Terrorism

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Faces of State Terrorism

By

Laura Westra

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To the People of Palestine

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FOREWORD

I always read with great interest and admiration the works published by my Canadian colleague Laura Westra (as I am a rather parochial individual, let me also recall her Italian origin). Her solid philosophical background leads to a broad approach, where the links between the ethical, the social and the legal dimensions are clearly understood, and the technical intricacies, which can be of interest only for a small range of "law addicts", are avoided. For instance, in the trilogy of books on environmental justice, published in 2006, 2008 and 2009, she responds to the present challenges by stressing the needs and the relevant rights of the most neglected categories of human beings, namely the unborn generations, the indigenous peoples and the ecological refugees. The subsequent logical step in this direction is to enter into the field of "violence", in particular economic violence (*Globalization, Violence and World Governance*, published in 2011) and political violence, in the sinister form of terrorism (this volume).

The analysis carried out in this book is seen by its author as a "disheartening journey", which is clearly not conducive to any optimist outlook. The picture reveals brutality, disregard for the dignity of humankind, and mockery of laws and principles. Laura Westra herself does not show much confidence in the radical change at which she hints, which is to establish a new international body to exercise a legal control and oversee what the United Nations Security Council, a political organ, is doing. This change would comply with ideals which can be expressed through elegant Latin wordings (*jus cogens*, *erga omnes*, *parens patriae*), but which are far from being likely in the actual world. How can sovereign states, and in particular the major powers, be expected to act in such a self-defeating manner?

According to Laura Westra's tentative conclusions, another way to address the present situation is to follow St Francis (his words are "start by doing what is necessary; then do what is possible; and suddenly you are doing the impossible") in order to return to the principles of civilized existence. In particular, the "voices of the older traditions from Europe" should be joined "to the new, younger voices of countries of all continents". In my view, St Francis, rather than being linked to any geographic origin, should be seen as a luminous instance of humankind as a whole. In fact, the meaning of the expression "European traditions" is quite dubious. History

tells us that the European countries have spent much of their time in waging wars against each other and against other countries, as well as in engaging in massacres of innocent people for a number of reasons, including difference of religion. The most atrocious "inventions" of the past century—massive genocide and massive bombing of urban areas—are due to "inventors" and practitioners of European origin. The basic message implied in the present process of European integration ("if we become rich together, perhaps we will be less aggressive than before") can only confirm the desire to depart from the models of the past.

But this consideration does not detract from the wisdom of message sent by St Francis. Silence and inaction are very close to complicity. Words and action against violence can lead to changes ("suddenly", said St Francis; but, being a saint, he could envisage miracles; in the case of the present fight against terrorism, we could be satisfied with gradual improvements).

* * *

Having expressed my view about the high quality of this book, I cannot refrain from briefly adding some considerations on the basic question of the definition of terrorism that is discussed in depth in the first chapters of it. It is a matter of fact that this definition has always determined endless discussions among states, without any generally accepted results so far. However, from the logical point of view, the definition seems quite simple in its three components, namely: (i) acts of violence, (ii) made for political purposes and (iii) indiscriminately directed against people. The first consequence of this kind of act is that it creates a state of terror among people. The second consequence is that such a situation is expected to lead to the political outcome wanted by the terrorists.

As pointed out in the book, terrorism, far from being a movement or a philosophy, is a method. It is not necessarily related to war, as it can also occur in time of peace. In my view (and in the view of most people), terrorism can never be accepted or condoned from whatever side it comes and for whatever purpose it is done. It is always a crime, as innocent people can never become an indiscriminate target, either in time of peace or in time of war.

In fact, the problem with the definition of terrorism is a practical, rather than a logical one. States, depending on their political positions, tend to exclude from the definition certain categories of action that they would like to justify. On the one hand, freedom fighters are criminals if they resort to terrorist methods (although some states are not ready to

subscribe to this conclusion). On the other, nothing prevents states themselves from resorting to terrorist methods (although some states are not ready to subscribe to this conclusion).

One of the main merits of Laura Westra's book is that due emphasis is put on the so-called state terrorism; that is, action by terrorists who are state agents. We are all aware of the crimes of which Osama bin Laden was accused (however, he was killed before he could have a trial), and of the thousands of innocent people who lost their lives in the vile attacks of 11 September 2001. But we should also remember that in other cases innocent people have been attacked for political ends by state agents in order to create a general state of terror. While the book provides several examples in this regard, I would here elaborate on the subject of enforced disappearances.

The first massive practice of enforced disappearance can be dated back to World War II, when thousands of people were secretly transferred to Germany from the occupied territories in Europe under the decree known as *Nacht und Nebel* ("Night and Fog"), issued on 7 December 1941 by the German Führer and Supreme Commander of the Armed Forces, Adolf Hitler. The fate of the arrested people was to vanish without leaving a trace. The practice of enforced disappearance was thus established as a measure against the civilian population to produce a deterrent effect. Hitler clearly understood that effective and lasting intimidation of a civilian population could best be achieved by measures that kept the victim's relatives and the population in general uncertainty as to his fate. He also understood that vanishing without trace may be even worse than dying.

Later, resort by state authorities to enforced disappearances has served different purposes depending on the specific circumstances. In each case, enforced disappearance has its own, albeit perverse, logic.

The most common kind of enforced disappearance was carried out, in complete violation of the domestic legislation, by state agents in the context of a state policy to fight members of the insurgent movements, or, more generally, political opponents and their supporters. If those who exercised power wanted to keep it any cost, for their own benefit and the benefit of their allies, the most direct way to pursue such a purpose was to make their opponents disappear.

The practice of enforced disappearance was also carried out to achieve a second and equally important aim; that is, to spread terror. Society as a whole was forced to live in a climate of physical and psychological submission to the benefit of those who, while violating the most basic laws of

human coexistence, enjoyed a condition of total impunity. If people are seen being abducted and are later found dead after severe torture, or disappear forever, everybody, even those who have no intention of becoming political opponents, is placed in a condition of fearful subjection to those who hold power and exercise it through terror. The practice was, at the same time, illegal and notorious: everybody knew that people disappeared, and could easily imagine who was responsible for it. But it was difficult to react, be it only for the sake of legality, because of the lack of information on the specific cases and the increasingly widespread climate of terror. This helped those who held power to retain it. In fact some state authorities used the concept of national security and the pretext of the terrorism of others to pursue their own terrorist purposes.

Besides the most common pattern of the practice, there are also special variations, as exemplified by the enforced disappearance of children either born during the captivity of their disappeared mothers or abducted separately. After their disappearance, several of these children were illegally adopted. Yet the existence of children of political opponents raised some questions for those practising enforced disappearance. Should the children disappear and be killed too, considering that, if they are not yet political opponents, they are likely become political opponents tomorrow? In principle, the logical answer should be in the affirmative. The children of the perpetrators of enforced disappearance should not be disturbed by the children of the disappeared people. However, consideration should also be given to the fact that children, especially the younger ones, could become a sort of tradable good and be given in adoption to couples who wanted a child (and were perhaps willing to pay money to get one). The market has its own attractions and rules too, and, if the children were given in adoption to reliable couples, they would not grow up as political opponents. The second purpose may contribute towards the achievement of the first.

In recent years there has been a further variation in the phenomenon of enforced disappearance. In the context of the so-called "war on terror", enforced disappearances operated at the transnational level have become a means by which information relevant for security purposes can be extracted. In almost all countries the legislation in force prohibits the state from subjecting people to torture or other cruel, inhuman or degrading treatment. It also provides that all detained persons are entitled to challenge the legality of their detention before a judicial body. But all this may prevent the intelligence or other state services from extracting information that they deem relevant for security purposes.

A way to circumvent the obstacle is to claim that the legal provisions against torture or other cruel, inhuman or degrading treatment (and, more generally, domestic and international provisions on human rights) apply only within the borders of the country (the so-called "not in my backyard" doctrine). It follows that what cannot be done domestically can be done abroad. If people who are in the country cannot be tortured or subjected to other cruel, inhuman or degrading treatment, foreign people who are abroad can. If people who are in the country cannot be caused to disappear, foreign people who are abroad can. What is important, for the sake of apparent legality, is that all the conduct that is domestically prohibited takes place outside the national territory and does not affect a national.

There is no doubt that such a theory is a mockery of any kind of legality and an insult to all those who believe in the rule of law. The core human rights provisions include, *inter alia*, the prohibition of torture and other cruel, inhuman or degrading treatment, the prohibition of enforced disappearance (especially where it is used as a means to facilitate such abhorred treatments), as well as the right to judicial protection. These provisions can never be derogated, even in cases of public emergencies or armed conflicts threatening the life of a nation. They must be fully complied with by all state agents, wherever they happen to act. State agents acting abroad are not less bound to abide by core human rights provisions. Is there any substantive difference if state torturers are instructed to ply their trade only abroad and not at home, and if the victim is a foreigner rather than a national?

The logical development of the "not in my backyard" doctrine follows a simple path: the less the national involvement, the better. The ideal situation occurs if information is extracted from a foreign suspect in a foreign country by foreign agents, and if the information, purged of any detail on how it has been obtained, independently reaches the national intelligence or other interested state security services. However, as such an ideal situation is not likely to occur in the real world, some sort of national involvement becomes inevitable. This is why the practice of the so-called enforced renditions has been invented. It is based on the forced transfer of the suspect from abroad to abroad. The foreign victims are captured abroad and transferred abroad to a state having a deplorable human rights record, where the relevant information is extracted from them through torture. The extraordinary rendition programme is a circuit that involves at least three states: the captor state; a foreign country where the victim is captured (the accomplice state); occasionally other foreign accomplice states

where the victim is provisionally transferred; and, finally, another foreign country, the extractor state.

At this point some obvious questions could be asked. Should terrorism be fought by terrorist methods? Should I live in a country (for example, Italy) where bands of secret agents, both local and foreign, go around abducting people and making them disappear, to be tortured abroad? If discovered, should these agents hide behind the doctrine of state secret to prevent criminal proceedings against them?

Leaving the questions without answer, I would turn to another issue related to state terrorism. Moving from the definition that seems to me the most appropriate, I would always link terrorism to the effect of creating terror. In my view, terrorism without terror would be a contradiction in itself. This is the reason why I have difficulties in accepting the broad concept of terrorism followed in Laura Westra's book, which goes as far as to include the imposition of unliveable conditions to consolidate the economic supremacy of some states over others. While this can be a serious violation of human rights, I would prefer to keep the definition of terrorism to its strict original meaning and to avoid what still seems to me a dilution of its scope. But I might be wrong in my assumption.

* * *

In her trip through the different kinds of terrorist violence, Laura Westra explores the area located between the worst reality and the utmost utopia. She provides the reader with informative materials followed by independent and thought-provoking considerations. In fact, it is only by describing things as they are, without trying to conceal them under a marsh of rhetoric, that steps forward can be made. After all, law is not conservation, but development and change.

Tullio Scovazzi

ACKNOWLEDGEMENTS

After my return to Osgoode Hall Law School to pursue further studies and research on the effects of globalized power, the role of states (especially powerful Western nations and alliances) became increasingly clear. In the decade after the events at 9/11 both real and misleading information about what happened and what followed appeared to be everywhere.

As well, the power of those states extended everywhere in the world, and the harms imposed on vulnerable people were the culmination of global imperialism, pursued with almost total impunity (see my *Globalization, Violence, and World Governance*, Brill, 2011). I became convinced that the illegal and incorrectly named "war on terror" and the measures dubbed "counter terrorism" were nothing but forms of terrorism, perpetrated by states.

I am very grateful, for the copious research material received from numerous sources, to the lawyers in the Law Union of Ontario (especially Ed Corrigan), to the members of the organization Science for Peace (especially Edwin Daniel), and to my son Richard Westra.

As always, the help of Diane Rooke, law librarian at Osgoode Hall Law School was foundational to this work, and the thorough and understanding copy-editing of Hamish Ironside ensured the completion of the book in a timely manner. Heartfelt gratitude once again to Luc Quenneville for his outstanding technical assistance. Finally, thanks are due to Richard Falk, whose work, and especially his encouragement at his recent talk in Toronto, provided both inspiration and direction.

INTRODUCTION

In the early 1990s I published a paper on terrorism, and in 1994 I was asked by Routledge to review a manuscript by Paul Gilbert, entitled *Terrorism, Security and Nationality*. I found Gilbert's work (primarily on Ireland and Palestine) particularly inspiring, and a few years later I introduced a new course at the University of Windsor—"War, Terrorism and Environmental Racism"—which used both the Gilbert book and my own *Faces of Environmental Racism* (Westra and Lawson 1998) as textbooks, not only at the University of Windsor, but also when I taught the same course for Sarah Lawrence College in 2000.

The topic of terrorism has become increasingly central in the last ten years. So, after returning to Osgoode Hall Law School for my second PhD in 2000 (published as *Ecoviolence and the Law*, 2004), I researched the global problems of environmental justice and published a trilogy on that topic (*Environmental Justice and the Rights of Unborn and Future Generations*, 2006; *Environmental Justice and the Rights of Indigenous Peoples*, 2007; *Environmental Justice and the Rights of Ecological Refugees*, 2009). From that research other urgent topics emerged: first, the issue of global governance (*Globalization, Violence and World Law*, 2011a); and, second, the question of collective rights (*Human Rights: the "Commons" and the Collective*, 2011b).

The material I discovered in my research led me to return to the topic of terrorism, which I could now approach better from the standpoint of law as well as that of morality. I decided to also return to my bestselling book title, and the "faces" (or "masks") that hide the real purposes and intents—sometimes those of non-state agents, but primarily those of states.

My research led me to trace the continuity between state support for dictatorial regimes in Central and South America, through repression and so-called "counter-insurgency" against socialist regimes in the 1950s, 1960s and beyond, to the current "counter-terrorism" practices in the so-called "war on terror", from renditions (disappearances?) to Guantanamo Bay and Abu Ghraib. As well, it is important to understand the use of language regarding terrorism itself. In March 2011, Libyan "freedom fighters" against an acknowledged dictatorial regime of Muammar Gaddafi are described in the media as "rebels", although NATO forces are standing by to assist

and to end the impasse. Nor is this the only example of "double standard", which extends to people fighting for self-determination everywhere, according to their region's economic importance and the alliances that may work against them.

Non-state terrorism and state terrorism—phenomena about which I have written in these pages—are complex notions, as state terrorism especially presents itself with many "faces", each one representing an attempt at justification and legality, as each "mask" hides the true nature of each practice. These are not wars (see Chapter 1); at least, not the outright wars of aggression proscribed by international law. At most it is a "war on terror" presented and promoted (inaccurately and illegally) as a "war of self-defense". In Chapter 2, the second inaccurate assumption regarding state terrorism is laid bare: "terrorists" are not criminals. But non-state terrorism gives rise to a long list of criminal activities on the part of the state involved, and the numerous breaches of human rights that flow from state terrorism are also listed in this chapter.

Chapter 3 separates sharply the mental element, the intent and motivation of non-state terrorism, from the same aspects of state terrorism. Essentially, the quest for self-determination, actual self-defense, and the support of one's culture or religion, are all rights supported by international instruments originating from the United Nations, or sanctioned by them. In contrast, the pursuit of profit, the plunder of resources, and the determination to forge power alliances in order to extend a nation's dominance in a specific region do not enjoy the same support in international law.

Chapter 4 discusses the less acknowledged aspects of those state pursuits and the effects of their oppressive, imperialistic policies, most often accompanied by illegal, violently repressive means that, therefore, constitute ongoing "faces" of state terrorism. Finally, Chapter 5 considers what is presently available in national and international law to counter these problems, which are both blatant and insidious in turn. We question once again the proliferation of individual human rights instruments, and note a recent attempt to indict former US President George W. Bush for the support and practice of torture of his administration. Chapter 5 also considers a UN Resolution condemning nuclear weapons, and concludes with a discussion of state responsibility and the *parens patriae* doctrine. It is the latter that inspires the present quest for a re-examination of the UN, its principles, its purposes, and its relation with some of its organs.

Chapter 6 returns to that theme as I examine in some detail the relation between the UNGA and the Security Council, which tends to confirm the

intimate connection between terrorism, counter-terrorism, and globalization. The UN is explicit regarding its goals and aims, and both its Charter and several of its Declarations and Covenants are equally explicit about the goal of peace and non-aggression. In contrast, there are no "exemptions" to these principles, either to favor the interests of "great powers" or simply in support of economic imperatives.

Chapter 7 reviews the argument of each chapter of the book, and emphasizes the importance, for all who are aware of these issues, to persevere, according to one's abilities and talents, in the effort to unmask all the "faces" of terrorism, and bring the multiple human rights breaches that result to the attention of the international community.

After the narrative of this work was completed, the assassination of Osama bin Laden occurred, and it showed yet another aspect of the gross illegalities involved in the "war on terror"; a "postscript" on that topic completes the volume.

Most people in various parts of the world and in various walks of life are aware of one or another of these "faces" and of those human rights breaches. It has been the aim of this work to bring these issues together, not as a new discovery, to be sure, but as an effort to show their interconnectedness, their rationale, and the ultimate unity of their multiple aspects. When added up, combined and viewed as a whole, I believe it will be easier to understand the global menace they represent.

CHAPTER ONE

TERRORISM: A CONCEPTUAL ANALYSIS

Introduction

> In my opinion, it may be safely contended that … at least transnational, state-sponsored or state-condoned terrorism amounts to an international crime, and is already contemplated and prohibited by international customary law as a distinct category of such crimes. (Cassese 2001)

In this paragraph Antonio Cassese outlines a very important topic. Although (as we shall see) terrorism as such is not defined in law, state terrorism can already be defined as a crime against humanity. In some sense, Steven Ratner agrees with Cassese, but he says that "Actions by States against civilians could be a war crime or a crime against humanity, but [they are] not terrorism", as he cites the High-Level Panel Report of the UN (Ratner et al. 2009).[1,2] Guided by Cassese, our analysis must work "backwards", in some sense; that is, not from the concept of terrorism as such to the same concept when applied to the actions of a state, but from the latter to the former instead. However, this move is only required when we consider terrorism in the legal sense, so that perhaps a brief overview of its history as a legal term should be in order before we turn to a consideration of the meaning of terrorism in general, and to the links that I argue it has with the neoliberal agenda of development and expansion.

Aggression and Terrorism in International Law 1972–2005: Working on an Impossible Definition

> Since a comprehensive convention with a legal definition of terrorism would have limited the discretion of the United States to determine the international public enemy on a case-by-case basis, the United States has been acting according to an old motto coined by a Roman lawyer, "*omnis definitio in jure periculosa*". (Friedrichs 2006)

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[1] See Chapter 6.

[2] Most of the actions that this work will define as "state terrorism" are referred to as "atrocities" in Ratner's work; see discussion on his page 14.

Elsewhere I have pointed to the social/economic immoralities and illegalities supported by the political power structures that are part of the global governance affecting the UN (Westra 2011a). For now, we should also examine whether the same power structures tend to support, or at least condone, unspeakable crimes against humanity, committed against the most vulnerable of humankind.

The same dominant political structures affect not only the increasing presence of terrorism, but also the very absence of a legal definition of that phenomenon, in a stance parallel to the one that is part of the neoliberal economic agenda regarding the ambiguity of "development".

Essentially, when a certain coalition, led by the "hegemon", controls for decades the efforts of most countries to reach a definition of what constitutes illegal violence, just as it effectively controls globalized trade and economics, then the time has come to find ways to check a power that increasingly exceeds the bounds of legality. In order to better understand what has led to the present international impasse regarding a definition, we should review briefly the history of the international efforts to reach a definition, and the various players who participated.

> For more than thirty years States have debated in the UN the question of punishing terrorism. However, they have been unable to agree upon a definition of this crime. Third World countries staunchly clung to their view that the notion could not cover acts of violence perpetrated by so-called freedom-fighters, that is individuals and groups struggling for the realization of self-determination. (Cassese 2005: 449)

According to Article 44.3 of the First Additional Protocol (UNGA, Res. 49/60, adopted 9 December 1994), some persons could be considered "freedom fighters", although they had no uniforms, nor openly carried arms, so that they would have prisoner of war status if captured. The annexed Declaration (para. 3) contains the following provision as a definition of terrorism:

> Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.

The UN has been attempting to grapple with the question of terrorism since 1972 (Friedrichs 2006: 71; Peterson 2004: 173). After the 1972 attacks on the Olympic Village in Munich, terrorism was placed on the agenda of

the General Assembly, while the US submitted a "Draft Convention for the Prevention and Punishment of Certain acts of International Terrorism" (UN Doc. A/C.6/L. 850, 25 September 1972). The US draft was limited to "certain acts of terrorism", without attempting a thorough definition. The main problem was that many Arab and African States wanted:

1) an in-depth discussion of the root causes of terrorism";
2) a differentiation between terrorists and freedom fighters; and
3) the inclusion of state terrorism as "the most harmful and deadly form of terrorism" (Friedrichs 2006: 72–73; Report of the Ad Hoc Committee, UN Doc. A/9028, annex 7, 1973).

The "non-Aligned Group" was adamant on the inclusion of state terrorism under the mandate of the Ad Hoc Committee:

> acts of violence by colonial, racist, and alien regimes, they maintained, constituted the cruelest and most pernicious form of international terrorism and therefore had to be given the highest priority during the deliberations. (Freiderichs 2006: 74; Report of the Ad Hoc Committee, UN Doc. A/32/37, 28 April 1977)

At any rate, as no consensus was forthcoming, only conventions against specific acts were enacted and no further effort emerged towards a definition of terrorism in general. In 1999 the United Nations adopted a "convention on the financing of terrorism" (Friedrichs 2006: 74), and after 2000 further discussions took place on the basis of another draft submitted by India (Friedrichs 2006; UN Doc. A/C.6/55/I, 28 August 2000, raised Draft Convention; see also UN Doc. A/C.6/51/6, 11 November 1996, original version). A tentative definition was also proposed in 2005:

> According to this definition serious offences against persons or heavy damage to private or public property qualify as offences within the meaning of the Convention, "where the purpose of the conduct, by its nature or contact, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act". (Friedrichs 2006; UN Doc. A/59/894, 12 August 2005; letter containing Comprehensive Convention on International Terrorism)

The main problems, however, remained unsolved. For instance, according to the Organization of the Islamic Conference (OIC), the question of groups' struggle against "foreign occupation, aggression, colonialism and hegemony", aimed at achieving their own self-determination, as well as the problem of state terrorism (with special consideration of the situation in Palestine), had not been resolved (Friedrichs 2006; UN Doc. A/C.6/55/L.2,

19 October 2000; UN Doc. A/57/730-5/2003/178, 13 February 2003; the former proposed by Malaysia, the latter by Syria). Thus, until 2006, the aim of reconciling the parties to achieve a comprehensive, binding definition had failed; both the history of the issue and the stumbling blocks that effectively ensured that no agreement could be reached reproduce similar, politically motivated perversions of important human rights issues.

Like trade- and "development"-related issues, the UN was unable to resolve the situation on the side of principles, morality, or even the binding legality of its own mandates, against the effects of Western political power.

One Source: Two Major Global Phenomena

> Therefore states should begin to move towards a comprehensive environmental legal dispensation that recognizes the unity of the planet as a single fragile ecosystem. That dispensation should revolve around the creation of the crime of geocide, literally a killing of the earth, the environmental counterpart of genocide, and its entrenchment as an international legal crime. (Berat 1994: 327)

Climate change and terrorism are acknowledged by most to be the two major threats facing humanity at this time. Both are present globally; both are diffuse and largely undefined. As well, although "everyone" knows what they are (and, in fact, terrorism is involved and cited more often than the global threat of climate change), their common source is not named either in legal or other academic discourse, to my knowledge. A question arises: is the coupling of these two scourges too facile and superficial? In order to answer this question I propose extending our consideration beyond the *material* and obvious results of the two phenomena to the other aspects of causality that characterize them, such as their shared "formal" and "final" causality, as proposed by Aristotle and recently defended by Alexander Wendt (Wendt 2003: 491–542). We shall flesh out this argument below.

The two join in their results: their "victims", or those who are suffering the worst effects of each, are the most vulnerable, the poor and the inhabitants of so-called "developing" countries. More importantly, however, they converge in their point of origin. Climate change is the final result of one of the major aspects of overconsumption: the overuse of energy. Many scholars from various disciplines have documented and described the overuse of energy required by the neoliberal globalization

and development agenda (Rees and Wackernagel 1996; Rees and Westra 2003: 99–124; Brennan and Lo 2010: 429–444; Mattei and Nader 2008: 35–63; Westra 2010: 15–37).

Richard Westra points out the interface between overconsumption and the pursuit of "growth" in the North, and its effects on the South:

> [...] specializing in raw material production became a road to serfdom for the Third World, rather than one of shared benefits of industrial progress. It led to an international economic structure of wealthy "Center" economies exporting industrial goods, the price of which tend to rise, and impoverished "peripheral" economies of the Third World exporting raw materials and foodstuffs, subject to falling prices, and to a process of "unequal exchange" with the center. (Westra 2010: 15–36)

This inequality, with the concomitant victimization of the Third World's impoverished people, is clearly supported by the overconsumption of the citizens of the North. But in order to support the neoliberal agenda of "development" and Northern/Western preferences for overconsumption, energy is required at every step. Thus, once the full, harmful effects of our ecological footprint are well understood, and the underlying causality of the conditions that generate climate change are laid bare, it is clear where one can find the origin of the conditions leading to climate change and the impetus for the confirmation of the *status quo*, as one after another of the Conferences of the Parties (COPs), following upon the Kyoto Protocol, continue to fail to meet the expectations of those seeking justice and security (Brown 2002; Brown et al. 2006).

The question, however, remains: what is the connection between energy consumption, greenhouse gases, and terrorism? The connection is, as stated, based on the neoliberal agenda of globalization. As the paragraph cited at the opening of this section states, destroying the earth and its systems ought to be considered a crime, and I have argued in a similar vein in my work on ecoviolence (Westra 2004). Destroying the Earth's natural systems also contributes significantly to the direct harms inflicted on human beings, particularly to Indigenous and other land-based communities in various countries in the global South. Ken Saro-Wiwa, the well-known eco-martyr from Nigeria, used the term "omnicide" to describe the effects of Royal Dutch Shell practices in Ogoniland (Westra 2007: Appendix 1).

I have worked extensively on environmental justice from various standpoints, and considered various related issues (Westra 2006, 2009), and I will not return to those arguments at this time. In contrast, before attending to the link and the moving impetus behind climate change and

terrorism, we should stop to consider terrorism as such in its logical and moral implications, beyond its legal status.

The Issues: Terrorism and Collective Human Rights

> People who have been dispossessed, degraded, humiliated, but whose spirit has not been broken, understandably want to proclaim their grievances, whether or not they expect their proclamation to advance their cause. (Baier 1988: 7)

Even in this early paper, long before terrorism became an important and debated legal issue, philosophers were debating the important topic of violence as a political tool. Paul Gilbert, for instance, was clear on the position:

> terrorism can be neither murder, which is purely private and has no political significance, nor war, which is entirely public and overt, but which the terrorist's party would be incapable of winning. (Gilbert 1994)

However, what we need to achieve in order to reduce (or even eliminate) terrorism is a comprehensive understanding of the phenomenon, beyond a purely philosophical analysis of its nature. Perhaps the best starting point is precisely an understanding of the "hegemon's" objections: the US (and the UK with them; but not Germany or France, for instance) do not want a precise definition, as they prefer to retain their "right" to call "terrorists" those they perceive as enemies, and clear of that taint those they consider friends or allies.

At any rate, the nations that prefer not to define terrorism also emphasize that terrorists attack those who should not be attacked (Gilbert 1994), or the "innocents" (i.e. civilians). Hence we can start by raising the first question in regard to terrorism: are all *civilians* morally blameless? Without going as far as Osama bin Laden, who claimed that full complicity with the imperialistic, racist practices supported by the US government rendered the "civilians" killed in the 9/11 attacks "non-innocents" because of their votes in support of their own government,[3] we must consider this question seriously today.

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[3] Osama bin Laden, "Letter to America", 24 November 2002: "You may … dispute that [the various accusations and grievances just stated do] not justify aggression against civilians for crimes they did not commit and offenses in which they did not partake: This argument contradicts your continuous repetition that America is the land of freedom …

For instance, some argue that not all civilians are blameless, given certain specific circumstances. In fact, perhaps "the citizens of a state with universal conscription", such as Israeli settlers,

> … are thus active participants in the theft of the Palestinian lands … not just conscious and willing participants but enthusiastic and indeed fanatical instigators and perpetrators of the strategy by which the theft is being accomplished. (McMahan 2009)

These "civilians" appear to be complicit in the "international crime of aggression, a crime that, when committed by soldiers, justifies defensive war" (McMahan 2009). We can thus conclude with McMahan, that "civilian immunity is contingent, rather than absolute" (McMahan 2009: 231).

Further, there is a question of self-defense, a topic I considered some years ago regarding terrorism. It is acceptable and legal to defend our own life and physical integrity, as well as our dignity as human beings, or the life and dignity of near family members (Westra 1989: 46–58). Essentially, there are other values beyond the immediate defense of our own physical integrity, such as (a) the immediate prevention of injury to others, (b) "long-range or indirect defense of self or others", and (c) securing the necessary conditions of minimally acceptable life, when no other possibility to achieve this goal is available (Westra 1989: 51).

Possibly, some limited form of violence might also be acceptable when the common good of humanity is at stake (Westra 2004). A somewhat Kantian defense of terrorism as "self-defense"—that is, as a form of defense of one's personal integrity (autonomy/dignity), and that of our family and community—might represent an acceptable extension of the traditional concept of self-defense. In fact, this might be one that is far

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Therefore, the American people are the ones who choose their government by way of their own free will; a choice which stems from their agreement to its policies. Thus the American people have chosen, consented to, and affirmed their support for the Israeli oppression of the Palestinians, the occupation and usurpation of their land, and its continuous killing, torture, punishment and expulsion of Palestinians. The American people have the ability and the choice to refuse the policies of the Government and even to change it if they want. The American people are the ones who pay the taxes which fund the planes that bomb us in Afghanistan, the tanks that strike and destroy our homes in Palestine, the armies which occupy our lands in the Arabian Gulf, and the fleets which ensure the blockade of Iraq. These tax dollars are given to Israel for it to continue to attack us and penetrate our lands. So the American people are the ones who fund the attacks against us, and they are the ones who oversee the expenditure of these monies in the way they wish, through their elected candidates. Also the American army is part of the American people … The American people are the ones who employ both their men and women in American forces which attack us. This is why the American people cannot be innocent of all the crimes committed by the Americans and Jews against us." (Full text at http://www.guardian.co.uk/world/2002/nov/24/theobserver)

more defensible than pre-emptive strikes against the possibility of future violent attacks, from the logical as well as the moral point of view.

This point brings us back to the question of "freedom fighters", which is surely one more issue that requires a thorough discussion of the motivations of the so-called terrorists (Friedrichs 2006: 71–72). The "US and Western countries" opposed the quest for the (possibly) "legitimate reasons behind the grievances raised by international terrorists", stating that they did not "wait for the underlying causes of crime to be identified before enacting penal laws against criminals" (Friedrichs 2006: 73; UN Doc. A/9028, 1973: Report of the Ad Hoc Committee, Annex 7b; UN Doc. A/C.6/SR.1355-1374, November 1972: verbatim records of the Sixth Committee).

But, as noted above, terrorist are not criminals, although that designation is often used by governments who do not abide by the legal regimes that prescribe the treatment of criminals (e.g. immediate access to legal advice and to their country representatives if they are foreign nationals; reasonably speedy trials, humane treatment in jails, and the like). Nor do the same governments treat them as combatants in armed conflict, with all the rights pertaining to that designation.

Hence it becomes even more imperative to define the acts that are or are not terrorism; and this requires a full understanding of the motives—the root causes that propel even young, educated people of either gender to commit suicide as part of their acts of terrorism, for their deeply held beliefs, and to bring the world's attention to the gross human rights violations their groups and communities are suffering.

Their position is akin to the one of the whistleblower, in some sense; that is, as a person pursuing activities harmful to oneself, but especially damaging to the guilty party (industry or corporation for the most part), albeit without engaging in violent attacks in the case of the whistleblower. The whistleblower engages in a form of self-defense; that is, she is calling attention to the breaches of human rights that follow upon certain corporate practices. She harms her own position by so doing, but the final goal is the defense of affected stakeholders and, in he case of grave environmental cases, perhaps the defense of humanity itself.

As well, the whistleblower acts from a justifiable desire to see universalizable principles upheld, and to continue to live in a way that is consonant with her personal integrity, and which permits the exercise of her autonomy. Of course, for the most part, the whistleblower only uses her knowledge to stop certain practices, and perhaps to harm the financial outlook of the targeted enterprise at most. Instead, the terrorist does much more

to bring the world's attention to the grave conditions her group or community has to bear. Her acts, even her suicide, bring home once again the powerlessness of individuals and minority groups even in so-called democratic and just societies, or in a world where principles have apparently been replaced by political expediency.

Given this attempt to place an understanding of terrorism in a somewhat Kantian context, it is important to recall that Kant forbids suicide generally, and offers the single example of Seneca as a morally correct one, dying to defend freedom and autonomy, in the hope that his death may encourage others to overcome oppression (Westra 1989: 56). Of course Kant addresses here self-violence, not violence directed at others, even to achieve laudable aims, as in the example he adduces.

In conclusion, all three main "issues" we have discussed *start* with the sincere and respectful attempt to understand the causes and reasons that may be the basic causes of terrorism. If such a course of action were to be pursued, the result may well go far beyond the understanding of terrorism we are advocating. In fact, respectful dialogue, and the return to the strict limits of international law, might mean the mitigation or even the cessation of the conditions that lead to the violent protests we are considering. After all, freedom fighters should be supported and protected, as they are attempting to actualize the UN mandate to eliminate colonialism and racial discrimination, and to defend the self-government of peoples (McMahan 2009: 26).

The Nature of Terrorism: A General Discussion

Duties of States Regarding Terrorism Acts and Human Rights

6. All terrorist acts result in violations of rights whether committed by States themselves or sub-state actors.
7. All States have a duty to promote and carry out national and international policies and practices to eliminate the causes of terrorism and to prevent the occurrence of terrorist acts. (Parker 2008)

In "On the Draft UN Principles and Guidelines on Human Rights and Terrorism", Karen Parker acknowledges that the UN Special Rapporteur did not address—for instance—"the root causes of terrorism", as these were issues of great complexity, which needed to "draw on a number of disciplines other than law to be useful" (Parker 2008: 235). It is my belief that these root causes (or, in Aristotelian terms, the "formal" and "final" causes; Wendt 2003: 491–542) of terrorism are the basis of any fruitful

discussion of terrorism. Unless one analyzes and researches the reasons why such acts are undertaken, one cannot hope to understand the phenomenon of terrorism, nor expect to be able to seek informed and effective solutions for its elimination.

Essentially, all present efforts to curb terrorism focus on the "symptoms" rather than the disease itself. If a doctor attempted to prescribe a "cure" for a fever without any attempt to discover the underlying conditions that were causing the fever, one would judge her to be an incompetent. But it is a fact that even the possibility of causal research into the reason for terrorism and its origins is totally neglected, while spurious, facile answers are provided instead, especially by the states that most keen to persecute terrorists today, such as the US or Israel.

The closest the "Draft Principles" came to an understanding of the possible reasons for terrorism may be found in the section on "Counter-terrorism measures and the definition of terrorism":

> States shall not use either the issue of terrorism or the existence of a terrorist act in the conduct of an armed conflict as an excuse to deny the right of self-determination of a people or to avoid the application of humanitarian law in situations of civil wars, wars of national liberation or international armed conflicts. (Parker 2008: 238)

Paul Gilbert had already pinpointed in 1994 some of the salient features of terrorism (Gilbert 1994): that it is neither simply "crime" nor war. Crime is normally hidden by the perpetrators, who make every effort not to divulge their role and motivation. War, in contrast, if it is legally waged, is declared, openly pursued, and subject to strict humanitarian guidelines both before it is declared (*jus ad bellum*) and while it is fought (*jus in bello*); we will return to the difference between war and terrorism below (Westra 2004: ch. 2).

Given the very origin of the so-called "war on terror"—that is, openly proclaimed revolt against the discrimination and mistreatment affecting most Muslim peoples (see Osama bin Laden's words in note 3 of the previous section)—perhaps the most serious considerations should be devoted to the distinction between freedom fighters (or those pursuing a war of liberation) and terrorists, especially in occupied lands such as Palestine, or behind disputed borders (neither of which is a situation amenable to democratic decision-making).

As well, the lack of a legal definition should be seriously discussed at the highest level in the UN, without any undue deference to the Security Council (SC), and the individual interests of any state, no matter how powerful. Number 11(c) of the "Draft Principles" states:

> Definition of terrorist crimes must be in conformity with all applicable international laws, such as with all applicable international laws, such as *nullum crimen sine lege*, or the principle of individual responsibility. In particular definitions should clearly set out what elements of the crime are terrorism. (Parker 2008: 238)

Thus what is or is not terrorism remains an open question. This issue remains the most problematic aspect of the many difficulties surrounding terrorism. However, given that there are several aspects of development and globalization that may include forms of state terrorism, the lack of a firm definition may also work in favor of community and collective rights, when it might be proposed to widen the reach of the concept in line with recent economic and political developments (Westra 2011b).

At any rate, this work should go beyond summing up what terrorism is or is not, given that there is no binding legal definition of the term, and that as many as 212 definitions of terrorism have been discovered in the English language (Andersson 2008: 249).

What must be done is to research and separate the various aspects of terrorism, as perpetrated by individuals, groups and states, perhaps starting from what sets terrorism apart from other violent acts, conflicts and crimes. Andersson sees this central aspect as "the will to sow the seed of terror" (Andersson, 2008: 24), but I am not convinced by this somewhat facile "core" definition, as the real question is *why* such a seed and its sowing should be viewed as necessary, to the point of sacrificing one's own life.

Yet Andersson is right when he speaks of the United Nations conventions, as he suggests that we "should abandon the ambiguity which often characterizes these documents, and hence opens the way to various interpretations, always to the benefit of the victors and of the strongest parties" (Anderson, 2008: 252). But the same "ambiguity" also permits us to consider, at least, the various possibilities we have alluded to above (those that combine recent global economic conditions of oppression and state violence, for instance). The UN Declaration on the Granting of Independence to Colonial Countries and Peoples (14 December 1960) states at Point 1:

> The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations, and is an impediment to the promotion of world peace and co-operation. (Andersson 2008: 252)

This point raises (albeit implicitly) a fundamental question: "subjugation", "domination", and "exploitation" are also features of what Wolfgang Sachs

defines as "economic oppression" (Sachs 2009: iii–xv), and what Mattei and Nader term "plunder" (Mattei and Nader 2008); hence, both signal an issue that must be explored in detail.

In addition, one must remember that "war crimes" do have a binding definition, and so do "crimes against the peace". But for either to occur, there must be a war in progress, especially for the first term. As well, both may either prompt terrorist reactions or be partly based on some feature of terrorism in themselves. It is instructive to consider the efforts of the US to destroy, or at least to significantly weaken, the International Criminal Court. The US did not ratify its Statute, and has pursued a policy of arranging bilateral agreements with countries who did, in order to ensure that no US citizens should be brought before that court, hence the "weakening of the court and the lowering of its capacity to prosecute" (Andersson 2008: 258). These policies entail that the civilian populations of the countries that have ratified the Statute are at risk, and hence they add to the list of "collateral damages" caused by the United States (Andersson 2008: 258).

Early Research Literature on Terrorism

> The newcomer to the field of terrorism research has to find his way with little to guide him. There is no clear and generally accepted definition of what constitutes terrorism to begin with. Its relationship to other concepts like political violence, guerrilla warfare, political assassination, etc. is insufficiently clarified. (Schmid 1984: 1)

A further difficulty lies in the fact that writings and research material on the topic are dispersed "in the psychological, historical, sociological, criminological and political science literature" (Schmid 1984: 1) in various languages. At any rate, "political violence" is a recurring theme, although both "war" and "crime" are viewed as components of the understanding of terrorism, as we acknowledged earlier. Schmid is intent upon researching what is available through multiple databases. We will recap some of his findings; but the final conclusion is (a) that there is no single, definitive understanding of the concept; and (b) that the most influential and accepted definition (through by no means exhaustive or precise), is based on definitions proposed by powerful states and the media on which they depend as we noted when we considered the legal literature.

Perhaps the most pervasive and expected aspect of terrorism is the presence of violence. That connection is explicit, for instance, in the British Prevention of Terrorism Act (Temporary Provision Act of 1974):

"For purposes of the legislation, terrorism is the use of violence for political ends" (Schmid 1984: 11).

The analysis of van der Dennen is particularly apt. It reads, in part:

> Violence has been defined in terms of force, coercive power, authority, (il)legitimacy. It has been defined in terms of behaviour, motives, intentions antecedents and consequences. It has been defined in terms of violation: violation of corporal integrity, violation of territorial or spatial integrity, violation of moral and legal integrity, violation of rules and expectation, even violations of self-esteem, dignity and autonomy. (van der Dennen, 1980: 118)

There are also many other interesting attempts to define terrorism in literature, all of which touch on one aspect of political violence or another, basic to both terrorism and counter-terrorism. For instance, Rubin speaks of "a rational motivation" and a "usage where (personal) material gain is absent" (Rubin 1970). Other attempts at definition include that of Harold Nieburg:

> … acts of disruption, destruction, injury whose purpose, choice of targets, or victims surrounding circumstance, implementation, and/or effects have political significance, that is, tend to modify the behaviour of others in a bargaining situation that has consequences for the social system. (Nieburg 1969: 13)

Another scholar, Ted Gurr, describes "political violence" as "acts of disruption, destruction, injury", while Perry Mars opts for the following conception of political violence:

The concept of political violence as distinct from violence in general has come to represent a combination of all or most of the following elements:

- activities carried out by aggregates of individuals, such as groups or collective movements;
- activities which tend to challenge the legitimacy of the governing regime, thus threatening the stability of political system as a whole;
- activities involving a high probability of resistance and coercive reaction by the governing regime; and
- activities involving a high degree of risk of injury and economic cost to both participants and the opponents in the political violence process. (Mars 1975: 221–239)

What is striking about these and many other similar attempts at circumscribing the concept of political violence, is that they all see it as directed towards governing bodies by their subjects, in the quest for social justice and recognition. The question of counter-measures does not yet exist, but

the basic motivation appears to be understood more clearly in these early discussions than it is now, when the reason and the rationality behind terrorist attacks have been obscured and twisted by Western states and the media they control. As well, the violence perpetrated by the states themselves, which usually initiates the causal chain that leads to forceful rebellions representing most (though not all) of the instances of terrorism today, is not even envisaged at the time of Schmid's exhaustive work on the topic.

The second aspect of terrorism that has been widely discussed (but is still not conclusively defined) is that of "political crime". We will review briefly the historical background of that concept in the early literature and give a more general discussion of "crime" in relation to terrorism in the next chapter. Some of Schmid's examples include:

> What was regarded as a political crime in extradition law was generally the violence exercised as "part of an organized attempt to overthrow the government and seize power in its place". (Schmid 1984: 25)

Thus the political violence in the crime discussed arises from a revolt against the standing government, whereas the possibility of a government committing political crimes is not as well represented. But "crimes" by victimized people "might consist of nothing more than exercising rights laid down … by the UN Declaration of Human Rights" (Schmid 1984: 26).

Two definitions of such forceful political acts stand out. The first is by one of the foremost experts in human rights law, Cherif Bassiouni, who defines a "purely political offense" as follows:

> … one whereby the conduct of the actor manifests an exercise in freedom of thought, expression and beliefs […] freedom of association and religious practice which are in violation of law designed to prohibit such conduct. (Bassiouni 1975: 408)

In contrast, "Anglo-American Law" does not distinguish political crime from other categories of crime (Schmid 1984: 27). Once again, a number of definitions are available, ranging from "An illegal act with political motivation or purpose … It is not necessarily violent" to "When undertaken against or on behalf of government for the purpose of influencing the authoritative allocation of values", or "If civilians are killed or injured in a diffuse act of terror such as bombing in a crowded market" (Schmid, 1984: 28).

An advantage of the material found in the early literature is the recognition of "crimes of government", which include "illegal means utilized

to influence the allocation of the social product or the occupation of positions of power" (Hess 1976). Hess describes several types of "crimes of government" that are relevant to our research, including the following:

1. Illegal measures of pre-industrial upper classes (such as the repression of Negros in the South of the United States after the Civil War);
2. Illegal measures of entrepreneurs (such as hiring of gangsters to "solve" the firms' problems with trade unions); [...]
4. Illegal transgressions of the police (such as entry without search warrant, torture or aggravated interrogation procedures);
5. Acts of terror by organizations close to the police force (such as the off-duty death squads of the Brazilian police); [...]
7. Colonial crimes (such as those of Portugal in Angola and Mozambique). (Hess 1976: 5–11)

Overall, Schmid's review of available literature tends to reinforce the first impression one gathers from turning to Schmid's research in general: prior to 9/11, most of the available studies discuss primarily revolting minorities and other groups resisting unfair conditions of oppression and economic and civil rights deprivations, fostered by governments. Included is the open description of violence perpetrated by states and—in general—the imposition of circumstances best described as forms of state terrorism.

However, "political crime" as such has an interesting and varied history (Passas 1986: 23–36), and we will return to that topic in the next chapter, devoted to the interface between crime and terrorism.

Towards a Non-legal Understanding of Terrorism in Its Multiple Aspects

> To hold an individual accountable for a crime under international law, it must first be determined whether that crime does in fact exist. Even if a crime is recognized under international law, universally recognized legal principles such as *nullum crimen sine lege* will bar ex post facto prosecutions if the crime came into existence after the allegedly wrongful acts were committed. (Vanzant 2010: 1053–1083)

We have mentioned several aspects of terrorism, similarities to and differences from other forms of violence, the existence of various reasons for violence (some more legitimate than others), and the undeniable distance between other categories of violence (such as war or crime) and terrorism,

although the latter are most often appealed to. Thus it might be best to start by eliminating the most unlikely connections (such as between terrorism and war or common crime) before we can start analysing other possible aspects of terrorism.

The plan to specify and identify the nature of terrorism should unfold in the next chapters as follows, starting with the most common form of identifying terrorism (that is, its connection with war):

- Terrorism and war (discussed in the next section).
- Terrorism and crime (Chapter 2).
- Terrorism: means and motives, the quest for independence and the limits to self-defense (Chapter 3).
- Terrorism and economic oppression through globalization (Chapter 4).
- Terrorism as ecoterrorism: the imposition of unlivable conditions, or "ethnic cleansing" (Chapter 5).
- Terrorism as the proclamation of human rights grievances (Chapter 6).

Each aspect will need a thorough discussion, especially the less obvious aspects here listed. But the understanding of the phenomenon that will emerge should be sufficiently exhaustive to enable us to reject the facile "explanations" that reign today. In addition, the present reactions to terrorism in most states do not appear capable of stemming the flow of harmful events. Thus, it would seem that non-partisan, clear understanding of terrorism might result in more than just another scholarly effort, as it might help to find solutions that are better suited to remedy what it really is than the current ad hoc attempts at eliminating something that is deliberately kept obscure. In the next section we will turn to the most obvious comparison: that with the classical locus of legal violence—that is, the just war, if such a thing is still possible today.

Just War in Antiquity and Early Christianity

From the time of the Roman Empire, and even earlier, the conditions of just war have been discussed and debated. Later theologians and philosophers of Christian times added their voices; earlier, philosophers of China, the Aztec empire, ancient Egypt, Babylonia, and Greece all discussed the proper and improper ways of visiting violence upon one's enemies. The Roman stoic thinker, Cicero, discussed the necessary conditions for *jus ad bellum* (or just war):

1) War must be declared by proper authority.
2) The antagonist must be notified of the declaration of war.
3) The antagonist must be afforded the opportunity to make a peaceful settlement prior to the initiation of hostilities (Christopher 1994; Cicero 1928).

Clearly, even before Christian thinkers, violence among groups, cities, and nations was an accepted part of political life, but the conditions of its legitimacy was a cause for concern. Violence as such was not desirable. Cicero also notes that war should be a last resort, turned to only when discussion is unsuccessful (Christopher 1994: 13).

It is fair to say that no other form of violence has enjoyed such a long history of concerned and concentrated study from so many and so varied sources. Hence, we can do no better than to attempt to understand under what conditions, in principle, violence might be morally justifiable.

In Roman times, there was a great deal of concern about the conduct of war (or *jus in bello*). Despite their position of imperial power, the Roman Senate adopted "just" laws based on principles so obvious and reasonable that they must be universally recognized, and imposed them on herself and those nations with whom she interacted (Christopher 1994: 14).

Rome issued and proclaimed a *jus gentium* (or world law), although there was no international cooperation leading to the formulation of such laws. To the Romans we owe the first detailed formulation of the duties owed to enemies, the *limits* of retribution, and the rights of non-combatants (those who lay down arms), as well as prisoners. Although no claim can be made that all violent conflict scrupulously followed the rules of war, the very existence of such rules creates a precedent for a clear dividing line between legitimate violence and violent crime. Although several aspects of the rules of war that were present in Roman times remain significant today, one well-accepted modern-day position appears to be absent from the discussion; that is, the position of pacifism. In fact, although Roman emperors are known to have looked down upon Christians and their less-than-wholehearted support of the war effort, this attitude might have been due to the Christians' refusal to worship the Emperor and to practice idolatry, rather than their pacifism.

Yet early Christians may have refused to offer violence even to their country's enemies, based on the passages from the Gospel that forbid violence even in retaliation. But aside from the clear prohibition against murder and the change from "an eye for an eye" to "love your neighbor" brought in by the Gospel, a certain ambiguity remains. On one hand, we

read "All who take the sword die by the sword";[4] on the other, the lawful authorities are expected and even obliged to keep order in the community and to mete out retribution and justice, and this may be done by violent means, if required (Christopher 1994: 21).

According to this interpretation, two significant aspects of present war morality emerge clearly: the need for a duly recognized authority to administer violent retribution according to its lights, and the presence of the condition required to legitimize violent punishment; that is, the primary concern for the public good. Pacifism understood as the complete rejection of any form of violence, under any circumstances, cannot be found in the Gospels, nor even in the convictions of early Christians. Considering the fact that early Christians were motivated by religious scripture rather than by the quest for solid argument, we might simply trace the history of just war theory by showing the development of theories from their earliest roots in antiquity to today, and set aside, for now, the question of pacifism.

Although Augustine worked on the question of what constitutes a just war, most of his doctrine was accepted and eventually incorporated in the work of Thomas Aquinas. Aquinas can be said to have summarized and systematized Augustine's thought to produce clear rules and principles (Christopher 1994: 52), in line with eternal law, and available to man through reason and codified in natural law. Natural law thus sets the boundaries of all human laws including the laws governing a just war. In the *Summa Theologica* (Q.94, A.2), Aquinas says: "Since however, good has the nature of the end, and evil the nature of the contrary, hence it is that all of those things to which man has a natural inclination that are naturally apprehended by reason as being good … Therefore, the order of the precepts of the natural law is according to the order of natural inclinations" (Timmons 1990: 97).

These "natural inclinations" are:

1) the "inclination to good in accordance with the nature which he has in common with all substances" that is the common inclination to self-preservation;
2) the "inclination in accordance to the natural law which nature has taught to all animals, such as sexual intercourse, the education of offspring, and so forth"; and
3) the "natural inclination to know the truth about God and to live in society."

[4] Matthew 26: 50–53.

War morality (and, in general, rules pertaining to the use of violence) is clearly derived from natural law, from both its first and third principles.

Self-preservation as a *duty* as well as a right is obvious, but the questions of "living in society" and "pursuing truth" are no less important in that regard. Society must be constructed and organized in such a way that the conditions are not only appropriate for a peaceful communal life, but also for a life kept safe, and thus kept congenial to the pursuit of truth at the same time. For the latter, a form of governance must be sought that (1) respects the *natural* ends of man, and (2) administers justice by authority that may legitimately employ violence when required. The basis for legitimacy lies in two criteria: the foundation of natural law and, most of all, the common good.

But the "common good" of the state cannot flourish unless its citizens be virtuous, and "the proper effect of law is to lead its subjects to their proper virtue" (Thomas Aquinas, quoted in Christopher 1994: 53). The common good "requirement", in fact, is so powerful that its presence or absence is sufficient to render a form of governance either legitimate or not. When laws are not enacted in support of the common good, understood in terms of the principles of natural law, then those very laws and the authorities promulgating them lose their legitimacy. They revert to being a form of violence instead; as Aquinas has it, "*violentia cuiusdam*" (*Summa Theologiae* I–II, bk. II, pt. I, 93, 3, ad 2).

Thus, the requirements of *jus ad bellum* rest upon four major premises:

1) that war be declared (as in Roman times);
2) that war be declared by the legitimate authority (that is, the duly sanctioned authority concerned with the common good);
3) that war be waged for a just reason and a good cause; and
4) that war be waged with good intention (e.g. with the intention of promoting the good, seeking peace, or punishing or avoiding evil).

In addition, unlike Ambrose and Augustine, Thomas Aquinas responded to those who insisted on *caritas* (or love of one's neighbor) rather than self-defense, in case of attacks, by bringing another doctrine: that of "double effect." This position entails that when we intend a good effect or a good result to follow our action, then a concomitant bad effect might be permissible, provided that it is unintended either as a deliberate means to our end, or as the end itself.

For instance, when we are attacked, we have the right to self-defense, but our defense must remain proportional to the attack itself. Self-defense may even extend to lethal violence against our assailant, provided that our intention remains to preserve our own life, not simply to destroy his: in

that case, his eventual demise remains "outside the intention, or accidental, instead" (Christopher 1994: 57; cp. *Summa Theologiae*,. Q.64, A.7). This doctrine should be kept in mind, and so should the notion of proportionality, as one of the basic requirements of legitimacy, together with the pursuit of the common good, which remains primary. This presentation of just war doctrine is not intended as a complete argument in defense of a particular position, but as an overview of its historical doctrinal development. Particularly emphasized is the movement from an ancient nonreligious background to the religious aspects of the doctrine, and finally to the passage from a religiously based theory to a legal one, in Grotius (1625). This is an overview that ignores several modern problems; civil uprising, for instance, or the possibility of a "war of liberation", or even the existence of "ethical revolutions" initiated not by the so-called "legitimate authority" but by various peoples seeking independence or justice (Gilbert 1994: 84–92).

From Morality to Law: Hugo Grotius

Although the seeds were already present in antiquity, it is in Grotius's laws of war that we find clearly articulated the principles defining just what makes a war just, from two separate points of view. Christopher says: "Grotius' laws of war deserve examination from two distinct and independent perspective: *jus ad bellum* and *jus in bello*. His primary objective is to prevent war. Failing to prevent it, he seeks to minimize its brutality" (Christopher 1994: 86).

Nevertheless, Grotius took for granted that war had to exist; his concern was with ensuring that when it did, it would be just, not with defending or upholding pacifism. The requirements of just war (as *jus ad bellum*), according to Grotius, include (1) a just cause (including self-defense, defense of one's property, violation of rights, or the punishment of an injury inflicted) and (2) the criterion of proportionality (that is, the "good" to be achieved by war must proportionally offset the bad effects inherent in the war itself). Relative to the proportionality requirement, Grotius speaks in an almost modern voice, in a way that resonates well for those who seek a global perspective today, instead of a national one: "Kings who measure up to the rules of wisdom take account not only of the nation which has been committed to them, but of the whole human race" (Grotius 1962, Prolegomena 24, at 18).

Proportionality is not only relevant to considerations of *jus ad bellum*, but also to *jus in bello*. Whether a war should be waged and how a war is waged (that is, what can happen within it) must *both* be governed by the principles of proportionality. The third condition for a just war is that it should have a reasonable chance of success (Christopher 1994: 91), as for Grotius life is primary, and war is necessarily an attack on life. The fourth and fifth conditions are that war must be publicly declared, and by a legitimate authority, as we saw earlier in Aquinas's doctrines. For a sixth condition, we need to consider war very seriously, and only undertake it in exceptional circumstances, when all else fails (Grotius 1962: ch. 25, III, at 579; Grotius 1962: ch. 24, VII, at 575).

The other condition, which both Augustine and Aquinas insisted as the determinant one (or the one that might render even an otherwise just war immoral; that is, the presence of the "right intention") was not recognized as valid by Grotius. This omission is understandable if one considers that it is morality, not the law that usually deals with the role of intentions, as actions themselves may not be affected by the agent's motivations. On the other hand, Grotius adds details to the condition of *jus in bello* and insists on the importance of designing rules to limit the conduct of war. Grotius also believed that his criteria were relevant and valid among nations, just as they were within a state.

The national application of the criteria will be helpful in bringing the rules of war to bear on other forms of institutionalized violence. From the standpoint of *jus in bello*, our first consideration should be the distinction between innocents and non-innocents, based upon their role within the hostilities, not on their individual moral character (Nagel 1979). Innocents are those who are not immediately threatening, according to Thomas Nagel (1979); hence, women, children, older men, prisoners of war, medical personnel, or those exercising their religious calling, are not to be harmed. Only in rare circumstances, when grave harm may befall many, might it be morally permissible to proceed in such a way that unintended consequences of our actions may harm some innocents, provided the death of these innocents is neither intended nor foreseen.

Another important criterion is that of proportionality, not only in deciding whether the harms perpetrated by war are offset by the good expected as a result of war, but also within the operation of war. The questions to be asked are several. Are civilian deaths minimized during the conflict? Are the targets sought absolutely necessary? And are the

means employed to bring about military targets and objectives specific enough and limited in the effects? A counter-example to proportionality occurred during the Vietnam War through the use of Agent Orange (a defoliant), used to destroy natural landscapes and vegetation, thus exposing the enemy targets. Christopher says: "Defoliation resulted in extensive long-term contamination of large areas of the Vietnam countryside, contamination of water supplies, and destruction of indigenous wildlife" (Christopher 1994: 102).

Eventually the carcinogenic properties of Agent Orange were discovered, adding yet another immoral consequence to the ones listed above. Note that most of the consequences listed represent additional harms to non-combatants, both direct and indirect.

The property of inflicting harms to the innocent belongs to certain policy decisions and war activities, and it also belongs to certain weapons: indiscriminate weaponry of all kinds must be eliminated through the rules of war. By definition, indiscriminate weapons cannot discriminate between combatants and non-combatants, and nuclear weapons are a clear instantiation of this kind of weapon; hence many view the dropping of the bomb on Hiroshima as a blatant case of terrorism.

From Just War to the "War on Terror"

> On 12 September 2001, in Resolution 1368, the UN Security Council strongly condemned the terrorist attacks against the US but stopped short of authorizing the use of force. Instead the Council expressed "its readiness to take all necessary steps", thus implicitly encouraging the US to seek authorization once its military plans were complete. (Byers 2002: 401-414; see also Security Council Resolution 1368, UN Doc.SC/7143, www.un.org/documetns/scres.htm)

Starting from the clear decision on the part of the US to use force and the SC's tacit or implied consent, it would seem that at least one of the conditions of a "just war" had been met: the open declaration to pursue some kind of war-like actions. But to accept this step as sufficient to bring the US actions into the realm of legitimacy would be to ignore the most important *previous* step required for a just war: the attempt to deal diplomatically with the perpetrators of the attack, discussing the reasons offered for it, and attempting to reach a fair compromise.

Not only this was never done, but the reasons for the 9/11 attacks were never publicly disclosed or discussed, and they still are not, to date. This fact is perhaps the main reason that compels me to attempt to bring out

that discussion explicitly in this work, as I believe that clarification is long overdue.

Most of the current literature on the topic of terrorism, at least in law journals, deals with procedural issues, even when it is openly critical of the US stance, and of its activities. But to concentrate on how one deals with terrorism, or how one conducts the "war on terror", is to start by accepting a definition such that "war" is the only appropriate response. In fact, the "war on terror" remains an oxymoron, at least until such time as more light is shed on the concept of terrorism and even that of "war" as an appropriate response to it. In a recent work on terror, Tamar Meisels remarks that "In view of recent events, there is a great need to adapt international law to the reality of modern warfare" (Meisels 2008: 10).

I respectfully submit that, in contrast, the opposite is true: "modern warfare" and those who practice it for the primary protection of their own interests (which are, most of the time, far removed from the morality of what a "just war" is or should be) must return to the basic principles supported by international law instead. These include non-aggression, the defense of human rights, and the rights of peoples to independence and self-determination.

As we shall see, Meisels describes those who offer any defense of terrorism's motivations as "entirely politically motivated" (Meisels 2008), without asking what would impel young, intelligent, often well-educated people to deliberately lose their life in the pursuit of political goals, but also in the quest to see that the rule of international law and moral rights are restored (Held 2004: 65–79; Chomsky 2001: 55–64).

We will consider the question of motivation below (see Chapters 2 and 3). For now, we must continue to explore why terrorism is not war, so that a response to it also cannot be war. Cassese says:

> I shall not dwell on the use of the term "war" by the American President and the whole US administration. It is obvious that in this case "war" is a misnomer. War is armed conflict between two or more states. Here we are confronted with an extremely serious terrorist attack by a non-state organization against a state. (Cassese 2001: 993–1003)

Hence, *pace* Meisels, the "disruption of international law" that Cassese perceives and deplores is (or should be) the main focus of research on terrorism, *not* the effort to "fit" international law to "modern warfare" (another misnomer, as we shall see, and one that clearly includes features of state terrorism instead).

At this point, the most important issue is the effect that terrorism has had on yet another category of just war theory: the concept of "self-defense." The "clear" legal sequence that Cassese describes as having been in force long before 9/11 stated that the state aggressed could also request assistance of other states, who could thus act in collective self-defense. Resort to force in self-defense was, however, subject to stringent conditions:

(i) the necessity for forcible reaction had to be "instant, overwhelming, leaving no choice of means, and no moment for deliberation" (according to the famous formula used by US Secretary of State Webster in 1842 in the Caroline case, and taken up by many for post-1945 self-defense);
(ii) the use of force was to be exclusively directed to repel the armed attack of the aggressor state;
(iii) force had to be proportionate to this purpose of driving back aggression;
(iv) the use of force had to be terminated as soon as the aggression had come to an end or the Security Council had taken the necessary measures; and
(v) states acting in self-defense had to comply with the fundamental principles of humanitarian law (hence, for instance, respect for the civilian population, refraining from using arms causing unnecessary suffering, etc.) (Cassese 2001: 995).

But some states (notably Israel, the United States and South Africa) thought it permissible to target terrorist bases in "the host country" (Cassese 2001: 995), a view that was not shared by the majority of states, who considered such armed attacks as "unlawful both against states and against terrorist organizations" (Cassese 2001: 995). It might be worth keeping in mind now, and as we move on to the next chapters, the words of the SC regarding Resolution 1373:

> 3(b) the Security Council … calls upon States … to cooperate … to prevent and suppress terrorist acts. (UN. Doc. S/Res/1377, 2001, www.un.org/documents/scres.htm; see discussion in Byers 2002: 402–403)

Thus, although self-defense is part of customary international law (Byers 2002: 405; Simma 1994: 61–678), both "necessity" and "proportionality" are required, although some older cases may support a more liberal interpretation (Jenning 1938; Akehurt 1977: 3). In contrast,

> … when Israel destroyed an Iraqi nuclear reactor in 1981, its claim to self-defense was firmly rejected by other states. Since a nuclear strike has not occurred and was not imminent, the requirements of necessity and proportionality were not fulfilled. Any right to engage in anticipatory acts as self defense remained strictly constrained. (Byers 2002: 406; see SC Res 487, 1981 (unanimous), www.un.org/document/scres/htm).

After 9/11, because the evidence regarding the terrorists pointed to Afghanistan as the possible origin of the threat and the location of the headquarters of that organization, it might have been appropriate to use military force, provided the focus of the operation was to apprehend and detain those responsible for the crime and to destroy "military" infrastructures (Cassese 2001: 997). At any rate, even if that had been the only response evoked by the events of 9/11, the result of repressive, violent methods might at best alleviate the obvious symptoms temporarily, but it could do nothing to provide a remedy (Cassese, 2001: 998). We will return to this point in Chapter 3.

Just War and the International Human Rights

> There is also a formal obstacle to applying the law of war to the fight against terrorism. The application of the law of war depends on the existence of either an international armed conflict or a non-international armed conflict. Yet large-scale hostilities between a state and a terrorist organization which transcend the territory to of the state involved, the recent conflict between Israel and Hamas in Gaza, and the conflict between the United States and Al-Qaeda represent such conflicts—do not fall neatly within the customary definitions of either an international or a non-international armed conflict. (Zemach 2010: 421–459)

Hence, even aside from just war theory, even the specifics of the so-called "war on terror" militate against a simplistic understanding of the situation. The main point to keep in mind is that "when it comes to the grounds for using lethal force, human rights law stands in strong contrast with the law of war" (Zemach 2010: 440). For one thing, the self-defense argument often advanced in order to justify indiscriminate attacks against terrorist organizations is problematic. The question is what permits the use of deadly force from the standpoint of human rights law?

The right to life is and should be absolute. Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms states:

1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
   (a) in defense of any person from unlawful violence;
   (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
   (c) in action lawfully taken for the purpose of quelling a riot or insurrection. (Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2(2), November 4, 1950, 213 UNTS 222)

In addition, the "temporal requirement" is particularly relevant (Zeemach 2010: 444). In fact, when addressing questions of self-defense with students, the simplest explanation is the contrast between fighting an attacker, even to the point where his life is at stake, and subduing him in order to lock him in one's basement with the intention of torturing or killing him outright later.

In natural law (Westra 2004: ch.1), the difference is clear: in the first case, your aim is to preserve your own life, or perhaps that of a family member, at the time when the attack is being perpetrated when there is no official protection available (e.g. police, army, and the like). The other is a deliberate killing when one is no longer under immediate threat, and the killing might be motivated by revenge, or by the fear of possible future attacks; hence it is no longer a permissible form of self-defense. In the second case, the attacker's civil rights come into play, although recent scholars after 9/11 tend to seek various forms of justification for such illegal pre-emptive strikes (Gross 2001: 195; Guiora 2004: 319).

Indeed, States have the responsibility and the obligation to protect their citizens. In the case of terrorist attacks, however, there are real legal and moral methods available to them: the first and foremost is also the simplest. One of the major characteristics of terrorism is that its motivation is both explicit and vocal, proclaiming its aims and the reasons for the attack it is forced to perpetrate by the fact that gentler, legal methods of obtaining redress have failed for decades. Therefore, *listening* to their legitimate grievances, as these are the basis of the difference between

terrorism and common crime, is the first step that a state must take in order to protect its citizens from harm.

The second step would be an open and sincere effort to reach a compromise and redress these grievances. Neither course of action offers a danger to human rights or to international law: in fact both fit with the basic requirements of just war, as they jointly represent the first step in *jus ad bellum*. The duty to protect one's citizens, therefore, could be accomplished without blood being spilled and without any breach of international law.

Equally noteworthy is that any legitimate aim can and should be achieved without adding the rider "by any means". For example, the state may have a duty to provide some employment for its citizens, but in hard times, opening houses of prostitution, or facilitating the sale of various organs, or even the sale of children, would not be an acceptable means of providing subsistence income for a state's citizens. Crime is not an acceptable means even to produce a worthy end. The Mafia and the Cosa Nostra, for instance, provide employment in areas where not much else is available, but few would consider their efforts at ensuring a livelihood for many impoverished families in the south of Italy a countervailing benefit to the crimes they commit.

At any rate, Zemach states:

> This article defends the traditional law enforcement/armed conflict dichotomy. Contrary to the prevailing view I argue that the threshold for the existence of an armed conflict is very high … Hostilities that do not meet the threshold for the existence of armed conflict, such as the conflict between the United States and Al-Qaeda, are governed by human rights law, which can and should be imposed with the unpleasant burden of presenting realistic standards of conduct for states, with the regard of targeting of suspected terrorists. (Zemach 2010: 428)

I agree completely with this assessment, although I don't share the author's dismay at having to accept limits imposed by human rights law for an undefined category of actions, presently termed terrorism. The difficulty with the defending a more permissive position is made evident, for instance, in the work of Tamar Meisels (2008) as she cites George Fletcher: "when it comes to terrorism, we know it when we see it, as Justice Stewart famously said about pornography" (Fletcher 2004; see also Fletcher 2006: 1–18; Meisels 2008: 8ff).

One needs simply to recall the famous Hart/Devlin debate regarding homosexuality and pornography to understand why "we know it when we

see it" was not acceptable when the result of such cavalier definitions was criminalization, or perhaps even a prison sentence. Thus it is far less acceptable when the result of an undefined "crime" leads to multiple deaths and destruction, including "collateral damage" involving civilians (Devlin 1998: 13–36; Hart 1998: 37–46). One devoutly hopes that as a society we have now moved singly and collectively beyond such inexcusable forms of political correctness, *pace* Fletcher and Meisels.

It is particularly galling to consider that for homosexuality, as for terrorism, the causative elements make all the difference: the understanding of the nature of homosexuality is what now permits changed legal regimes in its regard, and even "Gay Pride" parades, instead of jail sentences. In fact, even aside from life and death consequences of the war on terror, there are other grave consequences that follow upon it, and which affect human rights.

For instance, Michael Bothe remarks that "only recently … there has been a practical situation to violate human rights" (Bothe 2008: 543). The case in point is that of "targeted sanctions" (Bothe, 2008: 544), which include the listing of individuals by the SC without open trials or the possibility of appeals, as well as other "restrictions and deprivations". The latter have been imposed by the SC in situations that they considered "a threat to the peace", and they include

(i) travel restrictions;
(ii) financial restrictions; and
(iii) criminal responsibility (Bothe 2008: 544).[5]

The targeted individuals and organizations were allowed neither input nor access to "the decision-making process of the Sanctions Committee" (Bothe 2008: 546), a clear breach of civil and political rights, based on the presence of some "connection" to a so-called terrorist organization, rather than on a proved culpable involvement in anything specific. We will discuss these issues more fully under the heading of "terrorism and crime" in the next chapter. However, it is worth noting that the International Court of Justice has received requests to alter the procedures of the SC, as the fundamental rights of individuals and states need to be protected from the "listing and de-listing activities of a Sanctions Committee", because

[5] Note that Bothe provides a list of UNSC resolutions affecting such countries as Sierra Leone, Liberia, Iraq, Sudan, Lebanon and Iran; conspicuously absent are such resolutions targeting Israel instead.

any "decisions of the Security Council do not enjoy a 'supraconstitutional state' " (Bothe 2008: 548). The Advocate General Poiares Maduro delivered his "Opinion" on January 16, 2008 in *Yadi v. Council and Commission* (Court of the First Instance, case C-402/05 P) on this issue. At para. 45 of the Opinion, he states:

> The fact that the measures at issue are intended to suppress international terrorism should not inhibit the Court from fulfilling its duty to preserve the rule of law.

As well, the Opinion asks for justification on the part of the authorities, to "demonstrate the proportionality of such measures", as it urges the Court to apply "procedural safeguards". Even at this level, then, powerful interests and partisanship continue to supersede the rule of law, thus eroding the status of the UN and further undermining the respect due to that institution.

Conclusion: The "Necessity of Defending the Rule of Law"

> The principle of universal jurisdiction to judge crimes against humanity, or in actual fact criminals against humanity ... relies on the observation which is as simple as it is obvious: if there is a crime against humanity the victim of the crime is humanity; hence judgment of the criminal should be within the jurisdiction of any tribunal, in any district of any country. (Albala 2008: 201–208)

As the discussion of this chapter indicates, not only are there multiple definitions of terrorism, but there are an increasing number of aspects or "faces" of this phenomenon, many of which fall under the heading of state terrorism. As well, the etiologies of these many "faces" are multiple and diverse. One major, basic aspect unites them all: for better or worse, they are all forms of law-breaking, some more justifiable than others.

Hence, the focus of understanding what terrorism is, and its causal origins, in order to eventually eliminate its occurrence, is simultaneously a focus on re-establishing a just and acceptable rule of law. Jan Myrdal argues that too many countries, including his own (Sweden), are regrettably regressing, morally and legally, in their efforts to follow the US in its "war on terror":

> In Sweden the legal rule that no man could be imprisoned without due process was formed in 1350. It was given an even stronger legal structure after the revolution in 1809 (§16 in the Form of Government). Today that rule no longer holds. (Myrdal 2008: 181–185)

Myrdal argues that, after the indictment of Herman Goering, who explicitly admitted that "People were arrested and taken into protective custody who had not yet committed any crime, but who could be expected to do so if they remained free" (Myrdal 2008: 184), the words of one of the indictments of the Nuremberg trial also stated that "they imprisoned such persons without judicial process" (Myrdal 2008: 184), and the treatment accorded to these persons started with concentration camps, but eventually resulted in degradation, enslavement, torture and murder, a series of state crimes easily observable today (with the single exception of the "final solution", or murder).

State and non-state terrorism, the phenomena of which I will speak in these pages, are complex notions, as state terrorism especially presents itself with many "faces", each one representing an attempt at justification and legality, as each "mask" hides the true nature of each practice. These are not wars (see Chapter 1); at least, not the outright war of aggression proscribed by international law. At most it is a "war on terror" presented and promoted (inaccurately and illegally) as a "war of self-defense".

CHAPTER TWO

TERRORISM AND CRIME

Introduction

> What I am calling the political crime model of terrorism attempts to specify this category in such terms as "the resort to violence for political ends by non-authorized non-governmental actors in breach of accepted codes of behavior" … the political crime model locates the criminal character of terrorism outside its political motivation, and this reflects the state's disinclination to try terrorists for treason or other political offences. (Gilbert 1994: 49)

The most significant aspect of viewing terrorism as a "political crime" is that it places terrorist acts at a middle point between war and crime proper, and, in that case, the notion of self-defense will apply to a "group" of individuals against injury and imprisonment or grievous loss, and defense of a community against an alien or oppressive rule (Gilbert 1994: 25). Clearly, the rights of a group to self-defense is—to say the least—equal to that of individuals, especially when such a collective action might be directed against a tyrannical or otherwise oppressive state, the violence of which may be just as "lawless" as that of the terrorist response.

Of course the presence of a political cause must be clear and it must provide a unique motivation, as someone who commits a robbery, even in order to fund a political organization, is committing a private, rather than a political crime (Gilbert 1994: 51). Another aspect of terrorism that supports separating it from common criminal activities is the often-voiced remark that the terrorist attacks "the innocent": it is noteworthy that no common crime is ever discussed in terms of whether the crime's victim(s) are or are not "innocent".

Hence, just war theory, which considers questions of innocence, needs continued consideration as we attempt to clarify the concept of terrorism. To repeat the argument of the previous chapter (and the previous reference to Osama bin Laden), the more "democratic" a country is (or is supposed to be), the more likely the collusion between ordinary citizens and the oppressive and unjust administration or government against which the terrorist response is aimed, whether this agreement between citizens and policies is implicit or explicit.

In this sense, a close "kin" of terrorism may be found in "revolutionary struggle":

> What is required for revolutionary war is an attack upon the state (or some organization purporting to stand for it …) That is to say, a *political* organization must be the object of the attack. (Gilbert, 1994: 26)

The intent of such a war is to continue a "war of attrition" in order to change the state's own resistance to change, but most of all, to bring about the required change at the end of the hostilities (Gilbert, 1994: 26). The motivation of such a war may well be the attainment of a better, safer situation for all the people; that is, for the collective (Westra 2011b).

However, from a Kantian standpoint, even in the pursuit of a common good the terrorist fails the moral test, as she uses people (aside from whether they are "innocent" or not) as *means*, thus denying them the dignity of free choice and the right to life (Gilbert 1994: 35ff.). Yet, in favor of the terrorist's position, it must be noted that terrorists act from a position of "weakness", as they would be willing "to wage war" if their circumstances were otherwise (Gilbert 1994: 44).

Another strong point is that the right to be free from colonization and the right to fight for a people's freedom are strongly entrenched in law, and we will return to both issues in the next chapter. The most interesting aspect of considering terrorism a form of "political crime" is the fact that criminal acts are committed by *both* sides; that is, by the terrorists and also by those who initiate measures intended to be counter-terrorist.

It is hard to evaluate which side is more "lawless" than the other from this viewpoint. It is equally problematic to unravel the series of attacks and counter-attacks that are ongoing, in order to isolate the first causal connection.

It is undeniable that even groups who produce ongoing terrorist attacks, such as Al-Qaeda, are at least correct in taking a position in defense of their religion and culture against those who attack both on an ongoing basis (despite the many efforts to redress the situation through legal means) and despite the equally ongoing efforts on the part of the UN to send rapporteurs to examine the facts on the ground and to issue resolutions condemning the attacks that give rise to the outrage of the terrorist groups (Westra 2011a).

Counter-terrorism instead uses illegal means, for the most part, to support not principles but its own interests: these are, it bears repeating,

primarily to support trade and power interests, while denying and ignoring the etiology of terrorism. The latter is mostly described as a form of "mindless violence", without any legitimate motivation. This is plainly a false position, as the issue of "political crime", as distinct from common crime, has a long and important history, which will be briefly summed up in the next section.

Political Crime: History and Background of the Issue

> I shall kill by work, act, vote and my own hand if I can anyone who would destroy democracy in Athens, who would hold an official post when democracy is destroyed, who would become a tyrant, or who would assist someone to become a tyrant. If someone else kills such a person, I shall declare him sacred before the gods and demons for being a slayer of an enemy of Athens. (Demophantes: paras 159–160; Szabo 1965: 197)

Not everyone in ancient Greece was a supporter of democracy. Aristotle, for instance, clearly saw the conflict between an easily convinced and led populace, where democracy (or the rule of *demos*) prevailed, and the rule of law and reason instead:

> He who demands that law should rule may thus be regarded as commanding that God and reason alone should rule; he would commands that a man should rule, adds the character of the beast … law [as the pure voice of God and reason] may thus be defined as "reason free of all passion". (Barker 1973: 146)

Nature is central to Aristotle's argument in the *Politics*. This is routinely accepted by Aristotelian scholars:

> Aristotle conducted his study of things human in the fields of politics and ethics (and also of logic, poetry and oratory), side by side with a study of things natural (physics, medicine, and general biology). (Barker 1973: xxviii)

In addition, his "inclination towards the Ionic 'becoming' – the genetic doctrine of *phusis*" (Barker 1973: xxix) ensures that nature will remain foundational for all his arguments, from the admiration he evinces for the beauty of perfected forms to the presence of design in nature as such (Aristotle 1945). We note that governance, citizenship and the *polis* itself were discussed with reference to natural standards (of size, of completeness and the like). In the same sense, the constitution of the state will provide its "essence"—the explanation of its identity as a "quasi-juridical

person" (Barker 1973: 100–101). The constitution is analogous to the natural laws governing physical organisms (Barker 1973).

Like all natural entities, the state has two main ends for the association it represents. Aristotle starts with the basic "natural impulse" according to which "men desire to live a social life"; the other end is represented by the common interest:

> The good life is the chief end, both for the community as a whole and for each of us individually. But men also come together, and form and maintain political associations merely for the sake of life[.] (Aristotle 1932)

Hence the *essential* nature of a state—the laws that regulate it—exists for the sake of maintaining life, social association and the good life (Barker 1973: chapter III). This simply re-elaborates the theme clearly stated in Book I of the *Politics*, that "every *polis* exists by nature", and that the "nature of things consists in their ends or consummation", as "the end, the final cause is the best" (Barker 1973: 5). The *polis* exists "by nature" and man is meant "by nature" to live in a social environment.

If we consider the modern, liberal democratic state, we find something that is in direct conflict with the Aristotelian view of the state. It does provide association, so it satisfies at least one condition Aristotle finds essential to the nature of the state. But note that the other two "ends" or reasons why men join together in political association are missing or under threat. In glaring contrast with the Aristotelian emphasis on the state's support of the "common good", or the happiness that is based on the "natural end of man" as a moral ideal, in modern times even a token quest for that sort of good has been completely eliminated from present political institutions (Westra 1998).

Hence, if the state, its laws, and its citizens are understood in terms of what is natural, then we must start with the "nature of the end for which the state exists" (Barker 1973: 118). As one might expect, "the end of the state is not mere life; it is rather a good quality of life" (Barker 1973). Such a *polis* will include "the association of families and villages in a perfect and self-sufficing existence; and such an existence, on our definition, consists in a life of true felicity and goodness" (Barker 1973: 120).

So the *polis* (or the state) must be organized and governed only in ways that will foster "good actions", such that they represent the excellence of character or its citizens, as its laws are meant to make them just (Barker 1973: 118). A proper understanding of what constitutes justice is basic here:

> In democracies, for example, justice is considered to mean equality [in the distribution of offices]. It does mean equality—but equality for those who

> are equal, not all. In oligarchies, again, inequality is the distribution of office is considered to be just; and indeed it is—but only for those who are unequal, and not for all. (Barker 1973: 117)

An oligarchy is a constitution ruled by the wealthy; a democracy is here intended as one where the poor rule; hence, each is limited in its understanding of what a just constitution must be. In addition to being limited, neither starts from then required understanding in the operative aim of the state, on one hand, and the true meaning of citizenship, on the other. Barker says:

> The principle of a constitution is its conception of justice and this is the fundamental ground of difference between oligarchy and democracy. Democrats hold that if men are equal by birth, they should in justice have equal rights: oligarchs hold that if they are unequal in wealth, they should in justice have unequal rights. (Barker 1973: 116)

Aristotle states the problem clearly: both fail to acknowledge "the really cardinal factor" (i.e. the nature of the end for which the state exists; Barker 1973: 118). The state exists to support and promote the "good life", and (*pace* Nussbaum) the "good life" is the life of moral excellence, with the basic means thereof, not a life that entails the right of "flourishing", given the economic connotations that normally attach to that concept.

Instead, its legal structure must encourage habituation to the moral life by its system of rewards and punishments, as no man is born ethical, but only becomes such through habituation (Owens 1959: 23–25). Only when men are so habituated will their choices be morally just and exhibit that individual excellence that is the *causa causans* of a well-governed *polis*. Justice is "that kind of state of character which makes people dispose to do what is just and makes them act justly and wish for what is just" (Aristotle 1998: V, 1, 1129a 7–9). In a wider sense, justice is used to mean virtue in general, and in this meaning it includes all the virtues (Owens 1959: 347). Hence, it is neither "alliance for mutual defense against all injury" nor "to ease exchange and promote economic intercourse" (Barker 1973: 118) that represent the true ends of the state, but the promotion of individual virtue and collective excellence, indicative of true happiness.

Once we have ascertained what is the nature of the *polis* itself for Aristotle, and its basic aim (Barker 1973: 92), we need to consider the nature of its components: its citizens. Citizens are not such in virtue of being residents in the *polis* or of being entitled to sue and be sued, or of being admitted as resident aliens. Aristotle says "We may lay down that citizens are those who share in the holding of office as so defined" (e.g. as

office held for an indeterminate period; Barker 1973: 94). Hence, we can conclude that, for Aristotle, a citizen is only someone who actively participates in the operation and then governance of *polis*, and therefore one who is dedicated to furthering its aims.

It is because of his distrust of the *demos* that Aristotle does not place democracy at the pinnacle of desirable forms of governance. Nevertheless, he firmly holds that

> Only governments, therefore, which aim at the common interest are true governments; those which regard only the interests of the rulers are deviation forms. (Ross 1995: 259)

But Aristotle follows earlier Greek scholarship by viewing "tyranny" as a further deviation from kingship, which is the most desirable form of constitution itself:

> … the monarchy of the perfect man … is for Aristotle the ideal constitution. But he knows that such men are seldom or never found. (Ross 1995: 263)

Leaving Ancient Greece behind, the concept of *crimen laesae majestas* is viewed as any attack against rulers, including hostile intentions against the Emperors of ancient Rome. In fact, some have argued that:

> … Christianity was dealt with as a political crime, because (1) Christians by observing strictly the imperatives of their creed did not offer sacrifices to the Emperor, (2) the social order of the Romans was substituted by the order of God, and (3) some Christians would not accept military service in the Roman army, which was considered as a challenge to the power of the state. (Passas 1986: 24)

The distinction between king and tyrant re-emerges in the Middle Ages, and it supported the introduction of political philosophy and the positive law of the right to revolt against abuses of power (see the Magna Carta, 1215, in Passas, 1986: 24).[1] This position represents the emergence of the "medieval notion of social contract as the basis of society" (Passas 1986: 25).

These are the ideas that eventually led to the French Revolution of 1789, "the worst collective political crime" (Passas, 1986: 25), but also the clearest example of noble motives for forceful resistance and a radical change of the established authority. Yet, as time passed and social ideals became

[1] Note also Thomas Aquinas in the right to disobey and the duty to fight against a tyrannical ruler, as discussed in Chapter 1.

entrenched, the political offender was regarded as the "aristocrat of delinquency". He was viewed as profoundly different from the common criminal because of his altruistic and noble motives (Passas 1986: 26). Such special status of the political crime offender is still in evidence today as the non-extradition of political offenders remains in law, although some of this special consideration appears to decline by the end of the 19th century (Kircheiner 1961: 32).

What emerges is a two-fold theory of "pure political crime": the "subjective" and the "objective" theories. The former views the motives and the aims of the offender as primary (Papadatos 1954, as cited in Passas 1986: 26); the latter simply describes as "objective" all offences against the external political order:

> … such as independence of the nation and territorial integrity or the internal political order, such as the established political institutions and their functioning. (Passas 1986: 27)

When the objective aspect is viewed as primary, neither motivations of the offender(s) nor the historical background of "political crime" are taken in consideration, so that altruistic offenders with a noble social aim were not viewed or treated differently than those who acted from base self-interest. In this sense, all criminals can be viewed as "political offenders", as to defy the established laws is to attack "a given value system of morality in which the prevailing order believes" (Horowitz and Leibowitz 1968: 281–281). However, this is indeed a dated position, as we noted in our discussion of the Hart/Devlin debate in Chapter 1.

Yet the political offender who openly contests the prevailing and established social order is an extremely valuable voice of public conscience, and may even be a beacon of progress, no matter how radical her "conviction" and "political beliefs" (Passas 1986: 29). These convictions render her a figure worthy of respect and popular sympathy, whose "crime" is only a means to a socially valuable ultimate end (Passas 1986: 30).

In the next chapter we will note the difference between legitimacy and legality as we discuss the concept of "plunder" (Mattei and Nader 2008), where the acknowledged primacy of trade, supported by such organizations as the WTO, the IMF or NAFTA, silence many important voices in society as they are reduced to a category of inexcusable criminals, whose voice should not be heeded. Passas concluded that:

> Terrorism is a polemic rather than a scientific or objective term: the terms "force" and "violence" are, like "terrorist" or "freedom fighter", largely

> emotive propaganda terms; which we use about a given act depends not on the degree of force or violence, but on a view of its justification. (Passas 1986: 34)

It is indicative of the times that the European Convention on the Suppression of Terrorism (1976) "essentially abolishes the notion of political crime and political offenders for extradition purposes" (Passas 1986: 34), but would leave such offenders to be prosecuted (better yet "persecuted") within the state where they are found. This is only one of the many noxious effects of recent events, culminating eventually in the "war on terror".

At any rate, as we consider the meaning and possible definition of terrorism (and its possible identity), we also need to examine a seldom-mentioned, indirect effect of terrorism, and one which is neither intended nor desired by the terrorists themselves: the proliferation of illegal and criminal activities that terrorism appears to generate in response to its own actions. These are the by-products of the so-called "war on terror", which, we noted with Cassese, is a total misnomer (Cassese 2001: 993). Cassese affirms that "terrorist attacks" have "potentially shattering consequences for international law" (Cassese 2001: 993). I submit that its effects are equally disastrous in regard to domestic law, and the civil rights of citizens, especially in the US, as we shall see below.

Criminal Consequences of Terrorism

> 1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its obligations under the international law and do not involve discrimination on the ground of race, color, sex, language, religion or social origin. (American Convention on Human Rights, San Jose, 1969, Art.1)

The main criminal activities on the part of Northern/Western states (primarily the US and the UK, but also some EU states, in some cases) have been the following:

1) The question of "extraordinary renditions" (Amnesty International 2008; Scovazzi 2009: 885–898; Resolution on the Alleged Use of European Countries by the ICA for the Transportation and Illegal Detention of Prisoners, EUR.PACL.DOC.P6_TA-PROV(2007) 0032).

2) The existence of illegal and protracted detention of many prisoners, without a concrete specific indictment or trial (also related to point 1 above).
3) The deprivation of civil liberties of citizens (Boyne 2009–2010: 417–483; Donahue 2005: 233; Minow 2007: 453; Banisar 2008).
4) The classification of "material support of terrorism" as a war crime (Morse 2010: 1066).

We will address these questions in turn.

Khaled El-Masri and the Case of "Extraordinary Renditions"

> … the right to truth about gross human rights violations and serious violations of human rights law is an inalienable and autonomous right, linked to the duty and obligation of the State to protect and guarantee human rights, to conduct effective investigations and to guarantee effective remedy and reparation. This right is closely linked with other rights and has both an individual and social dimension and should be considered as a non-derogable right and not to be subject to limitations. (OHCHR Report 2006)

In Chapter 1, while trying to define "collective rights" in contrast to individual rights, we noted briefly that the approach proposed was bound to be viewed as suspect, given the way the concept of collective rights has been used recently to deny not only the civil and political rights of individuals, but even their right to life. Of course all domestic legal systems include the protection of state secrets, but, most of all, they include the invocation to "collective interests" such as national security and the public order (Scovazzi 2009).

The UN Commission for Human Rights (CCPR Final Observations on the United States of America 2006) expressed its concern because the United States invoked the "state secrets" principle to forbid access to information regarding a case about torture, or cruel, inhumane and degrading treatment, contrary to article 7 of the ICCPR:

> The Committee is moreover concerned by numerous well-publicized and documented allegations that persons sent to Third World countries in this way were indeed detained and interrogated while receiving treatment grossly violating the prohibition contained in Article 7, allegations that the State party did not contest. Its concern is deepened by the so far successful invocation of state Secrecy in cases where the victims of these practices have sought a remedy before the state party's courts.

A case in point is that of Khaled El-Masri, a German citizen who became involved in the web of "extraordinary renditions", a clear example of the

extreme injustice that may follow the invocation of state secrecy (Scovazzi 2009: 893–896).[2] The states involved "managed to combine torture, forced disappearances, denial of justice and other violations" in their treatment of El-Masri (Scovazzi 2009: 294).

The whole sequence was based on the assumption that even if it is forbidden to inflict torture within the territory of one state, it is allowable to do so if the foreigner was so treated in another country. This would permit the first state to eventually make use of the information/confessions thus obtained (Scovazzi 2009: 294). All states involved in this "torture circuit" (i.e. not only the state who captures but also the state that permits its territory or its airplanes to be so used, as well as the state that received and tortures the man (CoE PA 2006: 36). This programme had been set up after September 11, 2001 ("GST programme") by the CIA, and it was an example of the greatly enhanced powers of the CIA from that time on.

El-Masri was captured in Macedonia on December 31, 2003, from where he disappeared and was transported to Afghanistan by agents of the US. There he was tortured and kept prisoner until May 28, 2004, without access to a lawyer, an official of his country, or family members. He was then taken to Albania, then to Germany where he was freed (CoE PA 2006: 894–895). Nor was his "testimony" important for any country's security; his story was described as follows by the European Rapporteur:

> The story of El-Masri is the dramatic story of a person who is evidently innocent—or at least against whom not the slightest accusation could ever be made—who has been through a real nightmare in the CIA's "spider web", merely because a supposed friendship with a person suspect at some point in time to maintain contact with terrorist groups. El-Masri is still waiting for the truth to be established, and for an excuse. His application to a court in the United States has been rejected, at least in the first instance; not because it seemed unfounded, but because the government brought to bear so-called "national security" and "state secrecy" interests. This speaks for itself. (CoE-PA 2006: 132)

Both "national security" and "state secrecy" are intended to convey collective rights of such grave import that, apparently, all individual human rights established in law, as—for instance the Convention Against Torture and Other Inhuman, Cruel or Degrading Treatment or Punishment

[2] This discussion is based on the report of the case of Prof. Scovazzi and direct quotes are translated from the Italian language by the author.

(1465 UNTS 85, adopted 10 December, 1984, into force 26 June 1987) does not allow any derogation from its mandates for any reason), nor does Article 4 of the ICCPR (International Covenant on Civil and Political Rights; UN Doc. A/6316, 1966) or the American Convention on Human Rights (OAS Treaty Ser./No.36, 1969), and the two last documents include the right to life, the right to humane treatment and other related rights (particularly relevant in the latter is the right to "judicial guarantees essential for the protection of moral rights", Art. 27).

The problem that arises from the perspective of the argument proposed in these pages is a grave one: if collective rights, as advanced by states who are, after all, the main subjects of international law, as well as the main ostensible "bastion" of human rights protection, use the concept in contrast with individual human rights and in conflict with any notion of human dignity, how can this interpretation of the concept be avoided?

The Background of "Extraordinary Renditions" and Some International Implications of the "CIA's Long-Term Detainees" (*Human Rights Watch Briefing Paper, October 2004*)

> When territories wanted for violations of US law are at large overseas, their return for persecution shall be a matter of the highest priority … If we do not receive adequate cooperation from a state that harbors a terrorist whose extradition we are seeking, we shall take appropriate measures to induce cooperation. Return of suspects by force may be effected without the cooperation of the host government[.] (President Bill Clinton, Presidential Decision Directive 39; Winkler 2008)

President Clinton, however, spoke of "suspects", the usual term employed to describe persons against whom there is evidence of criminal activity, but also persons who have not been formally charged and convicted after a trial: a category quite distinct from those with vague, unproven connections to planning terrorist activities. The Presidential Decision Directive 39 (PDD39), was originally intended for the FBI, an agency that would not have had the capacity to deal successfully with "local intelligence agencies", whose cooperation would have depended on the relevant treaties regarding extradition (Winkler 2008: 40).

When the CIA took over this mandate, its actions were governed entirely by "immediate political convenience" (Winkler 2008: 40), in order to achieve "prevention", but eschewing both the collaborative aspects of PDD 39 with their foreign counterparts, and the related instruments of international law, many of which had been ratified by the US (Winkler

2008: 41). Hence renditions remain outside the ambit of legal procedures both those based on international law, and on domestic criminal process (Winkler 2008: 42).

In 2001, Condoleezza Rice spoke of the need for "adaptation" to the ongoing terrorist threats and added that "renditions save lives" (Condoleezza Rice's Statement, "Renditions Save Lives", 2005), a clear appeal to "collective" rights of US citizens to protection, and their government's responsibility in that regard. This further extension of the US's earlier directive was based on another classified directive signed by President George W. Bush on Sept 17, 2001. This "Memorandum of Notification" allows the CIA "to render terrorists without governmental approval and establishes measures restraining individual freedoms, without due process of law (i.e., a formal indictment)" (Waterman 2005).

Thus the Extraordinary Rendition Program (ERP) allows, and in fact encourages, illegal and often violent seizure, right at the start; it then knowingly ensures the transfer individuals to countries where torture is practiced and legal; finally, the "results" of interrogations and torture are returned to the CIA, as the "product" of this circuit. Winkler outlines three problems with this sequence. First, the possible application of the *male captus bene detentus* rule (that is, the rule that states that an inappropriate capture of a suspect still allows for a legitimate trial to follow in the court) is unclear, and some courts have rejected it outright. Second, the *male captus* rule applies to criminal trials, not to the interrogation of a possible suspect. Third, forced abduction is definitely illegal, especially when a country's intelligences services are not competent to allow such a disregard of their country's sovereignty (Winkler 2008: 46–47).

In addition, even the dubious aspects of the legality of the capture of suspects are a minor concern given the "very absolute ban" of torture in law:

> Torture is unquestionably illegal under international law. Indeed, its prohibition is provided by a norm of *jus cogens*, making it non-derogable and unjustifiable under all circumstances. (Winkler 2008: 48; see also *Prosecutor v. Furunddzjia* 1999; De Wet 2004)

The previous section discussed the El-Masri case, but that is only one (and not the worst such) case of renditions. Abu Omar was abducted from Italy in 2003, to end up being brutally tortured by Egyptians; he suffered electric shocks to his genitals and excruciatingly loud music (Winkler 2008: 340), becoming both incontinent and partially deaf. Other such cases include Jamil Qasim Saeed Mohammed, a Yemeni citizen abducted in

2001; Mahdouh Habib, taken from Pakistan to Egypt; and the list could include many more such cases (Winkler 2008: 35; Grey 2005).

The Canadian Position: Maher Arar and State Interests

> On September 26, US authorities arrested Maher Arar on a routine stopover in New York while he was waiting for a connecting flight home to Canada. Arar was born in Syria, but he lived in Canada for more than twenty years and was a Canadian citizen. (Silva 2009: 313)

Arar was detained because he had listed Abdullah Almaki, another Canadian citizen suspected of terrorist activities, as an emergency contact on a rental application. He was denied legal advice and a telephone call. After the Canadian counsel assured him he would be returned to Canada, he agreed to that and signed a document to that effect. Despite that assurance, Arar was rendered to Jordan instead: he was beaten and interrogated there, before being sent to Syria and eventually to Afghanistan. At that point, he "confessed to having links to terrorism" in the hope of avoiding further torture (Silva 2009).

In 2003, Arar was released to the Canadian Embassy, and at that time he had not been charged with any crime, either in the US or in Canada. Canada's government "established a Commission of Inquiry to investigate and report on the actions of Canadian officials in relation to Maher Arar", in February 2008 (Silva 2009). The work of that commission suggested that those who had provided the information on Arar to their US counterparts had been "willfully blind" to what would follow and correspondingly equally linked to Canadian obligation under the Convention Against Torture (Silva 2009). Arar brought action against the US under the Torture Victims Protection Act (1991, ratified in 1992) (*Arar v. Ashcroft* 2006; Sage 2006: 121), but the case was quickly dismissed because of "national security" consideration.

This is the main point at issue: if and when *universally* agreed upon human rights (in our sense of rights of the collectivity of humankind) are set aside and viewed as secondary because of considerations related to "collective" national interests, the "national interests" thus given as primary are those of a specific "community" instead (UN Human Rights Council, Report of Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, 2007). National security is indeed a right of citizens, but contravention of universal rights through the practice of extraordinary renditions (that is renditions to torture, rather than to justice, as originally intended by the President Clinton) is not acceptable either in law or morality.

Extraordinary renditions appear to totally subordinate human dignity and human rights to state interests; and this result is particularly hard to accept when we acknowledge the cooperation many EU states have provided to the CIA in that regard. Boyne remarks that:

> European history has played a crucial constitutive role in shaping the constitutional enshrinement of the principle known as the "watermark" of the ECHR, but it is explicitly recognized in several European Constitutions. (Boyne 2009–2010: 437).[3]

The Charter of the European Union in fact supports human dignity as well, as it states that "Human Dignity is inviolable … It must be respected and protected" (Charter of Fundamental Rights and Freedoms of the European Union 2000).

In contrast, the US Supreme Court has only limited references to "human dignity" (Boyne 2009–2010: 438). Hence, while we acknowledged the problem of the use of non-combatants as means, on the part of the terrorists, we can also acknowledge the same neglect of basic human rights and values on the part of those who initiate responses to terrorism. In each case, the motivation and the goals of each part needs to be considered before the gravity of their respective actions may be assessed. We will consider motivations and aims in the next chapter. For now it might be best to continue our discussion of counter-terrorist crime, or illegal detentions.

Secret Prisons and Illegal Detentions

> According to Arar, US officials violated the TVPA by rendering him to Syrian custody and by conspiring with both Jordanian and Syrian officials to bring about the "violations of [his] right not to be tortured under color of [foreign] law". Regarding his Fifth Amendment claim, Arar charged the defendants with depriving him of liberty without due process of law, by arbitrarily detaining him in the United States, and subsequently transporting him to Syria for the purpose of arbitrary and indefinite detention. (Henderson 2006: 192; *Arar v. Ashcroft* 2006)

This passage clearly links the crime of "renditions to torture" (Henderson 2006: 189) discussed in the previous section to that of illegal, indefinite detention. Maher Arar holds Canadian and Syrian citizenship. Another

[3] Note that the EU states that "explicitly recognized human dignity" in their constitutions are: Austria, Belgium, Germany, Finland, Estonia, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Poland, Slovenia, the Slovak Republic and Spain.

victim, Ahmed Abu Ali, is a US citizen who suffered a similar fate as Saudi officials took him into custody, while he was a student at the Islamic University at Medina, "at the request of the United States." He was tortured in prison with full knowledge of the US and held in custody without being charged with any crime (Henderson 2006: 193).

He remained jailed in Saudi Arabia form 2003 to 2005, when he was transferred to the US, where "a grand jury in Virginia indicted Abu Ali for plotting to assassinate President Bush" (Henderson 2006: 193). Although Abu Ali pleaded not guilty, he was convicted on the basis of a "confession" obtained under torture, on November 22, 2005 (Henderson 2006: 194; see also ft. 42, "for purposes of US law, extradition is permitted only when authorized by a treaty, or statute"; see 18 USC §3194, 2000).

The related cases of *Rasul* and *Al Odah* arose because, from 2002 onward, more than 600 persons who had been captured abroad during hostilities between the United States and the Taliban regime in Afghanistan were detained at Guantanamo Bay. These cases are particularly relevant, I believe, because they raise the difficult question of detention and of its legality. In addition, the cases conclude with a majority decision of the US Supreme Court that, indeed, the cases should be retried as the Federal District Court was held to have a jurisdiction (under federal *habeas corpus* provisions; 28 USCS §2241), to review the legality of the "executive detention" of foreign nationals.

The plaintiffs included two citizens of Australia and 12 citizens of Kuwait, and neither of these countries were at war with the US. The plaintiffs' claims were: (1) their denial of "having engaged in or plotted acts of aggression against the United States; (2) they alleged they were "held in Federal custody in violation of the laws of the United States"; (3) they "had been imprisoned without being charged with any wrongdoing"; and (4) that they had been denied access to counsel, or courts, or other tribunals (Henderson 2006).

So far, the decision reached was simply that "the District Court had jurisdiction, under 28 UCSC § 2241, to review the legality of the plaintiffs' detention" (ibid., Opinion by Stevens, J., O'Connor, Souter, Ginsburg and Breyer JJ). Kennedy, J. concurred, as he stated that

> (1) federal courts had jurisdiction to consider challenges to the legality of the detention of foreign nationals held at the Guantanamo base, in light of (a) the base's status as a United States territory in every practical respect and as a territory far removed from any hostilities; and (b) the indefinite pretrial detention of the detainees; and (2) although there were circumstances in which maintained the power and responsibility to protection persons from

> unlawful detention even when military affairs were implicated, there was a realm of political authority over military affairs where the judicial power could not enter. (ibid.)

Thus it was not total support for the plaintiffs' position, but it was a favorable opinion, at least procedurally, after their defeat at the hands of the lower courts. Nevertheless, this decision should be considered in the context of the US's general approach to international law.

The US Executive Branch and Domestic and International Law

The Convention against Torture

> It is sadly academic to ask whether human rights law should trump US domestic law. That is because, on the few occasions when the US government has ratified a human rights treaty, it has done so in a way designed to preclude the treaty from having any domestic effect. (Roth 2000: 347)

It would be easy to be led by optimism, and to consider that the final resolution of *Rasul v. Bush* is the precursor of a new era in which the affirmation of human rights prevails. Yet it would be wrong to overestimate the value of this decision. As well, it is not wrong to concentrate on the US, because other powerful countries such as Canada and Australia often follow the lead of the US in their approach to international obligations. In contrast, EU countries often march to a different drummer.

Even if the US government ratifies an international treaty with human rights implications, the lawyers of the Justice Department are expected to look very carefully at the document, to ensure that it could not extend human rights protection beyond the standards present in their domestic law instruments. Should that not be the case, and should the international document propose additional human rights considerations, "a reservation, declaration or understanding is drafted to negate the additional rights protection" (Roth 2000: 347).

A particularly ugly example of this practice is the efforts of US representatives, regarding one of the most important human rights conventions: the United Nations Convention on the Rights of the Child (1989). The US representatives made every effort to change the article regarding child soldiers (Article 38). The US wanted to be able to continue recruiting children under 18 years of age. Eventually, the article lowered the age of prohibition of recruitment to age 15, at which time children are permitted to fight. In addition, the US is today the only Western power to permit life sentences for convicted juveniles (Convention on the Rights of the Child; Nilsen 2007: 111). When we turn to the Convention against torture, its relation to US domestic law becomes even more problematic:

> The Convention Against Torture provides that no exceptional circumstances whatsoever, whether a state of war, or a threat of war, international political instability or any other public emergency, may be invoked as a justification for torture. (UN Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1987)

The question that arises is twofold: first, what exactly constitutes "cruel, inhuman, or degrading treatment" in the case of detainees, in general? Second, how "elastic" have those concepts become against the background of the present geopolitical situation and the US power to influence other countries?

One of the countries where the US exerts the strongest influence is its immediate neighbor to the north, Canada. Canada has had a long history of strength (and even leadership) in the field of human rights, but lately the grounds of that stellar record have been eroded. As UN High Commissioner for Human Rights Louise Arbour said on October 22, 2007, speaking in Ottawa:

> There is a sense that Canada is moving away from its total commitment to multinationalism, and is now, I think, advancing other forms of either national or regional alliances … Canada has to work very hard to maintain what invariably has been the perception internationally that it's a consensus builder and it's a valid interlocutor to all. (Amnesty International 2007: 2)

The international NGO Amnesty International is particularly concerned with Canada's recent record toward Indigenous Peoples and the protection of refugees: it has renewed its long-standing request that Canada should amend its laws to comply with its obligation under Article 3 of the UN Convention Against Torture, as both in 2006 and in 2007 Canada deported asylum seekers to countries where they were at serious risk of being tortured (Amnesty International 2007: 17).[4] In addition, Canada's response to the more than 4 million Iraqis presently displaced and 2 million who are refugees in adjacent countries under conditions that violate their human rights should be far stronger than it presently is.

Hesitations and uncertainties in the face of mounting human rights violations, especially regarding detainees, appears particularly ominous in the wake of Canada's lack of outspoken condemnation of present US practices regarding detainees, as the "legal conscience of the [US] Executive Branch", in the context of Abu Ghraib

[4] Bachan Singh Sogi was deported to India; on October 22, 2007, Said Jaziri was deported to Tunisia.

> … treated the torture prohibition as if it were a tax code, and as if the main function of the lawyer was not to ensure that the letter and the spirit of the law be honoured, but to find loopholes in the code. (Cole 2006: 636; see also "Memorandum" from J. S. Bybee to Alberto Gonzales, regarding Standards for Conduct or Interrogation under 18 USC §§2340–2340A, August 2002)

Some of these "loopholes" included the opinion of the Office of Legal Counsel (OLC) that it was all right to threaten a detainee with death (but not with "imminent death"), "to administer personality-altering drugs as long as they did not penetrate to the core of an individual's ability to perceive the world around him", and to inflict mental harm (provided it was not "prolonged"). Their opinion was also that physical pain was acceptable, provided it was not severe enough to signify "organ failure" (Cole 2006: 636; Bybee Memorandum: 119–125, 146–149; on the question of torture see also Luban 2006: 55-68; Luban 2007).

In fact, after *Sosa*, the "third wave" of ATCA lawsuits already challenge some of the "key elements" of the US government's strategy for detaining and interrogating suspected terrorists (Ku 2005: 126–127). Once these practices have been exposed, it is not only claims of "terrorism" that spur states to ignore the dictates of international law and natural justice, starting with the presumed legitimacy of "pre-emptive strikes" (Semple 2007).

Thus many other grave human rights issues are in jeopardy because of a specifically "nationalist jurisprudence" approach on the part of US Courts (Koh 2004: 43). The opinion of such justices as Scalia or Clarence Thomas, view the law beyond the Constitution of the United States as "irrelevant, or worse yet, an impermissible imposition on the exercise of American Sovereignty" (Koh 2004: 52; see for instance *Foster v. Florida* 2002).

Unlike "nationalist jurisprudence", "transnationalist jurisprudence", or the approach taken by such Justices as Breyer, Ginsburg, Stevens, Souter and Chief Justice Marshall (as well as many others), includes one of the leaders of this camp, Justice Harry Blackmun (Koh 2005: 52–53; Koh 1991: 2362–2363; Blackmun 1994: 39). What precisely is "transnational jurisprudence"? Koh explains:

> Unlike nationalist jurisprudence, which rejects foreign and international precedents and looks for guidance primarily to national territory, political institutions and executive power, the transnational jurisprudence assumes America's political and economic interdependence with other nations operating within the legal system. Nor, significantly, do these justices distinguish sharply between the relevance of foreign and international law, recognizing that one prominent features of globalizing world is the emergence of

> a transnational law, particularly in the area of human rights, that merges the national and the international. (Koh 2005: 53)

Essentially, then, it is vital that the US Courts go beyond the promotion of narrow American interests and aims, to the support and promotion of the "mutual interests of all nations in a smoothly functioning international legal regime" (Breyer 2003; O'Connor 2002: 348). The US position of power imposes a grave responsibility to abide by international law and all the principles of natural justice, upon which the country's judicial system is based, not only because of the immediate effects of its own decisions, but because of the import of all its policies on other Western democracies.

Indefinite Detention and US Plenary Power in Zadvydas v. Davis

> *Zadvydas* will thus remain a fixture in the legal landscape. Like *Plyler v. Doe* it will be seen as an important monument to human rights, immigrants' rights and constitutionalism, but without a substantial change in the Court's membership, it will have little generative power. As if the sun were directly overhead, it will shine brightly but cast almost no shadow. (Aleinikoff 2002: 366)

At issue is the question of indefinite detention, particularly in the aftermath of the enactment of the USA Patriot Act of 2001 ("Continued Detention of Aliens Subject to Final Orders of Removal"). In fact, in this Act the Attorney General "Appears to authorize indefinite detention without either administrative or judicial process" (Aleinikoff 2002: 366).

"Detaining Plenary Power" is present in the US at this time, although technically it does not exist in Canada or other countries. As in the passage cited at the start of this section, substantive changes in political will are necessary for all Western powers, before serious consideration of human rights can moderate or, better yet, eliminate present policies.

Aleinikoff advocates the need to increase "constitutional sensitivity" to present lawmaking and jurisprudence (Aleinikoff 2002: 360). He says:

> The draconian 1996 legislation violated deep norms of due process, proportionality and fairness. Rather because the Court's reading cannot be understood as faithful to legislative intent, its opinion should be read as a constitutional holding. (Aleinikoff 2002)

The previous discussion of the interface between international human rights law and domestic constitutions (at least in the example of the United States) noted that the goal of the former is to introduce higher standards into the present constitutional legislature. Like the presence of *erga omnes* obligations, it puts states and non-state actors on notice about

the standards that must be followed and the non-derogable obligations these norms imply. *Zadvydas* is here described as a "landmark decision", because in that case, the Court "has moved beyond invoking a "phantom" constitutional norm to justify an interpretation of a statute that accords for notions of fundamental fairness" (Aleinikoff 2002).

Essentially, aliens entering the US should benefit from the general constitutional rights from which US citizens benefit, including "the right to be free from arbitrary detention" (Aleinikoff 2002: 371). Even the presence of "dangerousness", absent the proof that crimes have been committed, is insufficient to permit indefinite detention of immigrants or other aliens. The Court cited *United States v. Salerno* (1987), which included substantial procedure protections for detainees. It is instructive to consider Justice Marshall's dissenting opinion from that case:

> This case brings before the Court for the first time a statue in which Congress declares that a person innocent of any crime may be jailed indefinitely, pending the trial of allegations which are legally presumed to be untrue, if the government shows to the satisfaction of a judge that the accused is likely to commit crimes, unrelated to the pending charges, at any time in the future. Such statutes, consistent with the usages of tyranny and the excesses of what bitter experience teaches us to call the police state, have long been thought incompatible with the fundamental human rights protected by our Constitution. Today a majority of this Court hold otherwise. Its decision disregards basic principles of justice established centuries ago and *enshrined beyond the reach of government interference* in the Bill of Rights (*Salerno*, 481 US at 755–756; Marshall J. dissenting; emphasis added).

Emphasizing the fact that there are norms that are "beyond the reach of government interference" points to the presence of norms of natural justice, *jus cogens* norms, and the principles that may derive from them, which are part of the origins of international law (Lauterpacht 1984) that inspired most constitutions of civilized countries today. These must be followed whether or not they are "enshrined" in the constitutions of specific countries.

This is the most important message to be taken from this case and, in general, from the discussion of the recent treatment of aliens, in the context of recent circumstances and of the present US administration. Although the other countries discussed thus far (Canada and Australia) have not experienced an immediate attack by a specific alien organization, such as has befallen the US in 2001, the unfortunate "race to the bottom" of normativity and justice that has happened in the US has unduly influenced other Western countries in their attitude to aliens in general. It has

also helped to "normalize" in the eyes of other non-US governments the other unacceptable practices that have followed in the US, from the legitimization of "first strikes" (no longer apparently considered illegal aggression in an unjust war) to the barbarous (and equally illegal) practices of "interrogations" and "renditions" of detainees.

Torture and Terrorism

The gravest criminal attacks against terrorists (or those thought to be terrorists) remain in the cavalier approach to torture and kidnapping as part of the "war on terror". Henderson remarks that

> Although the United States ratified the convention against torture (CAT) pursuant to Article II §2 of the US Constitution of 1994, the Senate's advice and consent" resulted in a number of reservations understandings, and declarations regarding its implementation. (Henderson 2006: 198)[5]

As noted above, the US definition of torture is "narrower than the definition provided under CAT", as it requires "intent" (Henderson 2006: 200). In contrast, the definition under CAT states:

> Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions (CAT, art.1(1)).

As well, the CAT not only requires states to abolish such practices, but also, following the principle of non-refoulement, article 3 provides that individuals should not be extradited to countries where it is likely they would be tortured. Rendition itself, or "the covert transfer of an individual outside the framework of extradition proceedings", is strictly forbidden (Henderson 2006: 201).

It is clear that the so-called "war on terror" has produced grave damages to human rights, both from the standpoint of international law and in the

[5] See US Constitution, Art. II §2, which states that the President has the authority "by and with the Advice and Consent of the Senate, to make treaties, provided two-thirds of the Senators present concur". In contrast, see the Restatement (Third) of Foreign Relations Law of the US §702(d) (1987).

domestic setting, primarily in the US, but also in other countries that have been complicit in the unspeakable practice of rendition and illegal detention. As we shall see in the next section, although renditions, torture and detentions without charge are the most serious and evident effects of the responses to terrorism by states, they are by no means the only breaches of human rights that we have emerged.

The Deprivation of Citizens' Civil Liberties

> [W]e are seeing an increasing use of what I call the "T-word"—terrorism—to demonize political opponents, to throttle freedom of speech and the press, and to delegitimize political grievances. (UN Secretary General Kofi Annan, 2003, as cited in Boyne, 2009–2010: 417)

Although the deprivation of civil liberties cannot compare in depravity with what amounts to kidnapping, forcible confinement and torture, for the citizens of many countries, it represents the loss of rights fought for, and acquired over centuries. In addition to a number of intentional and supranational conventions relating to terrorism (UN Security Council Resolution 2001; UN Security Council Resolution 2005; Council Framework Decision on Combating Terrorism 2002; Council Framework Decision Amending Framework Decision 2008; Council of Europe Convention on the Prevention of Terrorism 2005), many European states have enacted legal regimes curtailing free speech, as any speech that appeared to have even the weakest link to terrorism (Boyne 2009–2010: 421). In general, on both sides of the Atlantic, there has been a substantial increase in the broad regulation of "free speech".

As in the case of terrorism itself, regulatory regimes have been kept deliberately non-specific, in order to grant prosecutors the widest possible discretion to apply the law (Boyne, 2009–2010: 422). This milder but still significant harm arising from counter-terrorism measures has also had widespread consequences, as it affects many citizens who have now and have had no contact with terrorism at all. The same is true—albeit in an even more reduced sense—of the "counter-measures" against terrorism that affect all those who travel. These include the loss of privacy and dignity, land oss of time (as the "controls" at airports become increasingly intrusive, disrespectful and ultimately unacceptable).

Freedom of speech tends to have primacy in the US, and to be considered significant in Europe as well. The International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), promoted the development of "anti-hate" speech legislation since 1969 (Boyne

2009–2010: 439). The European Convention for the Protection of Human Rights and Fundamental Freedoms (November 4, 1950) defines free speech as follows:

> Everyone has the right to freedom of expression. [T]his right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers [...] The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintain the authority and impartiality of the judiciary. (Art. 10, §1–2).

In addition to Article 10, the European Court of Human Rights (ECHR) also declared freedom of expression to be a "qualified right" (Boyne 2009–2010: 440; Sottiaux 2008) when national security or public safety are at stake. Nevertheless, the European Court carefully weighs the possible "pressing social need" against both the necessity and the proportionality of the issue involved when speech acts are considered. These two requirements must, in turn, satisfy two conditions:

> First, the objective of the interference must provide sufficient justification. Second, there must be a rational connection between the objective and the restriction in question and the means employed. (Boyne 200–2010: 443)

Counter-terrorism: Financial Measures

Civil and political rights also include the right to one's property, and that is another area that has been under severe attacks by counter-terrorist measures:

> In the wake of 2001, the freezing of property emerged as a dominant method for counter-terrorism. Borrowing the concept applied to global money laundering and the drug trade, terrorist finance came under scrutiny and became a locus of preventing measures. The result has been a litany of laws whose central object has been the detection and freezing resources connected to terrorism. (Gallant 2010)

There is a particular system used to decide who are those who could be selected for "listing" or "designation"; thus, who might be connected in any way to terrorism. These individuals (or groups) are not only deprived of their rightful property, but the mechanisms through which they are

selected to be "designated" as material supporters of terrorism is neither transparent nor open to appeal.

The justification for these breaches of human rights is based upon "finance warfare" (Navias 2007: 171–194). The actual attacks, at least those arising from Al-Qaeda, are not particularly costly, as the September 11 attacks were estimated to have cost only "about $500,000", whereas "communications networks, training facilities, and protection" are far more expensive (Navias 2007: 172; Greenberg 2002).

However, the general belief was that freezing bank accounts would curtail, possibly even eliminate, terrorist strikes (Navias 2007: 173). It is highly debatable whether this curtailment of civil rights has had a serious impact on the operation of terrorism worldwide, even aside from the immorality of the position of attempting to "buy" security at the expense of minority rights (Dworkin 2003).

Nevertheless, especially in the US, legislation was enacted quickly after 9/11 without either debate or public moral outrage for the cavalier decision to set aside civil rights to privacy, a concept that used to be considered important enough to stand against the right to life, for instance, in the case of abortion (*Roe v. Wade* 1973):

> The US Congress passed the voluminous USA/Patriot Act six weeks after 9/11 with virtually no debate, or dissent, granting the executive the extraordinary powers of surveillance that it had sought unsuccessfully in the past. (PoKempner 2007: 162)

Re-authorized in 2006, the Patriot Act enforces the authority of the FBI as it permits it "to obtain personal records from third parties—such as libraries, doctors, internet service providers without notifying the person under surveillance" (PoKempner 2007: 162). As well, "massive wiretapping" was also permitted outside the control of any federal regulatory regimes, simply at the discretion of the president, providing yet another dangerous aspect of the erosion of legal norms and the dismissal of morality and justice we noted in regards to renditions and torture.

A Recent example is that of *Her Majesty's Treasury v. Mohamed Jabar Ahmed and Others* (January 2010). The UK Supreme Court

> ... upheld the appeals of individuals who had been "listed" and thereby denied access to property pursuant to two anti-terrorist property regimes, the Terrorism (United Nations Measures) Order 2006 (TO) and al-Qaida and Taliban (United Nations Measures) Order 2006 (AQO). (Gallant 2010: 1)

The UN measures here cited reflected the "executive action taken by the UK Treasury under the United Nations Act 1946" (Gallant 2010: 1), and the

presence of a number of Security Council (SC) resolutions (see for instance SCR 1373, discussed above). Even without pursuing a more detailed analysis of the case, and having noted that one reasonable decision, by itself, cannot solve the problem, we can only confirm the consequences that arise from "asset-freezing mechanisms", which include the inability to access any kind of independent review, the failure to disclose the basis for the SC decisions, and the absence of any available "de-listing recourse through the state" (Gallant 2010: 4).

What is extraordinary about all these counter-terrorism measures is that they share with terrorism itself something that Alex Schmid describes as a "marked indifference towards basic moral codes. No rules of combat is respected if rule violation serves the terrorist purpose" (Schmid 1984). The same disregard for both justice and morality will be apparent in the next section as we consider yet another aspect of providing "material support to terrorism".

The Material Support of Terrorism

> While the War Crimes Act makes no direct mention of material support to terrorism, 18 U.S.C. §2339A and 18 U.S.C. §2339B [2006], specifically criminalize harboring and supporting terrorists. These statues have formed the basis for a relatively large number of prosecutions in recent years. Under these statutes, individuals who materially support terrorists or designated foreign terrorist organizations, may be imprisoned for up to 15 years, or, if the death of any person results due to a terrorist act, life imprisonment may be imposed. (Vanzant 2010: 1056)

Providing property, services, money, lodging, training, safehouses, advice, false documentation, weapons, lethal substances, explosives, transportation, and more are all parts of what constitutes "material support" (Vanzant 2010: 1056). And these provisions were incorporated into the Military Commission Act of 2006, although material support for terrorism was not recognized as a "war crime" prior to that date in international law. In fact,

> To hold an individual accountable for a crime under international law, it must first be determined whether that crime does in fact exist. Even if a crime is recognized under international law, universally recognized legal principles such as *nullum crimen sine lege* will bar *ex post facto* prosecutions if the crime came into existence after the allegedly wrongful acts were committed. (Vanzant 2010: 1059)

Material support for terrorism, then, cannot fit neatly under any category of international law: neither international conventions nor international

custom, nor yet the general principles of law recognized by civilized nations or even the judicial decisions and the teachings of the most highly qualified publicists, list it as a crime (Vanzant 2010: 1059). However, the consequences of viewing "providing material support" as a war crime are serious indeed first and foremost as that designation merits a trial by a "military tribunal" (Morse 2010: 1061).

The best-known and most obviously wrongful case under that designation is that of Salim Ahmed Hamdan (*Hamdan v. Rumsfeld* 2006).[6] A young Yemeni man in his twenties, in 1996, Hamdan was hired as a driver, working for the equivalent of about $200 per month. He possibly served as a bodyguard to Osama bin Laden on occasion, as well as a driver, or transported weapons, but he "did not join Al-Qaeda … nor did he joint he Afghan military force known as the Taliban" (Morse 2010: 1061–1062).

In November 2001, the Afghan military halted him and, although he had no passengers at the time, and was not fighting or resisting, they turned him over to the US military, who, in 2002, transferred him to Guantanamo Bay. His wife and two daughters remained in Afghanistan (Morse 2010: 1062).

In May 2007, Hamdan was charged with

> … providing material support for terrorism in violation of 10 U.S.C. 950v (b) (25) and conspiracy to commit various terrorist acts in violation of 10 U.S.C. 950v (b) (28). Both offenses fall under the 2006 Military Commission Act (MCA), which congress passed "[t]o authorize trial by military commission for violations of the law of war". (Morse 2010: 1063; see also Military Commission Act of 2006)

Hamdan was eventually acquitted of the original "conspiracy" charge, but he was (a) deemed to be an "unlawful enemy combatant", and (b) convicted of providing "material support for terrorism as a war crime" (Morse 2010: 1063–1064).

It is worth nothing that, aside from the immorality of this sequence of events, there are a number of grave procedural illegalities connected with Hamdan's prosecution. The first is the definition of providing material support as a "war crime", in direct conflict with the Charter of the International Military Tribunals at Nuremberg (Morse 2010), as well as the Rome Statute of the International Criminal Court (ICC). War crimes

[6] See also www.defenselin.mil/news/May 2007/Han Charges.pdf; and Human Rights First, The Case of Salim Ahmed Hamdan, www.humanrightsfirst.org/us/law/inthecourts/supremecourt hamdan.htm.

include "the improper use of a flag of truce, pillaging a town, rape and grave breaches of the Geneva Conventions" (Morse 2010: 1072–1073).

The second problem arises when one considers that the "procedural protections" guaranteed under Article III of the constitution of the United States does not apply to court martial or military commissions, and that even the Uniform Code of Military Justice (UCMJ) does not apply to military commissions, unless to states explicitly by the MCA (Morse 2010: 1075–1076). Finally, according to the universally accepted principle *nullum crimen sine lege*, the "crime" with which Hamdan was tried did not exist either in international law or in US domestic law at the time he was detained (Vanzant 2010: 1073).

Therefore, Hamdan's conviction can be viewed, minimally, as a "historical aberration", one that only the US has defended, at least at the time of the Bush administration, whereas no other nation (nor international law itself) has shown any indication of wanting to follow the US along this path (Vanzant 2010: 1079–1080).

Terrorism and Counter-terrorism Crime

> Terrorism is not at all the instrument of the weak, as is often claimed, but rather the routinely employed instrument of the strong, and usually, only the final resort of the weak. (Steinhoff 2004: 108)

We have reviewed the several criminal counter-measures to terrorism, but terrorism itself consists in highly questionable activities of a criminal nature. As we discussed some of the counter-measures that have escalated since the 9/11 events, those responses to terrorism are unavoidably the result of terrorist threats. Thus, both sets of crimes must be understood as part of the "war on terror". Yet despite our ongoing efforts to provide—as much as possible—some clarification on the motives of both parties to that "war", we should acknowledge that such motives are not necessarily similar for each attack, any more than they are for each counter-measures. Both need a serious analysis, rather than a single evaluation.

Terrorist attacks might be motivated by legal and legitimate grievances, or they might not. And the same may be true of counter-measures. Some basic differences, however, remain. First, terrorist attacks are open and clearly ascribed to a group and a cause, whereas counter-terrorist measures are surreptitious and lack transparency, although they originate from democratic countries, which are committed (at least on paper) to the rule of law.

Second, counter-terrorist measures originate from a position of power, rather than one of weakness (and often of desperation), as do the actions of terrorists. Third, the terrorists openly present themselves and usually put their own lives on the line together with the lives of their victims.

In contrast, counter-terrorist measures are most often initiated by powerful states, but "outsourced", and planned so that they are not likely to "rebound" on their perpetrators, even (as we saw in the last section) to the point of subverting and rewriting existing laws in order to protect their officials and their status.

For both, it is hard to view each party as unitary and as based on a single position or goal. Hence, the only way to understand their respective positions and statuses hinges on a thorough discussion of their respective causes, motives, and goals. We will undertake an initial discussion of those issues in the next chapter.

CHAPTER THREE

TERRORISM: MEANS AND MOTIVES, THE QUEST FOR INDEPENDENCE AND THE LIMITS TO SELF-DEFENSE

Introduction

> Terrorism has a certain structure: It has two targets: the primary and the secondary. The latter target is directly hit, but he objective is to get at the former to intimidate the person or persons who are the primary target into doing things they would not normally do. (Primoratz 2004a: 24)

This is yet another addition to the attempted definitions, intended to help to understand the meaning of terrorism, discussed in Chapter 1. But Primoratz suggests the above as part of a definition that is not "overly restrictive" (Primoratz 2004a: 22), as he denies the accuracy of any definition that views terrorism as entirely political. He states that:

> the method of coercive intimidation by infliction of violence on innocent persons has often been used in non-political contexts: One can speak of religious terrorism (e.g. that of Hezbollah) and criminal terrorism (e.g. that of the Mafia). (Primoratz 2004: 22)

Aside from the fact that this passage defines as terrorism the legitimate resistance of Hezbollah to foreign, illegal occupation and ongoing aggression, Primoratz assumes the existence of "innocents" as almost mandatory as the target of terrorism. In defense of this argument, however, he accepts the existence of "institutionalized terrorism", as well as state terrorism, practiced even by democratic states, citing the events of Dresden, Hamburg, Hiroshima, and Nagasaki as examples (Primoratz 2004a: 23), thus naming the US (but not yet Israel).

Nevertheless, before we can properly assess the moral status of terrorism (or even the legal status), we must start by eliminating the first stumbling block: the conviction that terrorism must be both immoral and illegal because of the means it employs (that is, its attacks on "innocents"), which eliminates the need to question its primary goal (that is, the causes of the terrorist attacks). Once we agree with McMahan that civilian innocence is contingent rather than absolute (McMahan 2009), the first obstacle to a fair assessment of the status of terrorism is set aside.

At any rate, S. A. J. Coady says, correctly as far as it goes, that terrorism "violates the central principle of the *jus in bello*, the principle of discrimination which declares the immunity of non-combatants from direct attack" (Coady 2004: 80). However, Coady sees the possibility of a situation of supreme emergency as capable of overriding the prohibition to harm non-combatants from a clearly utilitarian standpoint (Coady 2004: 84; Walzer 2000: ch.16). In contrast, Thomas Nagel acknowledges the necessity of such actions in war, but judges them to be immoral; that is, not "the moral choice" but the necessary one, forcing even a convinced deontologist into a "moral blind alley" (Nagel 1979: 62).

Of course the Kantianism of Nagel's position pushes one even further back into the causal chain resulting in violence, and farther away from a facile position of immediate condemnation. McMahan's argument clearly showed the difficulty of justifying killing even in a just war (and we'll return to what he terms "threat" in the next section). Yet he could not distance totally the concept of war from that of terrorism, as both are forms of political violence, the possible morality of which rests on their motivation and their respective aims, as does their legal position.

It is important to note that for both, there are obvious difficulties in espousing, or at least allowing occasionally, a double standard in what counts as a "supreme emergency", and that applies to all groups, or even states (Coady 2004: 92).

The Question of Justification

> It seems reasonable, I think, that on grounds of justice, it is better to equalize rights violations in a transition to bring an end to rights violations, than it is to subject a given group that has already suffered extensive rights violations, if the degree of severity of the two violations is similar … If we must have rights violations, a more equitable distribution of such violations is better than a less equitable violation. (Held 2004: 74–75)

Virginia Held's argument is convincing—at least *prima facie*—although Uwe Steinhoff offers a serious objection regarding the shift from individual to group rights:

> "If one group is having a bad time, the other shall also have a bad time" does not look like a particularly commendable principle. (Steinhoff 2004: 102)

Coady's proposed justification as "supreme emergency" is fraught with difficulties. To serve as a justification it could only be based on a non-partisan approach to justice, whereas the concept is used almost routinely today in a different way, to mean "to the advantage of the powerful." An example might be the unqualified public condemnation of terrorism, in contrast with the equally unqualified acceptance of the Hiroshima and Nagasaki atomic bombs, the morality of which is only sporadically questioned in the academic literature (Steinhoff 2004: 97).

Hence, like the Hobbesian "ruler" or "king", the most powerful governments, states and elites define and declare whose human rights are expendable and can therefore be violated with impunity: they "define" the location of 9/11 as a "holy ground", where around 3000 civilians were killed, but they view with equanimity gross violations of human rights in Palestine, or in Iraq, right after that war. The elimination of the infrastructure in Iraq gravely affected those who are truly innocent, the children:

> There was no public outcry, for example, when the popular press cited the conclusion of a Harvard Medical School Study: 75,000 Iraqi children would die due to the destruction of the Iraqi infrastructure. The civic celebrations continued as Bush's popularity soared. (Hirschbein 1999: 344)

Thus, once rights violations can be justified to the satisfaction of the most powerful states, with their control of the media to better spread their message, all their illegal counter-measures can also be easily justified. Similarly, in September 2010, with great fanfare, the G8 states proposed attempting to reach the Millennium Development Goals they had promised to achieve (but did not), at least regarding the obscene rates of mortality of children aged 0–5.

The involvement of these states in creating the conditions of starvation and disease that pervade much of the "developing" world through trade rules and organizations will be discussed in Chapter 4. But it is important at this point to focus on the wide difference between the respect given to the rights of the rich and powerful, and those of the poor. Both terrorism and counter-terrorism need to be analyzed from the standpoint of their respective motivations. Why does each group engage in activities that would normally be considered criminal, in support of their positions and goals?

The first chapter opened with Antonio Cassese's words, as he argued that although terrorism did not yet have an ultimate legal definition, state terrorism was already clearly proscribed in several international

instruments. Therefore it might be best to start by examining the goals and motives of the states engaging in counter-terrorist measures.

State Terrorism, Its Goals, Motives and Means: an Evaluation

> When it first entered political discourse, the word "terrorism" was used with reference to the reign of terror imposed by the Jacobin regime—that is—to describe a case of state terrorism. (Primoratz 2004b: 113)

The first point to note is that state terrorism appears to be morally more culpable than non-state terrorism, whether the state can be viewed as a "terrorist state" for its routine use of such practices on an ongoing basis, or whether "their resort to terrorism is occasional rather than sustained." Primoratz offers the example of Israel "in its conflict with the Palestinians and the neighbouring Arab States" (Primoratz 2004: 116–117). A further distinction can be made between the state's use of terrorism "against its own citizens" or "abroad" (Primoratz 2004b: 116–117).

There are several reasons why state terrorism is not only clearly illegal, but also morally more culpable than other forms of terrorism. First, the media of most countries, as well as the international media, tends to emphasize the gravity of non-state terrorist attacks, while it often ignores or downplays instances of state terrorism (Primoratz 2004: 116). The second culpable aspect of state terrorism is the lack of transparency, consultation and openness of the state, when it engages in terrorist practices, as was noted in the previous chapter. As well, the "national interest" is most often pitted against collective human rights, without however offering a logical or convincing argument in favor of this position (Westra 2011a).

The third point returns to the legal aspects of the situation: international instruments forbid most of the practices of terrorism, as do the various declarations and conventions drafted for the protection of human rights. Most states are signatories and have ratified those conventions, hence they have a clear legal obligation, as well as a moral one, to abide by their commitments (Primoratz 2004b: 119). In fact, as we saw in the previous chapter and in Chapter 1, powerful nations actively work to misrepresent and deliberately misinterpret such international instruments as the Convention Against Torture, in order to justify their ongoing violent practices, avoiding the immediate need to respond to the well-founded critiques of the UN and of international opinion (Primoratz 2004b: 119).

The fourth point is that the state cannot claim to be powerless, oppressed or exploited, let alone to be urgently in need of liberation from foreign occupation. One might counter that there are peaceful and legal

means available in law to redress the situations that impel the state to engage in illegal counter-terrorist measures. For instance, to return once again to the example of Palestine, not only is Israel still responding to small-scale attacks with all-out terrorism and an ongoing war of aggression and oppression ("ongoing" according to Primoratz at the time of his writing; Primoratz 2004b: 123), but the employment of full-scale illegal practices has escalated since 2004, with the continuing use of illegal settlements (Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the Situation of Human Rights in the Palestinian Territories Occupied by Israel since 1967, E/CN.4/2005/29; and its addendum, E/CN.4/2005/29/Add.1, 3 March 2005) and the construction of an illegal wall (Crawford 1999: 95–124; Amnesty International 2009).

In any case, the ongoing "collateral damage" (Leader 2000: 53–68) arising from counter-terrorist measures (as well as the deliberate perversion of the letter and the meaning of international law, especially on the part of the US-led "war on terror") cannot be morally or legally justified when the perpetrators are countries who are not desperately fighting for the survival of their citizens, or to remove an illegal foreign occupation. Steinhoff puts it well:

> But has the existence of Israel ever been threatened by the intifada or by the Palestinian authority, or would the existence or Israel be threatened by a Palestinian state? In consideration of the military weight of Israel and its American ally, such a thought seems utterly absurd. The idea that Al-Qaeda or the Taliban could threaten the existence or freedom of the United States is just absurd. (Steinhoff 2004: 107)

Thus state terrorism (or, as it is most often viewed, the practice of counter-terrorism) represents a total failure of justifiable activities, even when seen from the standpoint of proportionality and justice, leaving aside the question of legality. In fact, while the freedom fighters may be justified because of their people's UN-established right to self-determination, some of the motives of the states are far from lofty or even legal. For instance, the efforts to maintain an illegal occupation of a territory (Israel), or the determination to extend their "imperial" power and control the resources needed to support its might (US), and similar motives, are all equally insufficient as justification. Neocolonialism's thrust to control and conquer markets, peoples and resources is equally illegal and morally unfounded as a motive for violence, and we shall return to that topic in the next chapter. Now, it might be worthwhile to consider first the possible morality of self-defense against various "threats", aside from the international law aspects of the problem (McMahan 2009).

The Moral Response to "Threats"

> *Culpable Threats* … These are people who pose a threat of wrongful harm to others and have neither justification, permission, nor excuse. They may intend the harm they threaten, or the risk they impose, or the threat may arise from action that is reckless or negligent. (McMahan 2009: 159)

The first thing is note is that the definition here proposed by McMahan is not intended to refer to categories with a war context; it is simply viewed as individual cases discussed as "limits to self-defense" (McMahan 2009: 159). For instance, the example of an unequivocal "culpable threat" is someone attempting to kill his wife for financial gain: both the wife and any bystander are not only permitted but obliged to use force to prevent the killing, even to the point of killing the attacker (McMahan 2009: 159).

It is hard to tell whether such fully "culpable threats" exist within a war situation, where it would seem that both sides would have both permission and justification for their violence. It is even harder to imagine the moral right to a lethal response when neither terrorists nor counter-terrorists can offer such a clear example of *prima facie* culpability. Both require an analysis of their motivation, before their culpability might be assessed.

The second category McMahan proposes is that of "partially excused threats" as "people who unjustifiably pose a threat of wrongful harm to others, but whose action is excused to some extent, though not fully" (McMahan 2009: 159). Such diminished culpability may include lack of full knowledge, diminished capacity, error, or a threat to the life of the "threat" himself. In all these cases proportionately is recommended, but the right to self-defense remains (McMahan 2009: 160–163).

This category fits much better both counter-measures (or state terrorism) and terrorism (non-state) itself. In other words, there are possible justifications for the violence on both sides. Yet, no example of individual self-defense may fit, because it lacks the dimension of community or collective rights violation, which are most often determinant for both terrorism and counter-measures. The single terrorist, such as the suicide bomber, is unique as she acts not for her own gain or even rights, but for those of her community, whom she represents in her action.

The state official ordering violent counter-measures, or counter-measures in clear breach of human rights, equally acts in what he views as the "defense" of his country, his culture or that of a close ally. Hence the first question that arises is: where does the clearest element of culpability lie? The reasons of the suicide bomber are (most often) the determination

to bring out, to manifest to public opinion the breaches of basic collective human rights of her people, and the civil and political right of her community.

Either motive trumps without question the counter-terrorist motive that is to suppress and deny her cause and her effort. Yet, no matter how worthy and acceptable her cause, one grave problem remains: both terrorist and counter-terrorist do not respect the "innocent". Even if we agree with McMahan that civilian innocence is contingent rather than absolute (McMahan 2009: 231), most of the attacks perpetrated by either side are indiscriminate; that is, for the terrorist, they negligently include violence against children who (even by bin-Laden's standards; see Chapter 1) cannot be said to have voted to support the immoral state practices that they are condemning by their sacrifice. The same is true of counter-measures, but, even if we accept their "self-defense" position (long before or after the fact), the difference is that the state has a number of other available options at its disposal—options that are not present in the case of the suicide bomber.

McMahan stands by his position regarding the morality of civilian immunity, but, for "pragmatic considerations", opts instead for "the absolute, exceptionalness, legal prohibition of international military attacks against civilians" (McMahan 2009: 234). This is despite his own argument regarding terrorism, which implies that terrorism can be permissible even in situations that are not cases of supreme emergency" (McMahan 2009: 232).

Thus, although his analysis is highly detailed and instructive, it may be definitive only within the conduct of a just war. But terrorism is not war, despite the touted "war on terror" label, and the hybrid approaches (including both military and non-military treatment of captured terrorists). Perhaps both sides should at least eliminate any chance of harming children through their operations, as one can be absolutely sure they could not represent any kind of "culpable threat". This conclusion applies equally to terrorists and counter-terrorists: the suicide bomber should do what the 9/11 planes did and seek a location for her final statement that generally holds no children, rather than, say, a crowded marketplace, with mothers and children in attendance.

But the response to 9/11 should not include dropping so-called "spent uranium" bombs in Afghanistan, given the terrible deformities that exposed children in Fallujah will carry for the rest of their lives, because of pre-birth exposure. As well, they had no moral right to supply Israel with similar weapons, causing the same gross deformities to children exposed

pre-birth during "operation Cast Lead" (Amnesty International 2009). Similarly, both Chechen terrorists holding elementary schoolchildren hostage and the Russian state counter-measures that resulted in the death of many children were especially heinous and deserving of the condemnation of the international community.

What I am arguing for is to establish a counterpart to the rules governing *jus in bello*, within the context of terrorism and counter-terrorism. Once we affirm that terrorism is *not* simply a certain form of criminal activity, we must establish some limits even to the rights of self-defense, for both sides. It would make little sense to draft rules for "better" forms of rape or murder, although criminal law clearly deems certain forms of those crimes to be worse them others, and to be deserving of graver punishment.

There is another category of crimes that fits state terrorism, and perhaps also some cases of terrorism itself better: the category of crimes against humanity. Some recent case law helps to assess more clearly these illegal actions, and to separate the indefensible from the possibly defensible in law and morality. A noteworthy case is that of a Bosnian Serb who was part of a firing squad that "summarily executed approximately 1200 Bosnian Muslim civilians, following a threat that he would join the victims if he did not participate" (Newman 2010; *Prosecutor v. Dragen Erdemovic* 1997). Although in *Erdemovic* Judges McDonald and Vorak state that "duress" cannot constitute a complete defense, but could—at best—be used at the sentencing state to reduce the applicable sentence, Judge Cassese's dissenting opinion argues against this position.

Cassese argues that such a defense might be acceptable in principle, provided that "strict requirements" regarding "the imminence of the threat, lack of means of averting the evil, proportionality and non-causation by the offender of the circumstances giving rise to duress" could be met (Newman 2010: 2; separate Opinion of Judge Cassese, para. 16). Therefore, international criminal law cannot perhaps provide precise guidelines to assist in the evaluation of either terrorism or state terrorism, but it might well be used to suggest the criteria for evaluation.

The presence of "dire conditions" of the populations in states using counter-measures is certainly not part of the situation existing in either Israel or the US, if we consider once again the case of Palestine, and nor are any of the requirements named by Judge Cassese. In contrast, the Palestinians themselves clearly meet all the strict "requirements" listed by Judge Cassese. The final requirement listed—that is, the question of "non-causation" —is totally lacking from most instances of state terrorism, not

only for occupied territories, but many other aspects of state terrorism that we will discuss below.

Thus, for terrorism and counter-terrorism, which fit under the categories of neither war nor common crime, there is the immediate necessity to establish rules, as there are rules, *mutatis mutandis*, for demonstrations governing both the protestors/ demonstrators and the police forces used to control them. We will return to such *in bello* equivalent (or means and practices) rules in our conclusions. For now we should turn to the equivalent of *jus ad bellum* instead, or the basic reasons for violence on either side, that is the counterpart to *mens rea* in criminal law.

The Strongest Motive for Terrorism in Law and Morality: Independence and Self-Determination

> If denial of the right to self- determination constitutes a consistent pattern of gross and reliably attested violation of human rights and fundamental freedoms, the matter may be taken under advisement by the Human Rights Commission under the public procedure for in Resolution 1235-1967 of the Economic and Social Council of the United Nations of the Confidential Procedure provided for in resolution 1503 of 1970 of the Economic and Social Council Resolution 1235. (XLII) 42 U.N. ESCOR, 42nd Sess., supp. No. 1 at 17, UN Doc. E/ 4393 (1967); Economic and Social Council Resolution 1970)

Not all terrorist attacks arise from the denial of self-determination, and none of the counter-terrorist measures do. Nevertheless, self-determination and the respect for ethnic/cultural and religious groups are the strongest reasons for revolt against oppressing states and governments, and the motive most likely to spur violent protests and terrorist attacks, as well as the most likely basis to elicit public support for that "cause". The right to self-determination of peoples alongside the equality of nations, large and small, has been recognized as a basic norm of international law (van der Vyver 2004: 421; see also UN Charter, Art. 15).

Historically, the disintegration of great empires (Ottoman, German, Russian, Austro- Hungarian) fostered the concept of self-determination of peoples, based on distinct territories and political independence (van der Vyver 2004: 423). But after World War II, the emphasis shifted to the elimination of colonial rule (Western Sahara 1975; Legal Consequences for states of the Continued Presence of South Africa in Namibia).

At any rate, the virtual elimination of colonization is one of the clearest successes of the UN system, whereas securing adherence to the principles of its Charter, such as the principle of non-aggression, have not met with

as much success. In 1970, the General Assembly declared that "emergence into any political status freely determined by a people constitutes a mode of implementing the right of self-determination" (Kirgis 1995: 305). As well, its Declaration on Principles of International Law Concerning Cooperation among States supported the concept of "internal self-determination" (Kirgis 1995: 305), another aspect of a situation that may well give rise to insurrections and violent protests, if not terrorism.

Thus, there is no problem with establishing a strong legal and normative basis for the right to self-determination; the problem that arises is one of compliance and enforcement instead (van der Vyer 2003–2004: 430 ff.). Also:

> While … [a] state-centered model has been eroded in international criminal law developments that eliminate the state action requirement, nationality remains central to personal identity within the international system. (Castellino 2008: 504)

Thus many groups fight to defend their "personal identity" (that is, their cultural uniqueness) from indigenous peoples in all continents, including the Kurds and Basques, for example, as well as the Palestinians. Culture and religion are basic to the movement, beyond the bare territorial requirements of state formation (Anaya 2000: 3; Westra, 2011b). Castellino adds that "In order to retain its legitimacy, international law must reconceptualize the doctrines of territoriality and self-determination" (Castellino 2008: 505).

Even more important is to clearly establish the right of peoples and communities to have redress when their rights have been breached on either of those two issues, and the extent and limits of so doing in international law. That is, the most vexed question is not whether people have the right to be free from colonial domination, or even from the indirect economic oppression of imperialism. Rather, the main problem is the weakness of the UN regarding enforcement.

Both the Covenant on Economic, Social and Cultural Rights (Art. 16) and the Covenant on Civil and Political Rights (art. 40) require "periodic reports of State Parties on measures adopted and progress made in achieving the rights enunciated in the covenant." As well, the latter has an additional First Protocol that includes provisions for complaint procedures (Optional Protocol to the International Covenant on Civil and Political Rights 1976), which has not been ratified by the US. Individuals who remain in breach of human rights provisions might be prosecuted in the International Criminal Court (37 TLM 1002 (1998) art. 7(1) (h) and art. 7(2) (g); van der Vyver 2004: 432).

But the ICC is subject to limitations regarding precisely who may trigger a prosecution: "Security Council of the UN, a State Party, or the Prosecutor acting *proprio motu*" (van der Vyver 2004: 432). The US has not ratified the ICC, and it also has the right to veto any prosecution that may be harmful to itself, its allies, or the countries with which good relations are desired.

Equally problematic may be a situation calling for the elimination of "cultural genocide" from threatened communities or peoples, and neither it nor "physical destruction" (of a people) are part of the definition for genocide in the ICC statute (see art. 6) or the Convention on the Suppression and Punishment of the Crime of Genocide. The ICC cannot extend the definition of cultural genocide as "deliberately inflicting on ethnical groups conditions of life calculated to being about its physical destruction in whole or in part", by analogy.

A present example that clearly fits that category, that is the treatment of the Palestinians by Israel, with the active support of the US, could not be brought to court, even if the SC would not force a veto, as neither Israel nor the US have ratified the ICC. Van der Vyver concludes that "enforcement of the right to self-determination through international mechanisms is problematic, but not hopeless" (van der Vyver 2004: 435). Nevertheless, I suggest that it is the reality of the situation on the ground, the very hopelessness that some peoples encounter in their daily life, with no redress in sight, that is the most fertile ground for terrorism, the place where suicide bombers are born to die.

In a recent talk, Archbishop Desmond Tutu has asked the South Africa University, in the name of a principled commitment to justice, "not to turn a blind eye to the suffering of the Palestinian people", thus to end the University of Johannesburg's relations with the Israeli Ben-Gurion University of the Negev because of the latter's support of the Israeli military. He says: "When we say 'Never again!' do we mean 'never again!' or do we mean 'never again to us!' "? (Tutu 2010). And he adds:

> Together with the peace-loving people of this Earth I condemn any form of violence—but surely we must recognize that people caged in, starved and stripped of their essential material and political rights must resist the Pharaoh? Surely resistance also makes us human? (Tutu 2010)

That of course, is the question. How much "resistance" is too much? When a people's basic and cultural rights to self-determination are denied, what are the limits of self-defense in their case? The UN system and the international community are well aware of their plight, and of the immorality and illegally of the position, and of the increasingly blatant activities of Israel.

The latter flaunt the law and all UN pronouncements, as they continue to bask in the support of the US, while largely ignoring the rest of the world. Thus, once again, the question that requires an urgent answer is when a people's forceful resistance to the violence to which they are subjected is too much; or, essentially, what are the limits to defense of oneself, one's family, one's culture, or one's community?

The status of terrorism and counter-terrorism cannot be evaluated unless this question is answered first. Of course not all terrorists are either Palestinians or supporters of Palestine, and we will consider other cases and motives in the next section.

Other Motives for Terrorist Attacks

> I identity here three types classified by agent, or actor: non-state terrorism, state terrorism, and what I call "amphibolous" state-cum-non-state terrorism, each of which has subcategories according to objective or method. (Mani 2004: 220)

Rama Mani also distinguished between "self-determination terrorism" and "hate terrorism", two different aspects of non-state terrorism. We discussed the former in the previous section, using the Palestinian situation as the main example, although we could also have cited the acts of terrorism by the Irish Republican Army (IRA), or that or the Chechen Rebels in Moscow in 2002 (Mani 2004: 221). Hate terrorism, in contrast, includes the actions of white supremacists or neo-Nazis, and other similar groups in Europe and in the US, as well as other revolutionary "fronts" in Sierra Leone, Uganda and other similar areas, although some will not acknowledge these as acts of terrorism (Mani 2004: 221).

Less convincing is the description of mixed terrorism, described as combining state and non-state terrorism, and the primary example Mani related is that of Al-Qaeda, which he defines as "a collusion between non-state and state actors with strong business, financial and criminal connections" (Mani 2004: 221). However, this is a description, not an explanation, and I am not convinced that this represents a better definition of their motive then the one we cited earlier, offered by bin Laden himself. For Al-Qaeda, as for many other terrorist organizations, the "root cause" may be less obvious. Mani adds:

> Terrorism is not a philosophy or a movement. It is a method. To state the obvious, the search for root causes is futile of the definition of terrorism itself is consistently shifting. (Mani 2004: 221)

In contrast, Thomas Homer-Dixon argues (correctly, I believe) that "analyzing root causes was not a pretext for justify terrorism, but rather was done to prevent its recurrence" (Homer-Dixon 2001). That represents the most important focus of this research: root causes are absolutely necessary in order to comply with the mandates of the UN regarding the prevention of terrorism and the importance on non-aggression. Although the exact motivation of each single attack may not be immediately clear, claims of randomness and the lack of a serious cause amount to dismissal of the issues many consider grave enough to merit putting their own lives in the line.

In this sense, the superficial denial of a serious reason for the attack is clearly a major part of the problem: such denial will continue to elicit attacks—with some justice—as the issues that are most important to some are simply dismissed as non-existent by others. In fact, some believe that "understanding" leads directly to "legitimizing" terrorism. Those who take that position believe that it is unacceptable to try and listen, in order to understand what motivates terrorism. Both Ted Honderich (Honderich 2003) and Noam Chomsky (Chomsky 2001) plead for understanding. Meisels criticizes this position as she presents Derrida's as "to condemn unconditionally certain acts of terrorism … without having to ignore the situation that might have brought them about or even legitimated them" (Borradroi 2003; Meisels 2008: 36). Meisels adds that Netanyahu finds the quest for "root causes" to be "perplexing", and too close to legalization (Meisels 2008: 38).

However, we must acknowledge that unless we come to these attacks prepared to listen and understand, our real goal of the prevention of terrorism will never be reached, as it has not been reached by the violent practices that have prevailed in recent times. We should recall, with David Sturm, that human rights "are more than means of individual advance they are attributes of concern for each other" (Sturm 2004: 235–240).

Unless we are prepared to honor our common humanity and respect our differences, rather than hide behind walls of separation and discrimination between "us" and "them", it will not be possible to work for the prevention of terrorism and the diffusion of peace. Thus, *pace* Mani, Meisels, Netanyahu and others, even if one essential general cause of terrorism cannot be found, we can affirm that the root cause hinges on respect for the human rights, but also for cultural and religious rights of all individuals and peoples. All are firmly entrenched in international law, and basic to the letter and the spirit of the UN charter and other foundational documents.

Hence we need to discover what other causes motivate terrorist attacks, beyond the quest for self-determination and/or territorial integrity. No doubt, not all motives, once discovered, will justify the "legitimization" of terrorism, but each position may represent a varying shade of grey, rather than an uncompromising black or white, and each should be judged on its own merits.

We will return to this point in the conclusion of this chapter. At this point we should return to the question of motives beyond self-determination, understood as external self-determination. In contrast, internal self-determination is different, but it remains a motive that may spur communities embedded within states to revolt, or to act forcefully to defend themselves from state terrorism (the topic of the next section). For now it is important to keep in mind that in 1982 the UN Human Rights Commission and the Economic and Social Council approved the establishment of a working group on Indigenous Populations under the Subcommission on Prevention of Discrimination and the Protection of Minorities. The protection from discrimination of minorities and others includes the right of Indigenous Peoples to (internal) self-determination, but the focal point of minority protection is the issue of discrimination, already entrenched in international law, according to Article 27 of the ICCPR:

> [i]n those States in which ethnic, religious of linguistic minorities exist, persons belonging to such minorities shall not be denied the right in community with other members of their group to enjoy their own culture, to profess and practice their own religion, or to use their own language. (ICCPR, GA Res. 220 A(XXI), UN GAOR, Supp. no.16 at 52, UN Doc. A/631, #966 NTS 171, March 23, 1976)

Howard J. Vogel discusses this point as he adds that it was understood that the language of Article 27 included "the use of affirmative action", or what international law terms "special measures", to ensure the right enumerated (Vogel 2006: 456–457).

However, neither the ICCPR nor the Subcommission on Prevention of Discrimination specify what "measures", if any are legitimate in the affirmation of these rights, failing the appropriate legal procedures. In other words, aside from the presence of the system of the international courts, what are the rights of the citizens who are the victims of discrimination and apartheid, to name two basic and ongoing issues? There is no legal "permission" to employ terrorist tactics, to be sure—but the question is what else can be done, when the UN system is and remains practically unresponsive or insufficient, as we can see from the number of UN

resolutions again Israel that have been blocked by *one* veto: that of the US (Honderich 2006).

In the late summer of 2010, the French government decided to expel all the Roma people from France and send them back to various countries of origin, such a Romania, Bulgaria or Hungary, without their consent. In this case, there was an immediate outcry from the European Government, and on August 11–12, 2010 the Committee on the Elimination of Racial Discrimination heard the complaint of "Racial Discrimination Against Gypsies and Travellers in France".[1] On September 29 of that year the EU announced that France would be charged because of their discriminatory measures, which were disallowing the "free movement of people" across the EU. These peoples were seeking internal self-determination and the protection of their rights. In some ways they are like other Indigenous and Native peoples in various areas of the world. However, their needs are somewhat different, as neither their culture nor their religion are tied to a specific locality and environment in that way that Inuit people or First Nations of Canada, or the Sami of northern Europe are necessarily connected to their lands (Westra 2007). In contrast, their culture and lifestyle involve travelling through the country rather than to any specific area.

At any rate, non-discrimination would require that the conditions they encounter, including the location and facilities in the areas where they can legally stop, should have parity with the residential areas of other French citizens. The same should hold for their employment opportunities, civil and voting rights, and the education of their children. However, equity is not achieved in any of those areas, as the submitted statement amply documents. In fact, the situation of French Gypsies and travellers has deteriorated since CERD's last consideration of racial discrimination in France in 2005 (Westra 2007).

The Gypsies and Travellers, all French citizens (including the following groups or families: Sinti, Manouche, Kale, Gitans, Roma, Yenisch, "Travellers") are discriminated against, despite the presence of the Besson Law[2], as their allowable "halting" places do not include the expected facilities, and they are mostly located in what is termed an area of "brownfields" in racially segregated areas, placed in locations surrounded by hazardous

[1] Statement submitted by the French union of Gypsy Association (UFAT), National Association of Catholic Travellers (ANGVC) and Hollo Human Rights Consulting, for consideration by the United Nations Commission on the Elimination of Racial Discrimination, on the occasion of its periodic review in France.

[2] Besson Law, Consolidated Version 28 December 2007, available at http://www.legifrance.gouv.fr.

industries in North America (Westra and Lawson 2001). The statement describes their allowed "halting areas" as follows:

> *Unhealthy and Polluted Environments*
> Halting sites are frequently located in areas presenting significant environmental hazards posing serious risks to their health. They are systemically located near garbage dumps or waste treatment plants; high risk or polluting factories; freeways or railroad tracks with high tension wires frequently overhead.

As well, these sites suffer from a "lack of basic infrastructure":

> Although water and electricity are generally available on official sites, hot showers and toilets are constantly too few for the number of residents. On some sites, facilities are also extremely dirty and in a state of disrepair. (Westra and Lawson 2001)

These conditions are particularly unacceptable as the groups include the elderly, the sick and children. The statement describing these almost inhabitable areas concludes that "entering these neighbourhoods, one has the impression of going from the First World to a Third World slum in the space of a few minutes" (Westra and Lawson 2001). In addition to these unacceptable conditions, they also encounter difficulties buying property, having their voices heard in local and regional governments, as well as in securing equitable schooling for their children. We can conclude that racism and discrimination is clearly practiced against these embedded communities, despite the fact they are French citizens, and members of the EU.

The Roma did not resort to forceful resistance. Yet the question remains: could their resistance have employed force? And could they have resisted legally? This is a very important question, as the answer would help to better judge the resistance of other minorities who are not treated like other citizens, and who resort to terrorist acts in support of their human dignity, their culture and their religion. These cases are engendered by state actions, and we need to examine the morality and legality of both state attacks on minorities and the responses elicited, in order to better judge both the morality and legality of such interactions.

State Terrorism: Various Aspects and Responses

> So, depending on how you understand terrorism, it is a possibility that terrorism and terrorists can be engaged in a just war, or anyway, in just terrorism. (Honderich 2006: 37)

> ... some terrorism, including Palestinian terrorism, actually has the goal of nothing other than democracy. It is aimed at getting democratic self-governance in a homeland. (Honderich 2006: 81)

The repeated emphasis on the situation in Palestine appears to be almost redundant, as the very facts that they are (a) insurgents against an illegal occupation and (b) fighting to achieve statehood, independence and self-determination, are sufficient to render their use for forceful resistance a just one. But their case is not only representative of the strongest motive for so-called terrorist attacks, it is also the clearest existing example of state terrorism today.

In order to better assess the morality and justice of terrorist acts, if any, we need to assess all different aspects of state terrorism, as today it assumes a number of different "masks", connected to one another by several common causative elements. The main presence of state power (in fact, of the state's monopoly on the use of legal power within its territory) separates state terrorism from all other terrorist attacks. The state controls its forces, but, except in some dictatorships, these forces ought to be subject to the rule of law (domestic, but also to the major categories of recognized human rights law that are present in international regimes).

Many who address this topic start with a review of previous states who abused their power with their campaigns of terror. But the present geopolitics, the existence of globalization and other circumstances specific to our times, suggest that simply looking at the present and recent past might be best, in order to consider the moral and legal implications of a number of state activities that produce violent results for their own citizens and others, both directly through their actions and decisions, and indirectly through the decisions they omit.

It is clear that there are limits to a state's legal power, as their polices' and armies' force should end at their borders, unless they take part in international defensive forces such as NATO, or participate with other states in a war on foreign soil. Yet, in many ways, because of the effects of globalization, in recent times the state's power spreads violence in many areas far removed from its own territory. It might be useful to list some of these categories of globalized violence, starting from those that are least likely to be considered forms of terrorism, then moving up to the ones that involve armed repression of Indigenous and local communities, and finally to those attacks that are more likely to be acknowledged to be terrorist violence: the occupation of foreign territories, drone attacks, and—in general—illegal wars. Thus, in order of the gravity presently accepted,

and starting from the abuses of human rights by state powers that are considered to be the least serious today:

1) Ecoviolence (Westra 2004), which can be considered in two aspects:
   i) The imposition of ecological conditions that will visit violence on people worldwide, especially the poor and the most vulnerable, through ecological disintegrity and degradation. The most obvious example of this is climate change.
   ii) A further aspect of ecoviolence is that of plunder (Mattei and Nader 2008), which ensues from the support of multinational corporate activity and the "courts", and other organizations that administer and support the systematic oppression of peoples, in the defense of trade and the interests of the most powerful states.
2) The oppression and non-recognition of the rights of Indigenous peoples and other Native and local communities in all continents (Anaya 2004: 28).
3) The State-generated support for illegal wars and attacks based on self-interest and imperialism.

It seems that only the last category (3) on this list is presently recognized as a form of state terrorism, although the previous one (2) is also generally acknowledged in the international law literature. We will discuss each aspect in turn from the standpoint of the responses appropriate to each case, but we will return to some of the details of the other aspects of state terrorism in the following chapters as well. At that time we will also consider the applicable categories in international law, according to Cassese's assessment of state terrorism (Cassese 2005). Our present effort is to identify the extent of the harm and human rights deprivations perpetrated through several aspects of state violence or terrorism, in order to attempt to find a typology of acceptable responses on the part of affected populations.

Ecoviolence and State Terrorism

> Few changes on this planet have taken place solely because of non-violent action. To remain non-violent totally is to allow the perpetuation of violence against people, animals and the environment. (Watson 1982: 26)

Thus writes the radical activist of the Sea Shepherd Society, Paul Watson. His thought is echoed by that of Dave Forman (representative of Earth First!):

> Wilderness for its own sake, without any need to justify it for human benefit. Wilderness is for wilderness. For grizzlies, and whales and titmice, and rattlesnakes and stinkbugs. And … wilderness for human beings. Because it is the laboratory of three million years of human evolution and because it is home. (Forman 1993 188–191)

I have argued that ecoviolence *is* violence indeed; it is unwarranted, unprovoked, totally disproportionate aggression (Westra 2004). Hence, the question at issue now is a twofold one. First, is it morally and legally permissible to respond to violence with some degree of force, at least when all other approaches appear to fail (appeal to self-defense)? And, second, is it morally and legally permissible to respond with some degree of force in defense of principle or in protest against immoral laws and activities?

It is to the second of these questions that we will turn at this time, as the first question was discussed in Chapter 1, through an analysis of humanitarian and international human rights law. Although resistance to tyranny in defense of human rights has a long history, many representatives of this defense are (and have traditionally been) non-violent. Among these Mahatma Gandhi, Martin Luther King and David Thoreau stand out.

Yet civil disobedience may be defined as "the deliberate violation of law for a vital social purpose" (Zinn 1971). But this definition does not address the "means of disobedience": must they be entirely non-violent to retain their justification? Thoreau in "A plea for Captain John Brown" argued that:

> It was Brown's peculiar doctrine that a man has a perfect right to interfere by force with the slaveholder, in order to rescue the slave. I agree with him. (Zinn 1971: 105)

In addition, Gandhi wrote in *Young India*: "I do believe that where there is only a choice between cowardice and violence, I would advise violence" (Zinn 1971: 105). Camus, in *The Rebel*, like many others, reluctantly faces the dilemma of those who stand against unjust laws and principles. The first point to consider, even for non-consequentialists, is what is at stake. If human rights are at issue, especially the basic rights of the most vulnerable, then when the force is directed against property rather than life, we might need to reconsider absolute prohibitions against force. We noted that self-defense is morally and legally acceptable provided it is both focused and proportionate. Might it not be the case that a similar argument might be made in support of the defense not only of the human life in general, but even of all life-support systems and all life within them, beyond humankind? Zinn argues that: "Planned acts of violence in an

enormously important cause, (the resistance against Hitler may be an example), could be justifiable" (Zinn 1971: 111).

The principles to be protected are such that, even if national laws do not explicitly embody them, they are clearly present in international law instruments. Christian Bay expresses this point well, in regard to the right and the duty of civil disobedience:

> A strong case for exalting the law (and indirectly the lawyer) can be made from my own political ground of commitment to no system but to the sanctity of life, and the freedoms necessary for living, in so far as laws (and lawyers) were to operate to protect all human lives, in the priority for those most badly in need of protection. (Bay 1971: 73–92).

He does not encourage or even sanction force even in the support of such an obviously desirable project. But we also need to consider what we mean by violence as an integral part of civil disobedience. As we have used the term ecoviolence to characterize unjust and too permissive laws and practices that constitute attacks perpetrated (legally) in and through the environment, it might be best to refer to force instead for our possible response. In this manner, we need not confuse attack (ecoviolence) with self- or principled defense. Hence I will continue to use the word force to refer to the alternative to peaceful demonstrations. Nevertheless, even the most radical strategists among the proponents of Earth First! describe "monkey-wrenching" as "non-violent self-defense of the wild." Forman says:

> "Monkey-wrenching is non-violent resistance to the destruction of natural diversity and wilderness. It is not directed toward harming human beings or other forms of life. It is aimed at man-made machines and tools. (Forman 1993: 193).

In fact, although these tactics are illegal in most nations, they are not necessarily immoral: these activists are well aware of the seriousness of their mission and the necessary limits to their activities (unlike those who direct and command the corporate and institutional activities these environmentalists are committed to halt): "They remember that they are engaged in the most moral of all actions protecting life, defending the Earth" (Forman 1993: 194). Therefore, the question of proportionality will have to be foremost in the mind of activists: no one should put lives at risk for a right that is not as grave, or to prevent an action that is not irreversible.

Climate Change: The Watershed Issue of Our Time

> 2007 was the turning point for climate change. The Nobel Peace Prize was assigned to the persons who denounced climate change as a threat to our species's survival on the planet: a former runner-up to the US presidential elections, and a group of scientists who dispelled all doubts on the reality of global warming and its effects. Before this there was the Stern Report, the first report to clearly explain that the cost of inaction will be far greater than the cost of action. (Bertollini 2008)

It can be argued that nothing could be more pressing than the issue of climate change justice. Central to climate change justice are precisely the kinds of considerations invoked by the discussion thus far. While the right to health is a minimally necessary aspect of the issue, as we have seen in relation to discussion of indigenous peoples' rights, and although it is crucial to keep the right to health in mind, we do need to address the further legal and ethical implications of water issues.

It is currently a routine matter to find climate change discussed purely in terms of causality. At this stage, the anthropogenic causes of climate change are beyond dispute (Monbiot 2007; Brown et al. 2006; Stern 2007), but the damage that results is mostly discussed in terms of CO_2 percentages and increased degrees of heat. The increased warming of oceans, also much discussed, gives rise, for the most part, to the gravest effects of global warming: from the tsunamis and tidal waves to the increased frequency and seriousness of hurricanes, to the irreversible glacial melts that cause the worst damage in the Arctic regions, as already noted. One result of increasingly available scientific and economic measurements has been to lead some commentators to compare the present climate and global change situation to some of the most salient events in the history of mankind, such as the Black Death, the innovations of the Renaissance, or, much later, the abolition of slavery; or perhaps even the failure of nuclear disarmament (despite the WHO's role and the eventual 'Advisory Opinion'; Jaeger 2008).

It seems as if we are grasping to find a comparator, a way of understanding the pivotal nature of climate change. Jaeger suggests that this attempt at analogy stands as far as the magnitude and the gravity of the threat is concerned. However, the analogy is not equally apt if we consider the responsibilities and the duties implicated in each of the past-event cases used, and becomes particularly inapt when we consider the etiology of these events in comparison with climate change.

Although the Black Death was caused in significant part by human practices, before the discovery of the need for hygiene and before adequate understanding of the causes of infectious diseases, nevertheless the callous negligence, the general greed and careless pursuit of economic advantage that characterize the roots of climate change, explored above, were simply not present. While the innovative creativity of the Renaissance can serve as an inspiration and as a source of encouragement in relation to climate change, it is not, fundamentally, just 'innovative' choices that we need to discover, but moral responsibility and most of all political will. In this sense, the abolition of slavery is perhaps a closer analogy in several ways: slavery was a man-made disaster, resulting in gross human rights violations, fostered by economic interests. In fact, the elements of neocolonialism and persistent Western imperialism that characterize today's government/trade alliances render the slave trade and climate change meaningfully analogous—and, most importantly, both issues raise the central question of justice. Finally, the nuclear weapons issue supports the linkage between the interests of countries whose aspirations lie closest to the persisting forms of (predominantly) Western imperialism and potential human rights abuses of staggering proportions in the specter of nuclear war, and in ongoing and dangerous policies of inequity regarding nuclear power.

Climate change today is perhaps the primary issue captured by the general heading of environmental justice. Climate change justice is, in other words, a watershed issue, primarily because of the nature of climate change itself:

1) its multiple and insidious manifestations;
2) the gravity of most of these aspects in relation to human rights; and
3) the injustice it manifests in two related but separate senses: (i) the fact that those it affects most seriously are already the most vulnerable, impoverished peoples on earth, living mostly but not exclusively in developing countries; but also (ii) because of its anthropogenic causality, which, as indicated above, is based on the activities of nations and peoples in the developed world, who are potentially protected from its immediate effects by their relative wealth and social infrastructures.

The single, consistent contributor to climate-change-related disasters is a phenomenon fostered by human activities producing specific atmospheric conditions, resulting in effects primarily emerging as water issues

and events. In light of these considerations, as well as the inclusion of our biological integrity and physical security as the subject of many international law instruments meant for our protection (and perhaps especially at this time, 60 years after the 1948 UN Declaration of Human Rights), it would seem only appropriate that humanity, collectively, should now enjoy the right to water, not only as a positive right to all water's necessary and beneficial effects, but also as a negative right; that is, the right not to be harmed by polluted water or by the results of climate change for which water is the proximate (though not the ultimate) cause.

Water scarcity poses an imminent threat in many regions of the world, but so does its overabundance and the transformation of water into a hazardous presence rather than a bountiful, life-giving one. The most important question in relation to this seems to be: what has the global community and the UN infrastructure done to protect the enjoyment of human rights from the hazards of water and climate change? A brief survey will, perforce, have to suffice for now.

The International Community Response to Climate Change and the Threat to Human Rights

> A broad scientific consensus exists that climate change is real, the amount and the rate have accelerated, and the only uncertainty is about the political will of the international community to take effective measures to combat it. (Nanda 2008)

The 1992 United Nations Framework Convention on Climate Change (UNFCCC, 9 May 1992, 31 ILM 849 1992) was eventually followed by the final version of the Kyoto Protocol (1997). The goal established and agreed upon was the reduction of greenhouse gas (GHG) emissions to 1990 levels by 2000 (UNFCCC, Art 2.), but the Convention "provided no concrete targets or time frame for achieving that goal"; instead, it "deferred development of any binding state targets and timetables for a later period" (Nanda 2008: 6). The Kyoto Protocol added specific commitments for certain developed countries to reduce GHGs by over 5 per cent more than the 1990 benchmark, to be achieved by 2008 to 2012 (Kyoto Protocol, 1997, Art 3, 1, Annex B). Further meetings of the Conference of the Parties (COPs) have since taken place, in locations including Buenos Aires (1998), Bonn (2001), and Marrakesh (2001), when implementation rules were agreed upon. Later meetings, held in Montreal (2005), Nairobi (2006), and Bali (2007)—the latter conference adopting the 'Bali road map'—have been

followed by further meetings in Poznan (2008), prior to the total review of the document in Copenhagen in 2009. The results of the latter conference received mixed reviews, and there was a notable failure to pledge the formalization of the Accord as a binding treaty at the Mexico 2010 COP. Progress thus far, to say the least, has been frustratingly limited given the immense importance of effective and timely climate change action. Many have even been forced to question the very existence of the Clean Development Mechanism (CDM) of the Kyoto Protocol in relation to achieving sustainable development and the reduction of dangerous emissions. There is not, it seems, much cause for optimism at present.

In short, humanity has a significant way to go in finding an adequate response for the depth of the crisis we now face. Many commentators have remarked that "growth" of any sort (other than spiritual or intellectual) is simply no longer an option. We overshot our limits a long time ago (Meadows et al. 1972; Daly 1996; Rees and Westra 2003: 99–124). Any continuance of the status quo is, moreover, deeply inimical to the human rights that are so severely threatened by climate change. In March 2008 (arguably in some belated recognition of this fact), the Human Rights Council requested that the UN Commissioner for Human Rights ask his office to conduct "a detailed analytical study on the relationship between climate change and human rights" (Resolution 7/23, Human Rights and Climate Change, in UN Report of the Human Council on its Seventh Session, UN Doc. A/HRC/7/78, 14 July 2008; Nanda 2008: 13).

It is important that the limits we have now reached should inform our climate change initiatives, and that we should have the human rights of vulnerable populations clearly in mind. It is essential, in this regard, that the CDM should not merely support the continuation of the status quo as opposed to forcing developed countries to focus on the sheer unsustainability of present practices. We simply must, as an issue of climate change justice, not continue on our present trajectory. Climate change justice, however, seems particularly challenging to construct in law.

No genuine progress can be made unless the root causes of these tragedies and violations are laid bare and corrected or eliminated. Allowing the continuation of the present global situation is simply not an option. And although present-day human rights dilemmas are far more complex than they were when first envisioned in 1948, it is true to say that, if we are serious about defending human rights, over 60 years after the original UDHR, we need to grapple with the root causes at the heart of climate change, and with climate change injustice.

Ecoviolence and Plunder

> Neoliberalism is thus an aggregate of social, political, economic, legal and ideological practices, carried out by a variety of actors that respond to what we consider a formidable logic of plunder. (Mattei and Nader, 2008: 53)

Supported by the state as its engine, and multiplied through globalization, the whole project of "development" represents a new but ongoing form of plunder, fuelled by industrialized, market-based societies. As colonialism is no longer legal or accepted, "development" and "democracy" are intended to govern and direct globalization. However, international law regimes tend to support the movement of capital, rather than the implicit betterment of humankind (as development) or provision for better governance that is responsible and responsive.

With the advent of globalization, international law has often served the intentions and the interests of dominant states against "dependent and dominated states" (Chimni 2008), thus aiding the Western imperialist enterprise. However, international law is better used in several other areas beyond the "crude economic determinism" that would limit it to the development of the capitalist world economy (Chimni 2008: 60). The present diversity found in international law, which includes the emphasis on certain areas of human rights, is a positive development, especially when one considers the historical origins in the colonial enterprise (Angie 1996: 321–336).

In addition, it is true that international law regimes tend to support the movement of capital and the interests of dominant states, even through trade and economic institutions such as the International Monetary Fund (IMF) and the World Trade Organization (WTO). It is equally true that international human rights law and international environmental law both fail to protect weaker "developing" states: "corporations influence almost every negotiation on the environment that has taken place under the auspices of the UN" (Aggarwal 2001: 382).

International human rights law, for the most part, protects natural and legal individuals, not communities or the collective (Westra 2011a). But Karl Marx does not do much better as, according to Chimni, he observes that "right … can never be higher than the economic structure of society and its cultural development conditioned thereby" (Marx and Engels 1970: 8). Viewing dispossessed people as "subaltern classes" in some reductionist economic optic recognizes their plight to some extent, as well as the retreat of the welfare state, but it does nothing to acknowledge

their difference, and their cultural and religious rights. *Pace* Amartya Sen (Chimni 2006), it takes much more than the promotion of better economic conditions, necessary though that is to protect communities in danger everywhere. Such limited protection is necessary but not sufficient, as the promotion of economic advantage of the most powerful states involves the use of force, neglecting respectful and thorough consultation for whatever activity is planned by corporate actors (and sanctioned and permitted by a state). Lacking a thorough consultation process, explicit consent is seldom sought or received.

The "Right to Development"?

> "State responsibility" simply put, is the name public international law gives to the normative state of affairs which occurs following a breach by a state of one of its legal obligations (whether that obligation derives from treaty law, customary law, or other recognized sources such as "general principles of law"). (Scott 2001: 55–63)

State responsibility includes both positive and negative obligations; given the grave differences in the economic situation of citizens in various regions of the world, the issue of "development" is one of central importance. In September 2000, the Open-ended Working Group on the Right to Development of the Commission on Human Rights produced a document titled *The Right to Development*. While attempting to cover all aspects of poverty and hunger alleviation, that document also indicates clearly the grave problems present in such a right, and in the concept of "development" as such.

It might be best to start examining the major problems that arise within the concept, let alone with terming it a "right". The first question that arises is whose "right" it is. Presumably one should think of "development" as being a right of those who are not yet "developed"; that is, poor people in "developing countries". In fact, that right is intended as a remedy for the problems those persons encounter, to redress "the effects of poverty, structural adjustment, globalization and trade liberalization, on the prospects of the enjoyment of the right to development in developing countries" (*The Right to Development*: para 4).

Development, then, is related to the "removal of poverty". It is therefore an economic goal, one to be implemented as a "process" of "economic, social, cultural and political development", so that all "human rights and fundamental freedoms can be fully realized" (*The Right to Development*: para 4). Much of the language of this document is patterned on the work of Amartya Sen (Sen 1999). But reliance on the work of even a famous

economist carries its own pitfalls. Paragraph 6 of the document cites Sen (1999), and affirms that:

> To have right means to have claim to something of value on other people, institutions, the state, or the international community, who in turn, have the obligation of providing or helping to provide that something of value. (*The Right to Development*: para 6)

No doubt Sen would acknowledge that "something of value" would include more than the obligation to provide the economic means to relieve hunger or thirst. But it is unclear, with its globalizing drive to develop the undeveloped, whether this document takes into serious consideration the right of people *not* to "develop", if they so choose.

Economic development goes hand-in-hand with certain grave costs: first and foremost; the rights of people's own traditions and cultural lifestyles are indubitably at stake. One need only consider the abundant jurisprudence that demonstrates unequivocally the number of Indigenous and local communities who try to say no to development, but whose voice is neither heeded nor respected.[3] The "something of value" these people treasure is the right to be free *not* to develop, *not* to lose the freedom to choose their own lifestyle and their children's future. In these cases, the "perfect obligation" (Sen 1999) of states and other non-state agents should be to respect agents' choices, especially when they represent the will of these communities.

Similarly, the preferred means of viewing state obligations—that is, what Sen describes as the Kantian view of "imperfect obligations" (*The Right to Development*: para 8), applicable to anyone who is in a position to help—is no better if it excludes the choice not to develop, following Western economic patterns. What remains problematic is the starting point of this document: the assumption that "development" unqualified (that is, not educational, moral, artistic, cultural, etc.) is the answer to poverty and hunger, despite the numerous ongoing examples to the contrary.

Consider first who truly benefits from the commercial activities that are viewed as bringing "development". It is, first, the multinational corporations who come to mine, extract, log, build, and—in general—"develop"

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[3] *Omniyak and the Lubicon Lake Band v. Canada* 1996; *Chagos Islanders v. Attorney General* 2003; *Aguinda v. Texaco, Inc*. 1996; *Aguinda v. Texaco, Inc*. 2001; *Alvarez-Machain v. United States* 2003; *Bancoult v. McNamara* 2003; *Doe/Roe v. Unocal Corp* 2000; *Filartiga v. Pena Irala* 1980; *Jota v. Texaco, Inc*. 1998; *Maria Aguinda and others* 2002; *157 Oil and Gas Rep*. 2002.

an area rich in resources. The impassioned pleas of those who are suffering the effects of those activities, mostly unrestrained by either environmental or public health mandates, ought to demonstrate that freedom must be understood as both negative and positive: the right to develop as well as the right to embrace and maintain the *status quo*, and refuse modern development.

The second group who benefits from "development" activities includes the bureaucracies and governments of the affected countries who may receive a part of the profits enjoyed by the corporate actors involved; at best, from building roads and other infrastructure; at worst, military or paramilitary support for their war-like action (*Presbyterian Church of Sudan, Rev. John Gaduel and others v. Talisman Energy Inc*. 2003). When these elites are undemocratic or they represent outright military dictatorships, then any hope of even the least "trickle down" benefit is eliminated.

This happened in Ogoniland at the time of the rule of dictator Sani Abbacha in the 1990s (Westra 2007: 281). It was only in 2009 that Royal Dutch Shell finally paid US$15.5 million over the Saro-Wiwa killing, but without admitting their guilt for the multiple murders, rapes, and other violence they had perpetrated (Pilkington 2009)—truly incompensable harms. The Vienna Declaration states categorically that "human rights and fundamental freedom are the birthright of all human beings; their protection and promotion is the first responsibility of governments" (Vienna Declaration and Programme of Action: Article 1; see also Article 56 of the Charter of the United Nations). When Shell arrived to bring its "development" to Ogoniland, the Ogoni people had a comfortable traditional lifestyle, cultivating their land and fishing, before the advent of what Saro-Wiwa termed the "ecocide" and "omnicide" that ensued with the oil extraction and open flares that eliminated all possible cultivation in the area. They eventually received some compensation, but not all local communities are so lucky.

For the most part, today, "development" is aimed at economic profit, not at the health and freedom from want of peoples, as it often destroys, alters or removes the resources upon which local communities depend. In addition, even when the community is neither an island nor a coastal one, nor yet one that is located in the high Arctic, climate change does the rest as it imposes extreme events and temperatures.

Essentially, then, if the "imperfect duties" of state and non-state actors are to ensure freedom to (i) maintain and retain the cherished values of communities, and (ii) eliminate or at least reduce poverty and hunger,

then these should have started long ago, before the present impasse was reached. The obligations would have included allowing communities to say "no" to activities that harm the natural ecological basis upon which most of the world's people depend, "no" to international instruments that place environment and public health behind trade, and "no" to the political and economic support of corporate bodies whose activities and human rights records demanded careful scrutiny and regulation, rather than friendly cooperation.

All that the *Right to Development* document demands is that the right to development be understood as the right to a "process" that demands cooperation among all interdependent states, and that the form "development" should take should include "a sharp increase in GDP, or rapid industrialization, or an export-led growth" (*The Right to Development*: para 15). Yet paragraph 15 also acknowledges that, despite the listed forms of development, poverty may not be reduced, and there might be no commensurate "improvement in social indicators of education, health, gender development or environmental protection". The placement of environmental protection as last in the list is a further symptom of the misunderstanding of what constitutes a real "basic right" (Shue 1996), which would indeed be "the entitlement of every human person as a human right". Hence, we can conclude that this document's perception of the meaning of "development", even with the unremarkable addition of "sustainable" (unspecified and mostly misunderstood), is flawed and incomplete.

The loss of cultural and ecological integrity is not compensated by the introduction of some Western "improvements", especially when these arise from an unconsented project. In fact, the overwhelming use of resources and energy already in existence, fostered by the overconsumption of Western affluent countries (as indicated by ecological footprint analysis; Rees and Wackernagel 1996; Rees and Westra 2003: 99–124.), casts all further industrial development in doubt. Not only are most of its effects extremely deleterious to life on Earth in general (and specifically to the most vulnerable people in impoverished developing countries), but also there is neither energy nor materials enough on Earth to continue to expand the industrial enterprise and to bring it to all countries, to "raise" them to the level of growth present in the West today.

Sustainable development therefore remains an oxymoron, as any form of development (beyond the intellectual/cultural/moral kind) is intrinsically unsustainable and physically unachievable. Perhaps the only positive aspect of this document is the fact that the right to development is viewed as a *collective* rather than an individual right. But even that "plus"

cannot begin to offset the numerous deficiencies discussed above. However, international instruments aimed primarily at collectives are few and far between, so it is necessary to devote careful study to each existing one in order to see whether any support can be found for the position of collectives today.

"Plunder" and Covert Illegality

> Development is the process whereby other peoples are dominated and their destinies are shaped according to an essentially Western way of conceiving and perceiving the world. The development discourse is part of an imperial process whereby other peoples are appropriated and turned into objects. (Tucker 1999)

The history of the "rule of law" can be seen as a history of legalized plunder, according to Mattei and Nader (2008). Still, as we discuss the way things are now, and the roots of their historical development, we cannot forget the universal promise of international law as Martti Koskenniemi presented it (see Chapter 1). Now the glass is more than half empty, thus presenting a discouraging picture to the would-be optimist, but even that reality should not force us away from the promise of a cosmopolitan universalism, for which international law provides the only hope.

The paradox today is that international law is complicit in the worst problems, while it is also the only possible road toward just world institutions. At any rate, we can start by eliminating from consideration the rosy perspective of those who believe in "the dominant corporate capitalist model of development" (Mattei and Nader 2008: 24; Fukuyama 1992). That is the vision that fosters today's gross inequalities and violations of human rights. According to Mattei and Nader, the "other side" believes

> ... that it is precisely because of the current model of corporate capitalist development that the divisions between the "haves" and the "have nots" is so dramatic and irremediable. Thus freedom and prosperity for the rich, with their exaggerated patterns of consumption and waste, is possible only by a conscious effort to avoid liberation of the poor and disenfranchised. (Mattei and Nader 2008: 24)

Simply put, the question is: can the rule of law help to remedy a situation that its current instantiations have helped to create? The parallel question concerns the ongoing misuse and abuse of the "right to democracy" (Franck 1992: 46–91), when it is contrasted with what "democracy" is now and what it was intended to be (Engel 2010: ch. 2).

While colonization in its original war-like sense is now illegal, neocolonialism is an ongoing phenomenon, most often presented as beneficial to those who are exploited and colonized:

> A strong emphasis on freedom, democracy and the rule of law as deeply rooted American values has accompanied almost all US foreign interventions, invariably presented as in the service of the public good rather than in the interest of the intervening power. (Mattei and Nader 2008: 32)

This "narrative" is imposed on the victims "by means of propaganda and manipulation" (Mattei and Nader 2008: 32), and its racist component is obscured as the "enemies of freedom" are always portrayed as part of a different and hostile ethnicity.

In contrast, the reality is sometimes starkly expressed by those "others", and even by the "arch-terrorist" Osama bin Laden who, on 24 January 2010, said that "as long as our brothers in Palestine continue to suffer, the US can expect no security" (or words to that effect). The following day Rabbi Dow Marmur (2010: A1B) described the situation in Palestine as "a conflict of two narratives, and two peoples who have a history of possession of the same land." This vision completely ignores the fact that whatever "narrative" forms one's background and gives rise to one's beliefs it cannot justify gross violations of human rights and humanitarian law.

Even aside from the "lawlessness" present in the Israel/Palestine situation (as well as in other areas where gross human rights violations prevail without international law intervention, such as Chechnya or Tibet), the poverty and the lack of appropriate infrastructures within "developing" countries have been used as excuses for interventions governed by policies characterized by obvious double standards.

Poverty itself is viewed as "justification" for intervention leading to plunder, and aid itself serves to aggravate poverty through debt repayment (Moyo 2009: 152), including the presence of "phantom debt". The latter is one of the main causes of the ongoing deprivation, involving aid that is "wasted, misdirected, or recycled within rich countries":

- Of US aid, 86 cents in the dollar is phantom, largely because it is tied to the purchase of American goods and services.
- Of Japanese aid to Vietnam, 86% is spent on infrastructure projects because Vietnam is a key market for Japanese exports. These projects tend to be found in areas where Japanese firms operate. (Elliott 2005)

In addition, foreign technical advisors in Vietnam were paid (in 2005) US$18,000 to US$27,000 per month, while local experts received between

US$1,500 and US$3,000 per month (Elliott 2005). Comparable examples can also be cited from several European countries, including France and the UK.

Among the various aspects of plunder, the "legal" practices of NAFTA and the WTO stand out. Mattei and Nader cite a telling example:

> For example, milk powder produced in the United States and subsidized at 137 per cent has been dumped in Jamaica, literally forcing the entire dairy sector of the impoverished island out of business. (Mattei and Nader 2008: 131)

Further examples include the WTO decisions regarding the "banana wars" between the EU and the US, concluding with the victory of the latter (Mattei and Nader 2008: 131), or the NAFTA decision against Canada and its efforts to protect Canadian citizens against a carcinogenic gasoline additive produced in the US (and costing Canada a hefty fine in the end; Boyd 2003).

Essentially, even a superficial survey of international relations indicates the subversion of basic rights and of accepted moral and legal principles in order to support and facilitate the economic, trade and corporate agenda against people, as plunder regularly includes not only the illegal taking of resources and the abusive practices against labor in impoverished countries, but also the "plunder" of their life, health, and normal development, the protection of which is no longer the first concern of today's weakened states.

Before turning to the next two aspects of state terrorism, it will be best to return to something that was discussed briefly above in relation to "threats" (McMahan 2009), and the justification for crimes. We should clarify the possible application of these criminal law categories to international criminal law and consider possible justifications in that context.

Given the dual aim of this work—that is, first a better and deeper understanding of terrorism, and second, the development of a set of rules for the forceful resistance to attacks (both on the part of groups and states, such that these attacks and counter-attacks might be morally acceptable and legally justifiable) —this discussion is necessary.

Self-Defense: Justification, Excuse and Duress

> [S]elf-defence is an exception to the ban on the threat or use of force laid down in Article 2(4) of the UN Charter, which has now become a peremptory norm of international law (*jus cogens*). Like any rule laying down exceptions, that on self-defence must be strictly construed. It would seem that the US is

> not entitled to further select states as targets of its military action. (Cassese 2001: 6)

Cassese is here examining the US response after 9/11, as he considers the response legally available after "crimes against humanity", as he views large-scale terrorist attacks. The question is which responses leave the bounds of self-defense and become "crimes against humanity" on the part of states. Regarding terrorism, we are faced with a question that straddles the aspects of *jus ad bellum* and *jus in bello*. Note that we are leaving aside terrorist acts that are intended to reduce or eliminate a specific community or religious belief, on the part of another faction of the same religion.

The choice of religious belief and practice is dependent on one's conscience and choice: there is no religion that should be imposed by force. Hence attacks on religious factions by other factions are hate crimes pure and simple, and cannot be justified, let alone "improved" by any "rule" or altered circumstance, whether they occur in Afghanistan, Iraq, Germany, or the Netherlands.

This helps to circumscribe and limit the realm of terrorism we need to consider, by eliminating those actions that represent, like "honor killings", simply crimes, with no redeeming political aspiration. Whether they occur as armed attacks, bombings or suicide bombers, such criminal attacks must be separated from the range of terrorist acts discussed in this work.

We are now left with several other forms of terrorism, many of which will have been considered already:

1) Various forms of ecoterrorism or ecoviolence, as discussed above.
2) The imposition of unlivable conditions through unconsented Western-style "development" in the Third World and in Indigenous communities in any continent.
3) The unlawful occupation of territories acquired by illegal means on the part of states.
4) Forceful responses of occupied and oppressed peoples that are unable to get legal recognition of their plight, and the redress of their conditions through the liberation of their nation.

So it is these forms of terrorism, originating from states or groups for various reasons and fitting roughly under the categories listed above, that we need to consider. For both sides, we need to consider what aspects of criminal law may apply to political crimes, or even to crimes against

humanity. The case of *Prosecutor v. Dragen Erdemovic* is the clearest example of "duress" available in international criminal law: kill or be killed is clearly a condition in favor of the moral and legal position of the killer, especially if the firing squad was intent on continuing with or without his participation.

The main turning point of criminal responsibility is the presence of *mens rea*. Brudner says:

> *Mens rea* is performing two normative tasks here-one authorizing punishment per se, the other authorizing a particular measure of punishment—but because the battery tends to be subsumed in the murder, it appears that the intention to kill is the only operative *mens rea*. (Brudner 2008: 4)

But, as Hart clearly saw, responsibility must also be ascribed to those who acted without "reasonable care" (Hart 1968: 145–147). Reasonable care implies at least "foreseeability" of the ultimate results of certain actions. Glanville Williams sees it as "an exception to the requirement of full mens rea in crime" (Williams 1961: 106), despite the maxim *actus reus non facit reum nisi mens sit rea*.

In contrast, *R. v. Caldwell* (1981) has been taken to support the view that objective fault marks the threshold of criminal liability (Brudner 2008: 6). When the wrongdoer is a state or a large group or nation rather than an individual, then the question of "different grades of responsibility for consequential risks or outcomes" becomes extremely complex, as we would be hard-pressed to decide, given a certain outcome, whether the appropriate *mens rea* should be "intention, foresight … [or] objective foreseeability" (Brudner 2008: 6).

It is noteworthy that the particular character of "intention", "foresight", and "objective foreseeability" may not be viewed as deserving different assessments or punishments:

> Criminal law generally attaches no practical significance to the distinction between committing an unlawful act for the purpose of doing so, committing it knowingly but regretfully as a means to (or by-product of) achieving some further end, consciously imposing an unreasonable risk and being indifferent to whether the risk materializes, and imposing an unreasonable risk, but hoping it will not materialize. (Brudner 2008: 8)

Although these "states of mind" are treated as morally equivalent, any of these aspects of *mens rea* will be sufficient to ensure the wrongdoer is judged according to the standards of criminal liability (Brudner 2008: 9). Several theories are used to assess and evaluate culpability, such as the

"character theory" (Brudner 2008: 9–11); clearly not applicable to our issue, as it is hard to apply to one criminal, but much harder to ascertain for a state or a nation. There is also the "choice theory", which seems to offer some insight that is vital to assessing culpability; it means that

> … blame is justified for an unlawful act only if the agent had a choice between committing an act and not committing it only if he could have chosen otherwise than he did. If the agent had no choice but to do what he did, he is not to blame for it. (Brudner 2008: 11)

Yet there are situations where a single individual may be mistaken on a matter of fact (e.g. taking a man for a wild animal in a forest in the dark; Brudner 2008: 13), so that being able to make a different choice may not be sufficient to ensure culpability. In contrast, both states and groups present conditions such that an individual's mistake could not happen, under circumstances of multiple persons able to consult with each other to ascertain matters of fact, before action is decided and the act performed.

Justification Based on Social Background

> [The term "peace activist"] reveals a profound misapprehension as to the nature of the Israeli–Palestinian conflict and a delusion as to how it might be resolved. The image it evokes is essentially symmetric; two sides, two nations, at war with each other, locked in a series of battles over a piece of disputed turf. To end the conflict, the two sides need to end the war, sit down together, and make peace. … In reality it is not a war: there was virtually no fighting in [Operation Cast Lead]. It was a one-sided massacre. Similarly, Israeli diplomacy insists on referring to the territories seized in 1967 as "disputed"—a deliberately symmetric description—rather than *occupied*. (Machover 2010)

Another important form of justification is proposed by Delgado, as acting in circumstance of "rotten social background" (RSB), intended to support a special version of the "duress" defense (Dressler 1988–1989; Delgado 1985). This is an interesting variation on justification based on the intellectual, moral, and emotional capacities of the accused, and one that is—at least *prima facie*—particularly inept to judge a criminal act committed by a number of perpetrators joined in the decision to act.

In a general sense, social and economic deprivations appear to have solidified the moral commitment to others and to their community, together with the rage and disgust at those who initiated and sustain such conditions (especially in the example of Palestinians, but also in other situations). But states and national governments possess financial

security and power; therefore they cannot be justified by any psychological excuse that might "force" them to act in ways that are not consistent with "a coherent moral theory" or with "society's moral intuitions" (Dressler 1988–1989: 1333).

What could possibly constitute "coercive conditions" in the case of a powerful, educated and reasonably secure government? Not the sheer "necessity" to commit a crime—say, cannibalism, to avoid imminent death by starvation (*Regina v. Dudley and Stephens* 1884; Fuller 1949)—nor any other form of immediate grave (possibly fatal) risk that might justify the claim of either duress or necessity. In fact such states, as the sole holders of military and police powers, could also be viewed as the representatives of the legal (and in some sense even moral) codes of the country they govern.

In fact, Shoeman suggests that not only certain crimes could be justified because of RSB, but that society that fosters and supports the "rotten social" conditions lacks the qualification to stand against that accused in judgment. This point is certainly applicable to criminal terrorist countermeasures, and even to violent repressive measures against those who protest against forced "development" and other forms of ecoviolence:"we have a responsibility to generate a society in which the powerful, humanly distorting conditions [present in the RSB actor's society] are not present" (Shoeman 1987: 311). Judge Bazelon further clarifies this issue, as he states that in order to be morally valid,

> … a decision for conviction requires not only a condemnable act, and an actor deserving of condemnation but also a society whose "conduct in relation to the actor entitles it to sit in condemnation of him with respect to the condemnable act". (Bazelon 1976)

It seems improbable that Western democracies would have the right to empower their governments, either legally or morally, to stand in judgment on the forceful attacks of various freedom fighters or other community actors who act in defense of their life and physical integrity (as in any forceful demonstration against the ineffectual G8 and G20 meetings); or in support of families and traditional culture (such as Indigenous communities attacked by corporate developers); or the right to self-determination in oppressed areas or illegally occupied territories (as for instance in Palestine, but also in similar situations elsewhere, where local communities attempt to repel occupying forces).

All the unacceptable conditions were either directly imposed upon non-consenting people, or indirectly permitted (by allowing the operations of industrial developers) without due care for the resulting conditions for

those affected. And if such governments should not be allowed to stand in judgment, then surely violent retaliatory measures are even less acceptable or justifiable.

The next chapter will discuss in some detail other forms of imposition of harmful societal conditions on state terrorism, without even the possible excuse of terming these conditions "counter-terrorist measures." In other words, any government that imposed unlivable conditions upon its own citizens or on citizens of other countries directly, or through its support of the harmful activities of an allied state, or their own or other multinational industry, should not stand in judgment on the attempts of those affected to respond forcefully to the harms imposed on them.

CHAPTER FOUR

STATE TERRORISM AND ECONOMIC OPPRESSION: THE MANY "FACES" OF STATE TERRORISM

Introduction

> With the world's eyes focused on the dramatic rescue of 33 miners trapped in Chile's San Jose mine, it is high time to shed light on mining's bleak reality. Across the globe, some 13 million of the world's most impoverished people—including 1 million children—work as miners, either in underground ore extraction or surface-level quarries and pits. (Birn et al. 2010: A19)

No doubt there have been cases of obvious state terrorism in history, and we have referred to some of those in the earlier chapter. They were often connected with colonialism, from Spain, France and England's annexation of the Americas (with the subsequent violent repression of existing Indigenous societies), as well as the more recent example of Germany's Nazi state.

In many of those cases terrorism was practiced through armed occupation. But with the elimination of the legality of colonization, imperialism now hides under a number of different masks, as it assumes various seemingly benign "faces", all based on the main motivation of the actors: the accumulation of power, control, and profit.

What is a state to do when it is no longer permitted to send out armies to occupy a desirable location, rich in resources, or placed in a highly desirable location? It has several choices, most of which will be discussed in this chapter. State terrorism, therefore, is not a goal; it represents the most efficient available means to achieve three goals: power, control, and profit.

Within a state itself, in contrast, these goals are less obvious. What was the government of Chile's goal in licensing and permitting the operation of a dangerous mine? Certainly not the acquisition of additional territory, and the "control" sought may only be understood as maintaining its internal power with the support of contributing industrial operations. Ultimately, the main motive of any government regarding such corporate hazards is economic.

Thus, economic advancement unites international/transnational forms of oppression that—as we shall see—impose grave conditions upon

vulnerable people. These imposed conditions are such that we can, without exaggeration, treat these forms of oppression as state terrorism. These forms include a transnational corporation in a wealthy country, expanding its operations to the Third World without regard for the consent or the living conditions of local communities; or a government ratifying treaties that support so-called "development" without considering the environmental and health conditions that may ensue; or the non-ratification of treaties intended to ameliorate the conditions of the collectivity of humankind, with particular disregard of the most poor and vulnerable; or, finally, it could be the most obvious support of the quest for power on the international stage, through wars of acquisition (of resources or strategically significant locations), no matter what arguments are used to justify them. These forms of oppression have already been discussed in Chapter 3.

To these categories we should add the support of oppressive regimes in various areas of the world, as we shall see below, with no consideration of the human rights violations that those regimes may perpetrate. These cases may be viewed as forms of vicarious, or perhaps complicit, state terrorism.

The passage that initiates this introductory section, however, shows one of the most common aspects of state terrorism: mining and extractive industries are among the most hazardous in the world, as they impose conditions which combine grave personal risks to those who are "lucky" enough to be employed there, with the equally grave imposition of untenable ecological conditions, such that they are increasingly treated as environmental crimes in law.[1]

These documents and reports on "environmental crimes" describe in detail the crimes directed at the environment, causing irreversible harm to biodiversity, and to the integrity and ecological functions of various areas. As well as these direct environmental crimes, however, there is a further aspect of these attacks that I have termed ecological crimes (or "ecocrimes"), because although the attacks are aimed at the integrity and ecological balance of an area, they also cause grave, though indirect, harms to exposed individuals in specific communities (e.g. the tar sands operations in Canada).

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[1] See, for instance, for Peru, www.minam.gob.pe; for Brazil, note Judge Paul Maldonade's recent investigation regarding environmental crime: information can be obtained from Juan Carlos Vasquez at Jvasquez@bluewin.ch; note also the AIC Report, No.109, Samantha Bricknell, *Environmental Crime in Australia*, Australian Government, www.aic.gov.au.

Ecocrimes therefore include not only specific attacks, but also deprivations that result in gross human rights violations, such as the right to health (International Covenant on Economic, Social and Cultural Rights 1976), the right to water (UN Economic and Social Council Committee on Economic, Social and Cultural Rights 2002), and the right to security and home life. For the latter, see for instance the recent toxic sludge disaster resulting from the Hungarian Aluminum Products and Trade Company, in Kolontar, Hungary (Rosenthal 2010: A29), even without mentioning the classic "accident" fostered by lax and unenforced regulatory regimes, from Bhopal (India) to Seveso (Italy).

These ecocrimes represent (or should represent, as there is no current case law to support my contention) clear crimes against humanity; thus, they should join the list of instances of state terrorism cited by Cassese (see Chapter 1). The use of "spent uranium" weapons in Fallujah (Iraq) and in Gaza are even clearer examples of the second sort of ecocrimes, and fit even better within the category of state terrorism, as well as crimes against humanity, committed by toxic chemical means.

It is important to separate and emphasize the importance of these types of ecocrimes, because, like all environmental crimes, the *mens rea* aspect is not present, in the sense of a specific intent to harm the victim(s), while other, lesser forms of intent are indeed involved. These may include the deliberate targeting of people, including children in occupied lands (Iraq, Palestine); the willful blindness regarding the noxious effects of certain practices or policies; and the negligence present in the omitted enforcement of existing environmental or public health rules on the part of government officials or corporations. In all such cases the industry's research and development departments have the clearest knowledge of the effects of their products, so that it would be very hard to plead ignorance.

Some may find this list of aspects (or "faces") of state terrorism over-inclusive, and attempting to over-reach expected legal boundaries. In fact there are two main difficulties in law regarding the very existence of ecocrimes: the first is that the law does not yet accept environmental issues as resulting in criminal effects; the second is even more problematic, as the close connection between ecological conditions and human rights is also not recognized, and we will discuss several such cases below.

The second problem is not recognized in the courts, despite the wealth of scientific research available from both epidemiology and medicine in general, as well as directly from the World Health Organization (WHO) in particular. A recent report of that organization explicitly links poor

social and environmental conditions to a graver burden of ill health (WHO 2009).

The main difference between some of these faces of state terrorism and our earlier discussion of environmental crimes is the added aspect of explicit economic/trade conditions that are the primary causative agents of the resulting harms. Climate change, for instance, derives its etiology from economic and trade conditions, but these are diffuse, rather than focused on one area, one community or, ultimately, one project at a time. Thus, in this chapter, we will consider the harmful effects imposed by powerful governments, or permitted and encouraged by them, through globalization and development policies.

Thus, state terrorism should include not only environmental harms generated by overconsumption (Brennan and Lo 2010: 429–444), but the specific burden of disease imposed by mining and other extractive industries, or gold or uranium mining, and many others at specific Third World locations. Hence we will start by discussing this specific face of state terrorism, rooted in the practice of globalization and the rhetoric of "development".

State Terrorism and Ecocrimes: The Interface

> To prevent disease and injury it is necessary to identify and deal with their causes—the health risks that underlie them. Each risk has its own causes too and many have their roots in a complex chain of events over time consisting of socioeconomic factors, environmental and community conditions and individual behaviour. The causal chain offers many entry points for intervention. (WHO 2009: 1)

Like the case of terrorism itself, prevention is far preferable, as a tool to promote public health, to remedies after the fact; and, as for terrorism, prevention is not possible without a thorough understanding of all its causes. The WHO report acknowledges that "the environment influences the health of people in many ways—through exposures to various physical, chemical and biological risk factors" (WHO 2009: 23).

Nevertheless, the report still limits its discussion of several of these "chemical, biological risk factors" to their discussion under the heading of "occupational carcinogens" and to "occupational airborne particulates" (including diseases caused by "silica, asbestos, and coal dust exposure"; WHO 2009: 25). Having participated in WHO-sponsored European environmental health ministers' meetings (as a non-governmental representative of Canada), this author can attest to the overwhelming presence

of the chemical industry, self-styled "the greatest country in the world," when normally only the representatives of European countries were allowed to speak (WHO 2005).

Almost every side-event had several obstructing representatives of "big chemistry", whose clear aim was to disrupt each and every effort to declare the well-proven deleterious effects of a multitude of chemical substances to human health, from the perinatal period onward (WHO 2005; Licari et al. 2005; Grandjean and Landrigan 2006: 2167–2178).

The WHO is an organ of the UN, but it remains both an actor and a stage, as the countries it represents must provide the funds for its operations. One needs only think back to the length of time it took for "big tobacco" to be defeated in its ongoing "it is safe" counter-claims, by the establishment of the Framework Convention on Tobacco Control (2005). In fact, that convention represents the clearest example of the eventual power of the WHO when it takes a decided position: the observances it mandates of that convention worldwide is unique, in comparison to other such instruments.

Hence the importance of starting a discussion of the interface between state terrorism and development/globalization, by disclosing the clearest link between state-sanctioned or permitted harms to affect its poorest and most vulnerable citizens (WHO 2009: 25–26). If one finds such anecdotal evidence insufficient, one need only turn to a brief survey of the related jurisprudence, the facts it discloses, and the corresponding total lack of redress available in the appropriate courts.

The case of *Sarei v. Rio Tinto* (2002) is one such case:

> Imagine living in an indigenous culture that has developed in harmony with nature, close to the natural cycles of the land. The lifeblood of your people is the natural bounty of your island home; the fish, fruit, and other natural materials that provide the vast majority of your people's needs. One day, strangers appear with unusual equipment and they seem to be doing something with the earth. As it turns out, these strangers are measuring the instance of copper in the soil of your native lands. You and some others from your village seek to get the strangers out of your native lands and are rebuffed. Later, more strangers come and dig the largest hole anyone in the entire history of your people has ever seen. Dirt and rock from the hole are piled nearby and chemicals are sprayed on the pile. The chemicals eventually leak into the streams, poisoning the fish, which are your people's primary food source. Smoke arises from the operation of the mine, killing many of the trees, which are necessary sources of food and wood. In addition, pollution from the mine causes cases of asthma, tuberculosis, and other respiratory ailments. Pollution also destroys thousands of hectares of land. Over thirty years of operation, the mine produces over a billion tons

> of waste; kills forest, rivers, fish and land; and destroys entirely the culture of your people. (Kozoll 2004: 271)

No doubt that government, like most others, must have the obligation to provide for the security and the protection of its citizens. But the large mining company involved provides that government with a significant portion of its revenue. Hence, rather than the specific community under attack, it is the large mining operation that receives the government's support.

One could term such a sequence of events an instance of racial or ethnic discrimination. In addition, the government's refusal to protect "represent[s] a deliberate attempt to inflict harm or refuse aid" (Kozoll 2004: 274), hence the present claim of my argument. This is a face of state terrorism, masquerading as "development", imposed on a specific population through an ongoing (but preventable) ecological disaster: as such, because of the condition imposed on the Indigenous community, it clearly fits the general understanding of state terrorism.

Beyond the clear possibility of racism (that is, of practices that single out one ethnic group for treatment less respectful than that available to another), the legal category of "persecution" might be considered appropriate. This aspect of deprivation of rights, is practiced by states who have the sole power to decide about the respective treatment to be accorded to different groups of citizens. It is also one of the categories that define a refugee, according to the 1951 Convention and the subsequent 1967 Protocol.[2]

In fact, an individual seeking asylum must present a "well-founded fear of persecution," based on her government's treatment of herself and others in her community, to ensure that both the subjective and objective aspects of "persecution" are in evidence (Kozoll 2004: 278–279; Cooper 1998; Westra 2009).

It is worthy of note that those who are simply fleeing from natural disasters, whether they are actually seeking asylum in another country or whether they are simply internally displaced persons (IDPs), do not qualify as refugees under international law. In contrast, if my argument about the connection between Western-style development, globalization and climate change is accepted, then the extreme "natural" disasters some

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[2] Convention Relating to the Status of Refugees, July 28, 1951, 189 UNTS 150; see also UN High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (UN Doc. HCR/IP/4/Eng/Rev.1, 1992).

suffer today are also not simply "acts of God", but carry an unmistakable element of *mens rea* on the part of both industry and complicit governments, given the full and thorough knowledge of products and processes that precedes extraction, production and distribution.

When we consider state support for corporate enterprise, which gravely endangers not only the individuals of certain Indigenous and land-based communities, but also often their cultural and religious traditions (hence their survival as a people), we can acknowledge that the label of state terrorism is not inappropriate:

> Though the Handbook does not enunciate a definitive standard for when discriminatory actions rise to the level of persecution, the Handbook does note that discriminatory actions leading to serious restrictions on the right to earn a livelihood, practice religion, or access normally available educational facilities amount to persecution. (Kozoll 2004: 283)

Such cases are often dismissed by the courts, as happened for *Sarei v. Rio Tinto*, for "lack of jurisdiction, holding that environmental damage does not constitute a violation of accepted norms of international law that would support a claim under ATCA (Kozoll 2004: 299; *Sarei v. Rio Tinto*). The court in this case did not pursue any findings of facts.

That hard-hit area is in Papua New Guinea (PNG), where Bougainville "is an island, rich in natural resources" (Kozol 2006: 14). The local people tried as much as possible to resist the mine, and the ruin of their resources, environment, and lifestyle. Eventually, violent protests erupted, in resistance to the polluted atmosphere, the spreading disease, the elimination of safe food, the damaged crops killed fish and destroyed habitats. As well, the few employed by the mine were paid slave wages (Kozol 2006: 14).

But Rio Tinto responded by supporting a blockage of Bougainville, "preventing medicine, clothing and other essential supplies from reaching Bougainville, killing more than 2000 children in its first two years" (Kozol 2006: 14). The corporate rationale was clearly stated: "to starve the bastards out some … so they would come around" (Sarei, 221 F. Supp. 2d, from Plaintiffs First Amended Complaint, p.196). Nor is this an isolated instance: the plight of Porgera PNG is not in the courts yet, but it is described by Amnesty International USA, as they document the activities of Barrick Gold, which included "violent and illegal forced evictions":

> Between April and July 2009, police raided villages in the highlands of Papua New Guinea, violently and illegally evicting people from their homes without warning. They threatened and beat the men, they kicked out young children, pregnant women and the elderly. (Amnesty International 2010)

The gold mine in question is 95 percent owned and operated by Barrick Gold Corporation, and it is the "largest gold mine in the world" (Amnesty International 2010). Gold mines are notoriously hazardous, wherever they operate, both during and after such operations cease.

For instance, the city of Johannesburg (South Africa) is built over mining shafts, some of which are over 100 years old, and the resulting "acid mine drainage" is threatening a "vast tide of poisonous water rising inexorably toward the foundations of the city itself" (York 2010). The mines have now been abandoned, and, as the water is no longer pumped out by the mine's owners, it continues to flood through the mine shafts:

> This water causes an oxidation of metal sulfides in pyrite in the surrounding rock, and the resulting product is a highly acidic water—often filled with heavy metals—that descends towards the surface as the mine shafts become deluged. (York 2010)

These highly hazardous conditions follow gold mining, in addition to the toxicity of the required cyanide ponds, necessary to produce the gold when the mine is in operation.[3]

At any rate, in PNG Barrick issued a "Statement" in response to the Amnesty International Report, on February 2, 2010. After declaring that they are committed "to protecting human rights and operating in alignment with the Voluntary Principles on Security and Human Rights",[4] Barrick also claimed that they were not informed in advanced about the PNG's police operations, and that they were not responsible "for the destruction of any structures". Further, they refused to stop their "passive support to the current police deployment", and they added: "the support is limited primarily to the provision of accommodations, meals and fuel to the deployment".[5] Yet, according to Amnesty International,

> The displaced citizens were left with nothing. The police burned down 130 buildings, destroyed their belongings and killed their cattle. (Amnesty International 2010)

Hence, it would appear that even if this is indeed a case of state terrorism, the continued corporate support of the PNG police in Porgera ensures

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[3] See, for instance, *Sipakapa no se Vende*, a video and report produced by the Maya inhabitants of Sipakapa, outlining the results of the operations of Glamis Gold in Guatemala.

[4] See http://www.barrick.com/CorporateResponsbiltiy/KeyTopics/Porgera/Amnesty/default.aspx.

[5] Ibid.

their complicity in these blatant crimes against humanity. As we consider the connection between state terrorism and ecocrime, we must return to the question of the *internal* right to self-determination of such indigenous communities, in order to fully appreciate the illegality of such national and corporate policies, when they are viewed against the background of human rights.

In the next section, we shall briefly review the rights of Indigenous peoples in international law; primarily, their right to self-determination, as internal communities within states. But it would further help to understand their plight to first review a recent attempt by some of the opposition to the standing Canadian government, regarding a proposed bill intended to introduce some moderate measures to empower the government to monitor the unacceptable practices of mining and extractive industries, on the part of multinational corporations (MNCs) based in Canada.

Canada is home to about 75 percent of the world's major mining and exploration companies. Because of the known problems these companies are generating in many developing countries, an opposition Liberal MP introduced BillC-300 (a private members bill) on February 9, 2009.[6] It is shameful that Canada's leadership under Stephen Harper actively helped to defeat the bill on October 28, 2010. The Bill would have "established guidelines responsible of responsible behaviour for Canadian oil, mining and gas companies operating overseas":

1) the government would base guidelines on "accepted principles of good corporate practice";
2) the government would "investigate credible cases where Canadian companies are alleged to have flouted he guidelines";
3) the government would "withhold some forms of taxpayer-funded … assistance" to companies flouting these guidelines (Albin-Lacky 2010).[7]

Such a recent Canadian decision helps to clarify why we need to turn to international law; although, as we shall see, better availability of international conventions and legal regimes does not translate into better monitoring and controls in defense of these communities.

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[6] Liberal MP John McKay introduced Bill C-300 to implement some key recommendations from the March 2009 *Final Report of the Corporate Social Responsibility* (*CSR*) *Roundtables*; the bill narrowly passed a vote in the House of Commons on April 22, 2009.

[7] Seewww.thestar.com/opinion/editorialopinion/article/881537--monitoring-of-mining-companies-long-overdue.

The Self-Determination Model Revisited: Internal Aspects

> [S]elf-determination is a powerful expression of the underlying tensions and contradictions of international legal theory: it perfectly reflects the cyclical oscillation between positivism and natural law, between an emphasis on consent, that is, voluntarism, and an emphasis on binding objective legal principles, between a 'statist' and a communitarian vision of world order. (Cassese 1995: 1)

"Self-determination appears to be the most firmly entrenched model in international law" (Anaya 2004: 97ff.). Self-determination is a pre-eminent topic in UN law scholarship; hence it is no doubt the easiest model to defend (Gros Espiell 1981).

But even this model is not free of difficulties, for several reasons. First, the very concept of "peoples" in this context is hard to define. Limiting it to post-colonial groups is insufficient; understanding the concept as including whole populations is unnecessarily over-inclusive and too state-centered; the third variant, based exclusively on "ethnonationalist theory", also ignores the existence of over-lapping groups and communities, all of which benefit from a definition based on human rights (Anaya 2004: 100–103). Perhaps the best approach may be found in the "Great Law of Peace", as defined by the Iroquois Confederacy (The Haudensosaunee):

> The Great Law of Peace … describes a great tree with roots extending in the four cardinal directions to all peoples of the earth; all are invited to follow the roots of the tree and join the peaceful co-existence and cooperation under its great long leaves. The Great Law of Peace promotes unity among individuals, families, clans, and nations while upholding the integrity of diverse identities and spheres of autonomy. (Wallace 1994: 25–30)

Hence the right to self-determination does not necessarily mean that any and all groups may have rights to independent statehood, although decolonization itself is indeed based on self-determination. Essentially, self-determination requires governing institutions where peoples "may live and develop freely on a continuous basis" (Anaya 2004: 104).

The Early Background of Self-Determination

Despite the importance of the concept of self-determination, its clear historical background, its consistent presence in international law, there is no "comprehensive legal account of the concept" (Anaya 2004: 2). Nor is the concept's prominence of recent origin, which might explain this lacuna: Lenin was one of the original proponents to the international

community regarding the importance of self-determination to support the freedom of peoples (Cassese 1995: 114 ff.; Lenin 1969).

Internal self-determination, given its origin, was seen as necessarily based on socialism. It had three aspects: first, it maintained that the "ethnic or national group" could decide freely their own destiny; the second was to be applied after military action, to decide on the appropriate allocation of territories. The most important aspect from our point of view is the third, intended to form the basis of anti-colonialism, and for the liberation of colonized territories (Cassese 1995: 16–17). For Lenin that goal was to be accomplished by secession. Lenin says:

> In the same way as mankind can arrive at the abolition of classes only through a transition period of the dictatorship of the oppressed classes, it can arrive at the inevitable integration of nations only through a transition period of the complete emancipation of all oppressed nations, i.e. their freedom to secede. (Lenin 1969: 160)

In contrast, as Cassese points out, US President Woodrow Wilson viewed self-determination as free choice and, ultimately, self-government (Cassese 1995: 19). This goal was to be accomplished through "orderly", progressive reforms, whereas Lenin called for the immediate halt to colonial rule, thus undermining present power structures, once you admitted the right of minorities to separate from the state. Nevertheless, aside from political principles, "State sovereignty and territorial integrity remained of paramount importance" (Cassese 1995: 33).

It is after World War II that these political principles emerged as international legal standards, although at first the principles were used for Europe; hence, that aspect of the historical development of the concept of self-determination, through interesting, is not relevant to the topic of this work. At any rate, even in Europe, "self-determination was deemed irrelevant where the people's will was certain to run counter to the victors' geopolitical, economic and strategic interests" (Cassese 1995: 25). This point is worth keeping in mind, as "victors" may be understood today to include "powerful states and corporations", and the same results will follow, as we shall see below.

In 1941 F. D. Roosevelt and Winston Churchill drafted the Atlantic Charter, and proclaimed self-determination as a general standard governing territorial changes, as well as a principle concerning the free choice of rulers in every sovereign state (internal self-determination) (Cassese 1995: 37; Grenville 1974: 198 ff.).

But, although (internal) self-determination is important, as it strengthens the ability of indigenous groups to stand up to those who would

exploit them, and perhaps provide them with a stronger voice in the governance of the host country, it is necessary, but not sufficient, to support indigenous rights. Even the UN Charter does not define either "external" or "internal" self-determination, and despite the wording of Article 1(2) and Article 55, the document does not impose hard and fast obligations on member states. Its merit lies primarily in being the first multilateral treaty that actually includes "self-determination".[8] After World War II, both eastern European and developing countries wanted to see Lenin's thesis developed principally as anti-colonialism, whereas Western countries were not immediately willing to accept that conception of self-determination (Cassese 1995: 43–47).

From Developing Countries' Approach to Self-Determination to the Impact of Neo-colonialism

> For developing countries self-determination meant three things: (1) the fight against colonialism and racism; (2) the struggle against the domination of any alien oppressor illegally occupying a territory (an idea that was fostered largely due to the insistence of the Arab states after 1967 with the case of Palestine in mind); (3) the struggle against all manifestation of neocolonialism and in particular the exploitation by alien Powers of the Natural resources of developing countries. (Cassese 1995: 45–46)

The 1966 covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights, are clear on the topic of both the political and economic aspects of self-determination, as the common Article 1 states:

> All peoples have the right to self-determination by virtue of that right they freely determine their political status, and freely pursue their economic, social and cultural development. [...] In no case may a people be deprived of its own means of subsistence. (ICESCR, UN Doc. A/6316 (1996) 993 UNTS 3; ICCPR, UN Doc. A/6316 (1996) 991 UNTS 171)

These rights appear to be unequivocal, and they stand unless a "public emergency which threatens the life of the nation", and which is proclaimed officially (Article 4(1)), permits a state to disregard the rights. Yet many cases brought before the courts by indigenous peoples' groups are

[8] Article 1(2)) addresses the question of the purpose of the United Nations: "[to] develop friendly relations among nations, based on respect for the principle of equal rights and self-determination of peoples, and to take the appropriate measures to strengthen universal peace"; Article 55 (c) states the goals of promoting, *inter alia*, "universal respect for and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion".

deemed "not to rise to the level of the law of nations". Cassese point out that "the problem lies not in understanding the nature of the right, but in ensuring state compliance" (Cassese 1995: 56).

In contrast, it is clear that the collaboration between states and MNCs violates Article 1(2) of the covenants, and the added presence of "complicity" between these actors when the deprivation of necessary resources results in genocide demonstrates yet another criminal aspect of these cases in international law. At the present time, however, at best it is possible for dispossessed people to seek compensation, totally ignoring the fact that many of the harms perpetrated against them are simply incompensable (see Article 47 of the ICCPR and Article 25 of the ICESCR, both of which reiterate "the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources").

Since 1945, and the proclamation of the UN Charter, self-determination, primarily in its internal form as self-government, has been accepted in law, but it is primarily a "goal", with no specific obligation imposed on states to accept it, even in this weakened form (Cassese 1995: 65). Nevertheless, in 1971 the International Court of Justice gave an Advisory Opinion on Namibia. The UN set Namibia up, in 1946, as a separate state, "under the direct responsibility of the United Nations", because South Africa refused to acknowledge it as a separate territory with a separate, freely elected government (Res. 435/1978 of 29 September 1978; Schmidt-Jortzig 1991: 413–428).[9]

But our main concern is with the disenfranchised victims of globalized "development", where resources, lands, water, and ways of life are taken and destroyed. The states wherein these groups live, in general, do not respect the law of self-determination, nor the mandates of international law regarding indigenous rights to their own resources. Nor is the principle of territorial integrity fully appreciated in its quantitative and qualitative aspects (see Para. 6 of the UN Resolution 1514 (XV): "Any attempt aimed at partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations").

The problem becomes more complex when one tries to extend the argument to encompass the standpoint of economic "neocolonialism." In 1977, the Geneva Protocol to the four 1949 Geneva Conventions on War Victims, Article 1 "support[ed] the thesis that the right to self-determination is considered to arise when a State dominates the people in a foreign

[9] Namibia's independence was declared on March 21, 1990.

territory using military means" (Cassese 1995: 92). In that document the phrase "alien occupation", the meaning of which lends itself less easily to an interpretation linked to economic development, militates against the interpretation I propose. However:

> It should be added that in the United Nations a minority of States – Mexico, Afghanistan, Iraq and Pakistan – considered economic exploitation of a foreign State (chiefly in the form of neo-colonialism) a breach of self-determination. (Cassese 1995: 93, n.74)

At best what is addressed here is the issue of economic interference in the affairs of a separate state, whereas our concern is the exploitation and domination of specific peoples. A further question remains regarding the definition of indigenous peoples and land-based minorities in this regard, and the possible inclusion of "local people" in that category, especially those based in the African continent. Leaving aside for now the ample scholarship on that question, we should return to the topic of this chapter by considering another face of state terrorism, one that only appears to be distinct from the previous categories of economic oppression and eco-crimes: the support of dictatorial and racist regimes, with the goal of establishing control and advancing the economic interests of the state involved.

The root of these "eco-crimes" remains firmly based in the disregard of the rule of law, or the misuse and abuse of that rule. We have discussed both the media and the regulatory regimes, and noted how they have been restrained by such instruments as the Patriot Act (Ackerman 2006).[10] But the pursuit of "plunder and re-colonization" (Mattei and Nader 2008: 193) continues unabated abroad even as opposition and dissent are silenced in the domestic realm.

What prevails is the dismantling, rejecting and remaking of international law, as these activities are required for the justification of all forms of state terrorism, from the oppressive pursuit of plunder outside the country to the repressive elimination of dissent within it. That is why we argued that laying bare all the faces of state terrorism will simultaneously serve to expose the misuse and disrespect for international legal principles and regimes, characteristic of the present "war on terror":

> International Law at the beginning of the twenty-first century is more important than ever. The role of the United States in trying to remake global

[10] The Patriot Act's full title is actually "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001".

> rules needs to be seen for what it is, namely an abandonment of values that are more vital than ever. (Sands 2005: 21)

State-Sponsored and State-Supported Terrorism

> Every state has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state, or acquiescing in organized activities within its territory directed towards the commission of such acts[.] (UN General Assembly Declaration of Principles of International Law Concerning Friendly Relations and Cooperation among States, 1970).

As early as 1970, international law noted the importance of curtailing the wishes of states who might have organized or supported violent and harmful activism in other states, although the full impact of the other faces of state terrorism, such as those related to development and other dangerous industrial activities, did not fully manifest their potential for violence until much later.

The stronger states need to extend their control against other, weaker states, so that their political ambitions may succeed. The stronger states will decide which regime to support and which to boycott, according to that criterion: an obvious example might be the relations between the United States and Cuba's regime.

In general, is it the US that can be termed the chief perpetrator of these forms of interference in the politics and governance of weaker states in South America. A study by Frederick Gareau proposed asking three basic questions to assess the relation between the US and the internal governance of a number of countries, including Iraq and Afghanistan. He asks:

1) Did the government being studied actually commit state terrorism? (Other forms of government repression such as torture or violation of human rights will be looked for as well.)
2) Given that each of the governments examined was engaged in combating a guerilla war, to what extent was the terror committed by the guerillas?
3) Was the country that perpetrated the terror upon its citizens actually supported by Washington? In what ways was this support provided? For example did Washington train the forces in the counter insurgency so that later they could commit the terror? Did they provide weapons for these forces, or cover up for them after the terror had been committed? (Gareau 2004: 19)

We will not attempt a survey of every single instance of US support for undesirable and undemocratic regimes anywhere, from South America to Iraq. We will simply use some examples to indicate the widespread and increasing use of state terrorism beyond the quest for purely economic gain, although that motive remains a regular aspect of the diverse reasons adduced for the violence employed beyond a state's borders. It should also be kept in mind that state actions, like those of individuals and groups, will remain imprecisely defined as long as terrorism itself is not defined in law, and this *lacuna* is obvious in the work of a UN-appointed rapporteur on the topic (GA Res. 1996/20 of August 29, 1996; van Krieken 2002: 164–166).[11]

The existence of state terrorism is well acknowledged in international law. Van Kreiken remarks that

> State-sponsored terrorism, along with other forms of unconventional and "indirect warfare", constitutes a particularly attractive mode of low-intensive warfare, allowing a State to strike its enemies in a way that is easily deniable, clandestine, relatively cheap, high yielding and less risky militarily than conventional armed conflict. (Van Krieken 2002: 192)

Thus, not only does state terrorism exist, but it has grown exponentially since 9/11. It certainly had existed before that in many countries but—most significantly—the dictators, generals and regime leaders of various South American countries were supported (if not sponsored) by US government officials, no matter how brutal their form of governance (Gareau 2004: 26ff).

In fact many of these generals and dictators were both trained and praised in the US before and after their ascent to power. A particularly deplorable example is that of San Salvador. Near Fort Benning, Georgia, the School of the Americas trained and graduated a number of individuals from South American states who eventually became presidents/dictators of their countries (Gareau 2004: 23). The Catholic Church strongly demonstrated against the school (an institution which, according to Fr. Bourgeois, for instance, was where "the killing started"; Gareau 2004: 23). Hence, in San Salvador the University of Central America saw the murder of 6 Jesuit priests, their cook and her 16-year-old daughter; their crime was to protest government policies. It is noteworthy that these schools are supported by

[11] The Subcommission on Prevention of Discrimination and the Protection of Minorities appointed Ms Kalliopi K. Koufa to submit a preliminary report at the 51st session of that body.

US taxpayers, and that, despite the protests and its connection to a number of political murders, it continued operating until December 15, 2000.

After the closing, however, the school was reopened as the Western Hemisphere Institute of Security Cooperation, teaching essentially the same curriculum as the former school, which was been aptly called "the school of assassins" (Gareau 2004: 23) because of the large numbers of military personnel it trained. This is an example of the contrast between the treatment of the school's graduates by the US and the treatment their graduates meted out to their dissenting subjects instead.

One of those dissenters was Sister Diana Ortiz, an Ursuline sister (US born), who was working in Guatemala. As she related in the book she wrote after her ordeal, she was repeatedly gang-raped, suffered more than 110 cigarette burns to her body, and was lowered in an open pit, "packed with human bodies—the bodies of children, men and women, some decapitated, some lying face-up, caked with blood, some dead, some still alive. All were swarming with rats" (Gareau 2004: 24).

A civil court in the US ruled eventually that General Hector Gramajo Morales was responsible for the sister's rape and torture, as well as those of many others. Yet Mattei and Nader (2008) note of General Morales, a "graduate of the school and formally Guatemalan Defense Minister", that

> … his term as Defense Minister was up in 1989, and the following year he became a Fellow of the Edward Mason Program in the Kennedy School of Government of Harvard University. In 1993 he delivered the commencement address to the graduating class of the officers of the Command and General Staff College of the School of the Americas. (Mattei and Nader 2008: 192)[12]

Sister Ortiz was eventually returned to the US, and on July 30, 2000 she "received the Pope Paul VI Teacher of Peace Award for her work with victims of torture and abuse, after she settled in Chicago after her ordeal" (Gareau 2004: 26; Buerghenthal 1994: 517). This terrible example is simply one of the many such cases resulting from the US's ongoing support of terrorist regimes, and its efforts to eliminate those socialist regimes that would not have been sympathetic and supportive of its own policies.

Before turning to some other examples that indicate the same general policies and practices, albeit in different locales, we need to consider that both the media and the regulatory regimes in the US are guided by such instruments as the Patriot Act (Ackerman 2006). Mattei and Nader, for instance, describe the policies of the Bush years:

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[12] See also *New York Times*, March 16, 1993, p. A7.

> The need for legitimate dissent was dismissed in favour of "balanced" reporting. Dissident positions are dubbed "offensive, irresponsible, unpatriotic…"[.] (Mattei and Nader 2008: 192)

But the pursuit of "plunder and recolonization" (Mattei and Nader 2008: 193) continue unabated abroad, even as opposition and dissent are silenced in the domestic realm. In contrast, Philippe Sands states:

> International law at the beginning of the twenty-first century is more important than ever. The role of the United States in trying to remake global rules needs to be seen for what it is, namely an abandonment of values that are more vital than ever. (Sands 2005: 21)

Thus the rejection and "remaking" of international law are at the root of state terrorism, from the oppressive pursuit of plunder out of the country to the repressive elimination of dissent within it.

For that reason we argued that laying bare all the faces of state terrorism, is acceptable and necessary to expose the lack of international legal principles and universally held rules and regimes that characterize the present "war on terror".

Blacklisted States and State Terrorism

> The list of state sponsors of terrorism is primarily a product of the law of economic sanctions. (Peed 2004–2005: 1324)

It is not surprising that the American government's "list of state sponsors of terrorism" is quite different from the list one can compose by observing which dictators and presidents enjoy support of the American Government in their own countries. Essentially, this list is a political document that often bears little resemblance to the reality of observable state terrorism.

This convenient selective blindness on the part of the US is the most significant part of the misleading faces of terrorism, and it is particularly hard for victims of terrorism to have justice in the courts:

> Because the terrorism list is both over- and under-inclusive—that is, it retains unfriendly states no longer engaged in terrorism while omitting allies that are—victims of state violence have unequal access to courts of justice. (Peed 2005: 133)

When a document that should be factual and carefully and fairly drafted becomes instead a partisan, political tool, we should not be surprised to discover its glaring limitations. The present list includes Iran (with no consideration of the CIA's propping up of the Shah of Iran's corrupt regimes; Sealing 2003: 136), Iraq (without, however, distinguishing

between its "legitimate" government and the insurgents; Sealing 2003: 136), Syria (despite its recent stint at the Security Council; Sealing 2003: 137), North Korea (named by then US President George W. Bush as part of the "axis of evil" in 2002), Cuba (a nation that does not appear to have either the money or the interest to support terrorism; Sealing 2003: 138), and Libya (presumably on the basis of the bombing of PanAm Flight 103; Sealing 2003: 138).

In contrast, the following countries are not on the list: Yemen, Afghanistan, Pakistan, Saudi Arabia, Somalia, Palestine, Israel and the United States (Sealing 2003: 138–141). Regarding Saudi Arabia, Sealing says:

> Saudi Arabia is of course an ally, not a state sponsor of terrorism but this designation has more to do with keeping America's SUVs on the road than with reality or justice. (Sealing 2003:140)

This is a particularly apt remark as it indicates precisely the sort of factor that will characterize the presence (or absence) of states or organizations on the list of "state sponsors of terrorism exception to state immunity", according to the Foreign Sovereign Immunity Act of 1976. Particularly unfair is the fact that the US itself, along with its allies and friends, is exempt, almost by definition, from a list that proposes which countries the US can sue for supporting terrorism, a conclusion that "can only be justified by the threat of pure force: America will exercise domestic jurisdiction over foreign sovereigns whenever it choose, because it *can*" (Sealing 2003: 121). Thus the exception is simply a "band aid" form of spurious legality to cover a violent, oppressive and largely illegal face of state terrorism. Justice and equity are foundational to law whether domestic or international. Hence, to pass a law that accepts and favors one nation (and its allies and friends) over others is yet another example of the lawlessness that reigns in today's globalized governance (Sands 2005; Westra 2011b). Perhaps one of the most telling reaction to the whole issue of the US and terrorist states emerges from the *New York Times Book Review*, as Roger Pavloff says:

> Do we really want Chinese Courts deciding whether the Unites States' unintended bombing of the Chinese Embassy in Belgrade in 1999 was a violation of international law? Do we really want Saudi courts opining on whether Israel engages in state-sponsored terrorism and racism? (Pavloff 2001: 9)

If international law and world governance were produced by the efforts to achieve blind justice, working on universal principles, the answer to both questions would be, obviously, *yes*, rather than being considered, as it

appears to be by the authors, an absurdity. If this conclusion appears to be too radical, and perhaps not well founded, perhaps a brief survey of some of the recent past and present ongoing faces of state terrorism and the role of the US in its support will provide convincing evidence in its support.

But before considering more examples, it might be useful to pinpoint more clearly why we argue that the category of state terrorism proposes a more appropriate understanding of certain state activities and omissions than any of the aspects viewed under the categories of "trade law", "development", or "globalization". The key concept necessary to justify the label of state terrorism is clearly to not only demonstrate the evils that befall groups and communities either because of state policies or because of the complicity of states with other natural or legal persons' commercial plans, but to clarify the question of the knowledge of intent that directs the harmful activities. Therefore, we will examine that vexed issue before offering further examples, without having fully established why we continue to use the radical expression "terrorism" in relation to those activities.

Intent, Knowledge and Genocide

> The Genocide Convention … simply reads "genocide means any of the following acts committed with the intent to destroy, in whole or in part, a … group as such". The type of intent required (e.g. *dolus specialis*, *dolus eventualis*, general, or knowledge-based), is not stated. (Goldsmith 2010: 240)

The basic question that arises is: how much knowledge and how much intent are required to recognize a case of genocide? For example, the International Commission of Inquiry on Darfur found ample evidence of the *actus reus* of genocide, but eventually concluded that "the crucial element of genocidal intent appears to be missing, at least as far as the central government authorities are concerned" (Report to the UN Secretary-General on the International Commission of Inquiry on Darfur 2004).

If we consider the copious evidence provided by that report, it is difficult to see, at least from a common-sense point of view, whether any other conclusion could be reached regarding the list of events described, even if no specific documents detailing that genocidal intent could be found. The report states:

> The Commission found that Government forces and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur. These acts were

> conducted on a widespread and systematic basis, and therefore may amount to crimes against humanity. The extensive destruction and displacements have resulted in a loss of livelihood and means of survival of countless women, men and children[.] (Report to the UN Secretary-General on the International Commission of Inquiry on Darfur 2004: 3)

These activities were directed to the "so-called African Tribes in the region"; thus, it seems that clear indications of the *actus reus* of genocide are insufficient to prove the required intent component. Yet it would seem obvious that those who came to cause the events listed above are not acting randomly, but are instead producing certain results according to a thought-out plan. Therefore they should bear a clear responsibility for the effects that will necessarily follow those activities. But do legal persons possess a unitary intent? In the next section we will consider intent and knowledge for another difficult-to- prove category: that of environmentally related human health effects.

Intent, Knowledge, Causality and Accountability

> What we mean by the word "proximate" is that because of convenience of public, or a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical policy. (*Palsgraf v. Long Island Railroad Co*., 248 NY 339, 162 NE 99 (NY 1928), per Andrews J in Hart and Honoré 1985: 90)

But the question we are raising is not about logic or practical considerations, it is about *justice*, beyond a rough approximation as above. When a number of actors play a part, no matter how negligible, in the design of policies or regulations that result in circumstances that the UN itself acknowledges to represent "the *actus reus* of genocide", then it might be appropriate to expect the perpetrators to provide evidence that they were innocent of malicious intent instead.

In all cases, including those where "ecoviolence" (Westra 2004) is involved, those who approve of certain regulations and regimes are just as guilty as those who cause harm while adhering to those regulations, even observing the letter of the law. For instance, Adolf Hitler was guilty of genocide although he personally did not kill a single Jew. Of course his case is clear, as his intent was openly proclaimed.

Imagine a city planner who failed to have stop signs or traffic lights installed at a very busy intersection. No doubt the drivers of any car involved in a collision would bear a responsibility for the accidents that ensued. But it is the responsibility of city planners, the municipality, and other bureaucrats to ensure that lights would be placed where needed,

and that they are working; also it is their responsibility to ensure that those not abiding by those signals are punished.

In comparison, a legislative framework that is so imprecise as to render the letter of the law very hard to detect even for those intent on following it fails totally to provide a regulatory system that can establish clear guidelines, and therefore protect public health adequately (Muldoon 1999). Hence, like those who would neglect to put up signals to control and direct traffic in a way that protects the public, the absence of clear "stop signs" to prevent continued hazardous activities appears to be a contributory cause to the eventual harms that ensue. Nor can we term this contribution too small to be significant. Remote though it might have been, the imprecise and incomplete formulation of rules and terms is *not* a case of *de minimis* (Hart and Honoré 1985: 226). In general, there is no question about governments and ministries having a "duty" of care to the public with whom they are entrusted: the "good" of the citizens, hence the protection of their life and health, minimally, is the condition that legitimizes their authority over citizens (Hohfeld 1923; Hobbes 1958; Simmons 1979; Gilbert 1994).

On the question of causation, Hart and Honoré argue that the three questions one needs to ask, in order to recognize what caused the harm (and hence who is responsible, in relation to the duty of care) are "whether the defendant was under the duty of care, whether he was in a legal sense guilty of negligence to the plaintiff, and whether his action was the proximate cause of the plaintiff's injury", but that these questions are "really one and the same" (Hart and Honoré 1985: 4). The "one question" the authors suggest (citing Denning LJ, who says that "simple is better") is "is the consequence within the risk?" (Denning LJ in *Roe v. Minister of Health* (1954) 2 QB66, 86). In the Canadian Environmental Protection Act (1999), for instance, the many repeated references to "duties to avoid harm to the environment and human health" confirms their awareness of multiple environmental risks, as does the reference in that act to the precautionary principle. Being fully aware of the threat of risks, further questions can be asked about the role of "interpersonal transactions":

> They are relevant whenever causing, inducing, helping, encouraging or permitting others to act, is a sufficient ground for criminal responsibility, even though the statutory of common law rule under which the liability arises is not expressly formulated in these terms. (Hart and Honoré 1985: 363)

The role of the ministry is one of "causing", "encouraging" and "permitting" in regard to the corporate bodies whose operations provide the sources of the risks. This complicit relationship holds true in most environmental

crimes, as it does in disasters where specific workers, employees of one or another corporation are exposed to disease or fatality (Glasbeek and Tucker 1993: 14–41).

Political theory, moral principles and the national legislative framework ensure that ministries and other government bodies have a duty of care, a responsibility for the citizens in the regions they govern. This, however, is not true of corporate bodies, especially the powerful multinational corporations who operate at many levels and in many countries, under diverse jurisdictions. As we noted it is extremely difficult even to characterize their hazardous activities as crimes, although when these crimes are perpetrated, MNCs operating in various countries cannot claim diplomatic immunity unless they are true representatives of their countries in their foreign operations (ILC Draft Articles on Jurisdictional Immunities of States as adopted at 43rd Session 1991).

The legal and moral status of the corporation should be discussed in the context of *mens rea* requirements for assaults convictions in corporate crimes. To sum up briefly, corporations are indeed legal persons, and there are several theories that address the meaning of that terminology (French 1984: 145).

There are many theories formulated to address this question. For our purpose, it will be sufficient to mention three major positions: the "fiction theory", the "legal aggregate theory" and the position that is taken to be clearest approach to predicate corporate intentionality, the "corporation's internal decision structure" (French 1984: 102, 105). The fiction theory has its roots in Roman jurisprudence, but its main flaw is that in relying on the description of "legal fictitious persons" it ignores the biological existence of real persons, as well as of any others, by implication. The legal aggregate theory recognizes the biological reality of persons and grants priority to these legal subjects, while treating corporate persons as purely derivative, and identifying them only with "directors, executives and stockholders" (French 1984: 102). In so doing, however, aggregate theory supporters are choosing arbitrarily where to ascribe responsibility, and make it impossible to distinguish between a group (or mob) and corporate reality.

A case in English law demonstrates the difficulties embedded in the first two theories. In *Continental Tyre and Rubber Co. Ltd. vs. Daimler Co. Ltd.* (1915, KB, p.893) a company whose directors and shareholders were German subjects and residents was incorporated in England and carried on its business there. The question was whether Continental Tyre should be treated as an English subject, and could bring suit in an English court while Britain was at war with Germany. The Court of Appeal's majority

opinion was that "the corporation was an entity created by statute", hence that it was "a different person altogether from the subscribers to the memorandum, the shareholders on the register" (French 1984: 102). Hence the corporation's biological composition may not be identical to its true "personhood" or its intentional structure.

It is also worthy of note that not all who are "subjects of rights" can in fact be the "administrators of rights", and infants, fetuses, animals, future generations and ecosystems are relevant examples of entities that have been declared at one time or another to have some rights, although it has never been argued that any of these could administrate their own rights (Stone 2000: 240–248). Hence, if we accept a non-specific description of a "person", such as "the subject of a right", we can at least make the following claims:

1) biological existence is not always necessary to personhood; and
2) the subject of a right is "the non-eliminable subject of a responsibility ascription" (French 1984: 103).

Responsibility is the necessary correlative of a right. In this sense, it goes beyond simply being the one (or the corporate person) who performed an action. We must address the question of intent. For corporations and institutions, the corporate internal decision-making structure (or CID structure) is the locus of the intentionality we intend to establish. Through the CID structure corporate power is deployed, setting in motion a series of actions flowing from a central, hierarchically made decision, but involving the "acts of biological persons who … occupy various stations on the organizational chart of the corporation" (French 1984: 106).

An advantage of this approach is to be able to maintain *corporate* responsibility while also, at the same time, retaining the ability to consider varying degrees of intent or of desire to bring about a certain result, the product of corporate ordered activities. French's argument strongly supports corporate responsibility and, because of its inclusivity, could easily be extended to other institutional bodies, as long as these, too, are possessed of "internal decision making structures".

In other words, once a corporate body has been distinguished from a "mob" or an "aggregate", and is in fact *defined* by its CID structure, then it is clear that its very nature is to be capable to intentional agency: that is the root of its "personhood". In addition, because it is not a biological entity, it can also be argued that such "persons" are not capable of the emotions that characterize individual biological entities. Corporate "persons", then, can only intend rationally whatever activity they choose;

such actions cannot be the result of sudden impulses or passions ("provocation"), fear for its own life (self-defense), or addiction ("intoxication"). Neither mental disorders, "automatism", nor any other "syndrome" will be possible. Hence, in a sense, by claiming to be persons, yet admitting they are not individual, biological ones, corporations may represent the clearest examples of "pure" purposefulness, or desire to bring about certain results, including the activities whose results are the physical elements of an *actus reus*.

If this line of argument is accepted, the Crown's burden of proof in regard to the mental element of a corporate fault will be substantially reduced and simplified. Once the physical elements of the fault are present, and after they can be causally connected to the corporate person, the "mental states" that connote its agency are limited to variants of intent, and may range from the purposeful desire to bring about a certain result to the "certain knowledge" that the result will occur, and the "probability" or "possibility" (recklessness) that a result might follow.

But corporations do have aims, goals and purposes, as do institutions (and many of these are even codified in their statements of intent or codes of practice). Thus the only conclusions one can draw is that, for the most part, and barring sabotage or people acting outside the corporate perimeter on their own, whatever corporations actually do is something they *decided, planned out*, and fully *intended* to accomplish. That guarantees the responsibility of the perpetrators.

Genocide and Intent Revisited

> Within the same legal system as *dolus specialis*, the intent one level below is known as *dolus eventualis*. In relation to genocide, this means that the perpetrator knows that his/her actions *may* bring about the destruction of a group, but continues to commit these acts. Reducing the level of intent would mean that those not specifically intending the destruction of the targeted group could be open to convictions for genocide. (Goldsmith 2010: 241)

If *dolus eventualis* should be too low a level of intent for the "crime of crimes" (Schabas 2000), then perhaps the understanding of the *dolus specialis* should be extended to encompass such other cases. But, as noted in the previous section, common sense (if not law) should entail that state and non-state actors do not act randomly, but have a "decision-making structure" as the CEOs and other comparable state bureaucrats/officials both make and execute plans or have them executed.

As my argument in the previous section indicated, the possibility of unplanned, emotionally charged decisions does not exist even as a remote possibility for such executive decisions, as these are all designed and carried out through many operative levels.

Thus, one should think that the responsibility to *disprove* intent should rest on corporate and state executives, thus relieving domestic and international courts of that onerous responsibility. If this argument were accepted, the nearly insurmountable difficulty to "obtain actual proof beyond a reasonable doubt" (Goldsmith 2010: 242) of the fully articulated intent of the perpetrators would no longer be an obstacle to both prosecution and the prevention of genocide.

This would be a significant step forward, as the state of mind of multiple actors (decision-makers for both state and non-state actors) is almost impossible, "unless explicitly stated" (Goldsmith 2010: 242). As Lawrence LeBland argues,

> not all governments, including that of the United States, would be as stupid as Hitler's and proclaim such demonic intentions … the authors of such a genocidal plan would not necessarily be "thoroughly conscious of their intentions"[.] (LeBland 1991: 51)

Of course the effects of these multiple difficulties do far more than pose an obstacle to prosecution *after* the fact: they make any intervention intended to prevent crimes against humanity and genocide far more plausible.

Consequences of the Specific Obstacles Arising from the Present Language of the Genocide Convention

> Intent refers to the person's state of mind at the time of committing the crime. Motive, on the other hand, refers to what drives the perpetrator to commit their crime, why they did it, and the proof of this is not required for conviction. (Goldsmith 2010: 243)

Hence, if some perpetrators are committing acts that are motivated by the desire to remove groups or communities they simply perceive as obstacles to their aims, they would need neither hate nor desire to eliminate a group; all they would need is to bring their plans to fruition as intended, and the genocidal acts may then be nothing more than collateral damage. Goldsmith summarizes the findings of the UN commission regarding Darfur: "Regardless of motive, they still intended to destroy a substantial part of the group and are, therefore, committing genocide" (Goldsmith 2010: 243).

However, the Darfur Commission of Inquiry did not adopt this perspective; in fact they even failed to consider "the decision taken at the Akayesu trial regarding intent proven from actions" (Goldsmith 2010: 243; *Prosecutor v. Akayesu* 1998). Nor is that the only case equating knowledge to intent. In Canada, the Ontario Court of Appeal, addressed the question of whether "foresight of consequence" could "equal intent":

> As a general rule a person who foresees that a consequence is certain or substantially certain to result from an act which he does in order to achieve some other purpose, intends that consequence ... His intention encompasses the means as to his ultimate objective. (Regina v. Buzzanga and Durocher 1979)

It is highly unlikely that natural and legal persons, and organizations both private and public, act without knowledge of the eventually consequences of their activities, or that specific results arise randomly from their acts.

Other Faces of State Terrorism

> The Fallujah (Iraq) birth defects with prevalence of congenital heart defects and neural tube defects have reached in 2010 unprecedented numbers above the world average. Lack of comprehensive birth registry has made it difficult to make an accurate comparison with the pre-war period and to understand modalities and dimensions of this unusual occurrence in Fallujah. (Alaani et al. 2011: 7)

The so-called "spent uranium" weaponry has been used in Fallujah by the US, and by the US's close ally, Israel, in Gaza, during the infamous "Operation Cast Lead" (Westra 2011a: ch. 5). The use of such forbidden weapons, especially on civilian targets, is already illegal, and an example of war crimes or crimes against humanity. Unfortunately, the countries who perpetrate such gross breaches of human rights appear to continue to pursue their aims with impunity (Andersson et al. 2008).

This is only one example of state-supported or sanctioned breaches of human rights that correspond, one can argue, without any inappropriate analogical reaching, to instances of state terrorism. Another one is the ongoing use of unmanned war planes ("drones") that depart from US bases and, obviously, do not target any specific "military target" understood in the traditional sense of targets in a country with which the US is at war.

It is particularly hard to accept that the present US administration, led by Nobel Prize winner Barack Obama, has maintained, and in fact more

than doubled, the number of US drone strikes initiated by the Bush administration in Pakistan. These strikes killed some militants but, according to the Brookings Institute, a civilian to militant rate of 10:1 obtained, as Pakistan authorities put the killings at 701 between January 2006 and April 2009, of which only 14 were al-Qaida militants.[13] According to Wikileaks, although the majority of Pakistanis are against the use of drones in tribal areas of the Afghan border, Pakistani Prime Minister Yousouf Raza Gilani is quoted as saying in 2008 "We'll protest in the National Assembly and then ignore it".[14]

Another clear "crime of state" is the ongoing "plunder" of resources still available on planet Earth:

> The US has 4.5% of the World's population but consumes 25% of its resources through anti-democratic hegemony maintained by egregious violence (8 million dead in Iraq, 4.9 million dead in Afghanistan, and 0.8 million dead (including 0.1 million Americans) from opiate drug-related causes due to the US alliance restoration of the Taliban-destroyed Afghan opium industry).
>
> The fundamental message of 1/1/11 is surely 1 (ONE)—1 man-one-vote, there is only 1 Planet (Spaceship Earth) for humanity, and equal shares in resources, i.e. until we necessarily all cease carbon dioxide (CO_2) pollution in 2050, the ratio of my share to your share should be 1. (Polya 2011)

Those of us who reside in the more comfortable West and North do not feel the sense of terror and urgency that is the burden of people in the global South, and which is particularly acute in coastal countries and towns, and in the Arctic.

Then there is the "hyper-example" of state terrorism (supported, once again, primarily by the US); that is, the ongoing genocide of Palestinians by the US's "partner", Israel, and the elimination of others in the Muslim world (Polya 2011).[15] A lot has been said about that specific problem in earlier chapters, but also by the WHO reports, UN reports and Amnesty International.

Then there is the way "inequality kills":

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[13] See www.guardian.co.uk/commentisfree/cifamerica/2010/dec/28/us-drone-attacks-no-laughing-matter.

[14] http://www.Guardian.co.uk/world2010/Nov/30/Wikileaks-cables-us-forces-embedded-pakistan

[15] see also "Muslim Holocaust, Muslim Genocide", at http://sites.google.com/site/mulimholocaustmuslimgenocide/

> Thus about 20,000 people die avoidably each year in the US, because they are too poor to have medical insurance. Each year about 20,000 under-5 year olds and infants die avoidably in the US. (Polya 2011)

As well, there are millions of avoidable deaths globally, because of deprivations and lack of health care:

> Whether a child dies from neocon bombs or bullets or from neocon-imposed deprivation, the result is the same and the culpability is the same. (Polya 2011: 2)

Climate change exacerbates the conditions of poor people everywhere. The increase in temperature permitted in the most recent COP meeting in Cancun's—that is, 4°C—encourages (and in fact guarantees) a situation that can be termed "ecocide" or "genocide,"[16] according to Bolivia's president. Hence the ways of supporting and defending wholesale harms, in both war and peace, using the might of the state and that of its alliances, within and without the UN, are multiple and not simply limited to the support of some South American dictatorships (Gareau 2004). We noted some of the problems of state collusion to terrorism in Guatemala earlier in this work. In the next section, we will briefly review the situation in Argentina and Chile.

State Terrorism in Central and South America

> The report of the United Nations was given the suggestive name *Guatemala: Memory of Silence*. The report itself concluded that the cost of the repression was high in term of lives lost, "but also because Guatemala became a country silenced, a country incommunicado". Free speech was a victim along with the other human rights. "To write about political and social realities, events or ideas meant running the risk of threats, disappearances, and torture." (Gareau 2004: 47; Science and Human Rights and Program of the American Association for the Advancement of Science 1999)

This paragraph is only a very partial report of the unspeakable horrors, most of them directed against Mayan peoples in Guatemala, under the heading of "counter-insurgency". The events taking place from the 1960s to the 1990s, went even beyond actions that could be termed forms of "state terrorism", as they included repeated acts that the United Nations report defined as "genocide" (Gareau 2004: 57–58; see also The United Nations Human Rights Commission, Hector Gros Espie Rapporteur), as it

[16] see http://www.bbc.co-uk/news/science-environment -11975470

"called upon the Guatemalan government to initiate or to intensify investigations, so as to bring justice to those responsible for disappearance, torture, murder, and extra-legal executions" (Issues Before the 4th General Assembly of the United Nations, Para. 108 to 123).

The UN Report did not specifically address the role of the US in their support to the Guatemalan government, the military regime, and the instructions provided regarding "counter-insurgency":

> In the case of Guatemala, military assistance was directed towards reinforcing the national intelligence apparatus and for the training the officer corps in counter- insurgency techniques, key factors which has significant bearing on the human rights violations during the arms confrontation. (*Guatemala: Memory of Silence*, para. 130.)

Although Guatemala presents an egregious example of state terrorism with its related US support, it is not the only such case. Argentina's "disappearances" and torture cases are another example. In 1981 "the Reagan administration received General Viola with full honors on his visit to Washington" (Gareau 2004: 94), as friendship was declared between the two countries, joined in their "crusade again communism in the Western Hemisphere". This "crusade" soon demonstrated its true nature as state terrorism.

In 1983, Argentina's National Commission on Disappeared Persons (*Nunca Mas: Informe de la Commission Nacional Sobre la Desaparicion de Personas*, report by CONADEP1986; Guest 1990) was appointed to investigate tortures and disappearances. They submitted their report in September 1984, despite the lack of cooperation on the part of the Argentinean authorities and their security forces:

> We must point out, however, that our work was hindered by the destruction and/or removal of a vast amount of documentation containing detailed information on the disappeared. (CONADEP 1986: 436)

Yet even these obstructions could not prevent the disclosure of sadistic practices:

> ... the army practiced state terrorism, made possible by the power and impunity of a military dictatorship which they misused to abduct, torture and kill thousands of human beings. (Gareau, 2004: 96)

The victims were mostly taken from their labor, students and white collar and professional people; Jewish people were especially targeted in the most brutal ways. As well, they practiced "transfers" as prisoners were taken into a basement room where a nurse would give them a shot to put

them asleep without killing them, then they were transferred by air to the sea, where they were thrown out alive.

Others were shot, and then burned, whether or not they were already dead, as bodies were not handed over to families (Gareau 2004: 101; CONADEP 1986: 221–222). During this period, although the US decreased or even eliminated military aid to the country, US trade with Argentina soared instead (Gareau 2004: 102–108). But before the so-called "dirty war", US economic aid and military aid was substantial, perhaps in preparation for what was to follow (Gareau 2004: 102–108).

As well, both General Viola and General Galtieri (another Argentinean Dictator) "were graduates of the school of the Americas" (Gareau 2004: 105), and Secretary of Defense McNamara had already told the US congress in 1963 that those people "…were the leaders of the future, the men who have the skills and will instruct their own Armed Forces … for us having these people as friends is invaluable" (CONADEP 1986: 443).

Essentially, not only did Washington support Argentina financially (US$870 million between 1960 and 1975), but it also trained its military personnel in "counter-insurgency warfare", hence their complicity in the state terrorism practiced in Argentina. The start of the sequence of events leading to counter-insurgency may well have been Castro's coming to power in 1959 (Feitlowitz 1998: 8). That is when Argentina adopted a special "Plan for Civil Insurrection Against the State":

> The Offensive was not limited to "terrorists", but extended to their sympathizers and to anyone "helping to conceal insurgents." The country was divided into military zones, headed by commanders with wide-reaching powers. Certainly Washington offered no welcome to Fidel. He was seen as a potential weapon of the Soviet Union in the Cold War. The United States determined to keep Latin America on its side. (Feitlowitz 1998: 8)

US defense Secretary Robert McNamara spoke on this issue at the swearing in of President Johnson:

> Our primary objective in Latin America is to aid, wherever necessary, the continual growth of the military and paramilitary force, so that together with the police and other security forces, they may provide the necessary internal security. (Feitlowitz 1998: 9)

Several groups were under surveillance, especially "political groups", diplomats, clergy, the "intelligentsia":

> The universities play a prominent role in the recruitment of terrorists. They introduce anarchists and Marxists doctrines and many of the student federations are controlled by radicals. (Feitlowitz 1998: 10)

This attitude toward anyone who dares to criticize the US policies against the countries it is attacking, or toward Israel and the US policies in that regard, is still prevalent in the US today.

In Argentina, many of the torturers were trained in the School of the Americas and knew how to extract maximum pain, through their "work" in the concentration camps they ruled. In addition, some of these individuals also learned how to conduct such activities from the French, and the "dirty war" the latter conducted in Algeria and Indochina, where the French military insisted that "we're defending the West here … a certain notion of what man is" (Feitlowitz 1998: 11).

Against the background of documented atrocities, for instance, a French government report describes "services", and refers to "excesses" of "methods", of "long established police procedures", and of "physical maltreatment", while deliberately avoiding the word "torture". At the same time, the camps where torture took place were also supplemented by thousands of disappearances (Feitlowitz 1998: 11).

The most important point here is that, contrary to the claims advanced after 9/11, the present practices are not new policies in response to a new form of attacks: they are simply the continuation of the very same forms of fascist repression of dissent, of freedom of speech and information, coupled with radical xenophobia and with the belief that US policies, practices, and convictions were right, and dissent was not only wrong, but that it represented an attack on their almost divine right to lead the world, to police it, and to punish those who disagreed.

A similar tale can be told of Chile. Once again the motivation for all ensuing horrors was a twofold one: first, the presence of socialist, communist sentiments in the majority of the population, especially among labor, students and white collar workers; and, second, the strong bias on the part of the US against those leftist positions. In fact, the US supported anti-community activities in Chile for several decades, starting from the late 1950s:

> On September 15, 1970, six weeks before than Chilean Congress was scheduled to vote, "President Nixon informed the DCI (Director of Central Intelligence) that an Allende regime in Chile would not be acceptable to the United States. He instructed the CIA to prevent Allende from coming to power or unseat him, and authorized $10 million for this purpose. (Gareau 2004: 68)

Yet in October 1970, the Chilean Congress elected Allende with a strong majority, and the CIA's role changed to one of well-funded covert work to undermine his presidency (Gareau 2004: 69). As well, Kissinger thought

that an "economic blockade" would reinforce the message of the US's disapproval of that regime, so the loans were discontinued and efforts were made to undermine Chile's own economy (Gareau 2004: 70). Finally, a coup was engineered to depose Allende; after addressing his people one last time, Allende committed suicide.

In 1973, Pinochet was installed and he ruled as "President of the Republic/Commander in Chief" until 1990 (Gareau 2004: 71). His repressive regime prevented free expression in the media, closed down newspapers, and discouraged most activities of labor unions (Gareau 2004: 72). From our point of view, there are two important aspects of Pinochet's repression, which were clearly disclosed by the *Report of the Chilean National Commission of Truth and Reconciliation* (1993: 453). One is the fact that many of those who implemented terrorist policies had been trained in the US on how to respond to "counter-insurgency", starting by defining those who had supported "an existing and democratically empowered government" as "rebel troops" (Gareau 2004). The other is the fact that when the Commission of Truth and Reconciliation disclosed the practices of the "intelligence agencies" and the "counter-insurgency doctrine" (as practiced and ordered by Lieutenant Colonel Contreras, one of many Chilean Military persons who attended the Military School of the Americas in Fort Belvoir, Virginia, or other US training, including the school of Americas), we notice the list of torture methods is eerily similar to the "interrogations" techniques practiced today by the US "counter-terrorism" measures. Gareau also remarks:

> I am struck by the similarity between the doctrine or philosophy of counter-insurgency, and that of counter-terrorism as embraced by the Bush Administration. (Gareau 2004: 80)

Torture techniques included "beatings, humiliation, insults, degrading conditions of confinement, being held blindfolded". Other practices included "suspension" (that is, suspending a victim by wrists or knees, then hanging over him to increase the pain); threatened asphyxiation through the practice of "submarine", a technique that involved immersion of a victim's head in dirty water; electric shocks administered to the most sensitive parts of the body, including genitalia, while laying on an iron bed; additional special forms of beatings with chains and other implements; all of which sounds very similar to what is partially disclosed at Abu Ghraib, and duplicated in countless situations from Guantanamo Bay to the torture enacted as the culminations of "extraordinary renditions" at various locations: the same training, the same practices (with slightly

different names, perhaps, like "water boarding" instead of "submarine",) and, at the very start, the same deliberate misrepresentation of the target group that is, in today's language, not "rebels" but always "terrorists".

Conclusion

This brief overview of some well-known and acknowledged human rights violations in recent history emphasizes some of the worst aspects of current counter-terrorist practices and policies. It becomes apparent that the latter are not extraordinary responses to the extraordinary attacks that took place on 9/11. In contrast, they appear to represent an ongoing development, the continuation of a historically established policy of supporting and practicing state terrorism, wherever and whenever a different ideology appears to threaten the *status quo*.

In the next chapter, we will consider what principles, doctrines and instruments might be available in law to counter this ongoing and escalating disregard for human rights and human life in the pursuit of power on the part of the United States and its allies.

CHAPTER FIVE

STATE RESPONSIBILITY: PRINCIPLES AND THEORY

Introduction: The "Age of Human Rights"?

> Much of the twentieth century, especially it's later half, will be recalled as an "Age of Human Rights". No preceding century of human history has been privileged to witness a profusion of human rights enunciations on a global scale. Never before have the languages of human rights brought to supplant all other ethical languages. (Baxi 1998: 125–169)

The paradox is clear: here there is a period, after World War II, when legal instruments promoting and protecting human rights proliferate while, at the same time, such horrors as the Holocaust and the bombs at Hiroshima/Nagasaki proclaim the most thorough disregard for the dignity and the rights of humanity. Hence the overwhelming presence of human rights discourse, in law, but especially in politics, has a great potential to improve the conditions of humanity, but instead "remains inadequate to humanize fully the barbaric practices of politics" (Baxi 1998: 127). Yet, Baxi points out that, whatever else human rights could achieve, minimally, it could "give voice to human suffering" (Baxi 1998: 127).

Baxi's conclusions are supported by the research of the previous chapters: the many instruments designed for the protection of human rights are contemporaneous with the many instances of indirect support of state terrorism on the part of the US, as well as the many direct and indirect instances of state terrorism practiced under the masks of "counter-terrorism" and so-called "development", respectively.

Both direct and indirect practices fit whatever tentative and even vague definition might be available in international law at this time:

> any action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act. (Para. 164, UN Doc. A/59/565, 2 December, 2004; Scovazzi 2005: 704).

Despite its under-inclusiveness and imprecision, it is certainly easy to conclude with Tullio Scovazzi that the term "terrorist" does not only fit a

member of a subversive and violent organization hostile to the state, but that the state's organs, both civilian and military, can be terrorist as well (Scovazzi 2005: 704; Proceedings of the Meeting "Controllo degli Armamenti a lotta al terrorism tra NATO").

In his seminal article Baxi considers several "critical themes" regarding human rights. Ostensibly, their proliferation is designed to fulfill their "historical mission", which is "to give voice to human suffering, to make it visible, to ameliorate it" (Baxi 1998: 127). The problem he outlines comprises, among other issues, "their logics of inclusion and exclusion", "the politics of difference and identity", "the resurfacing of arguments about ethical and cultural relativism" (which, in turn, permits the "toleration of vast stretches of human suffering"), and the "emergence with the force and relations of globalization … of a trade-related market-friendly paradigm of human rights seeking to supplant the paradigm of the Universal Declaration" (Baxi 1998: 127).

On the first point, Baxi cites "the long development of the European liberal tradition", which thought at various times various groups and communities "unworthy of being bearers of human rights"; those categories included slaves, heathen, colonized people, indigenous populations, children, the impoverished, and others (Baxi, 1998: 133). In contrast, he emphasizes Francisco de Vitoria's strong support of both human rights and the rights of communities beyond those accepted by the state and the Church of his time (Baxi 1998: 133–134; de Vitoria 1917). But "contemporary" human rights support the "illegitimacy of all forms of cruelty politics": how to judge, then, "environmental destruction/degradation acts of development cruelty? Are programs and measures of structural adjustment an aspect of the politics of imposed suffering?" (Baxi 1998: 137). Without a doubt, both "counter-terrorist" measures and their precursors, "counter-insurgency measures", represent the highest degree of the imposition of suffering, which are clearly both illegal and immoral, as we have noted in the previous chapters. Not only does the proliferation of human rights instruments and discourse manifest the UN's Human Rights Charter's impotence in the face of ongoing power politics of globalization, and neoliberal imperialism, but it seems that the violations of human rights are multiplying as well as increasing in severity, from Bhopal and Ogoniland, to Abu Ghraib, the deformed children of Fallujah, and the open support of torture and inhuman and demeaning treatment of prisoners at Guantanamo.

Unfortunately, the "process for accountability" of these crimes is neither sure nor swift. On February 6, 2011, tucked away in an inside part of a

major Canadian paper, we find a brief note entitled "Arrest fears quash Bush travel plans" (Nebehay 2011: A3). The text reports "criminal complaints against Bush alleging torture", as a 2,500 page document was prepared, drawing on Bush's self-admitted use of interrogation techniques including "water-boarding" and the treatment of "suspected militants at Guantanamo Bay" (Nebehay 2011: A3), both of which were described as "war crimes" by Dominique Beattig of the Swiss Parliament. Bush was invited to address a Jewish charity gala on February 12, 2011. It seems that Bush realized his position, as Beattig adds:

> The message from civil society is clear—if you're a torturer, be careful in your travel plans. It is a slow process for accountability, but we keep going. (Nebehay 2011: A3)

Although contemporary human rights appear to be "taking suffering seriously", Baxi puts it well:

> But this much is compellingly clear; the emergent collective human rights of global capital presents a formidable challenge to the human rights paradigm inaugurated by the Universal Declaration of Human Rights. (Baxi 1998: 139)

It is equally clear that this is the real reason why the "inflation of human rights" cannot serve a "useful function in the real world" (Baxi 1998: 140). Some may find this assessment overly cynical, but this reality is also supported by the fact that human rights instruments produce mainly "soft human rights law (exhortative resolution, declarations, codes of conduct, etc.) that does not reach, or even at times aspire, to the status of operative norms of conduct" (Baxi 1998: 141). In 1998, Baxi saw clearly the failure of the ongoing human rights project in the fact of the triumphant power of globalization and trade. Unless this impassable wall is breached by more than the scholarly work of Baxi, Falk, Chomsky and many others, and unless the message reaches the awareness of everyone, especially regarding legal regimes and procedures, from the UN on down, it is hard to see how true progress can be achieved.

Procedural or Substantive Human Rights?

> Procedural environmental rights include access to environmental information, meaningful participation in environmental decision-making, and access to legal redress for environmental wrongs. (Collins 2007: 129)

Like human rights in general, so-called "third generation" rights, which include prominently environmental rights, may be either substantive or

procedural. As well, like other more entrenched human rights included in the first of the two 1966 covenants, the rights protected by the International Covenant on Civil and Political Rights (ICCPR) are viewed as more binding, or at least far more serious, than the mandates of the other covenant (ICESCR). The latter may be implemented incrementally, as is not the case for the former. The difference between contemporary human rights and the earlier human rights documents is the fact that emergence of international human rights in the aftermath of the World War II introduced "the radical premise that a state's treatment of its own citizens, its internal governance on many significant matters, is subject to the norms of international law" (Collins 2007: 125; Steiner and Alston 1996: 148).

The difference above would represent the turn from what Baxi terms "modern" to "contemporary" human rights. The language and meaning of these newly minted human rights ought to represent an effective and impenetrable shield to protect citizens within states and outside states from the actions and inaction of their government, including erecting a defense against non-state agents whose activities may impose threats and harms.

Most countries have ratified the two 1966 Covenants, but unfortunately there are no organizations or regimes set up to monitor either state or non-state compliance. As well, it is an unwritten rule, but civil and political rights are taken far more seriously than social, economic or cultural rights. Third-generation or "solidarity" rights, however, are not even on the horizon as a serious consideration for international instruments or jurisprudence.

It is important to note that procedural rights, even if they were mandatory, would remain as they are based on a number of assumptions that cannot be taken for granted today. The first assumption is that "the right of information" will be observed in terms that those receiving the information will be able to comprehend both the meaning and the implications of the knowledge received; the second assumption is that "informed people" will be able "to participate meaningfully" in decision-making strategies that will affect them. Clearly this assumption cannot apply in all cases: whether it reflects the reality in one or another state is a function of both state and global governance, not simply of the availability of information. The third assumption is that those affected will want to participate in decisions that might reflect severe limits and changes to their work situation: many poor people will accept a hazardous situation rather than eliminate a possible source of income that they may not be able to replace. The fourth assumption is that "informed people", even when reached by

media within full description of hazards they could understand, would be able to protest or demand a change in policy, or ask for redress, and will be able to do so without fearing violent retribution, as is often the case when indigenous communities attempt to resist some form of hazardous and unwanted "development" (Westra 2007: ch. 6).

Hence, when Collins enumerates the procedural aspects of environmental rights, for example, we need to read each aspect with the reservations listed above in mind. Another difficulty is the fact that the procedural access to legal redress is problematic in itself: the issue is, or should be, how to stop human suffering from happening, not to allow it to happen with impunity for the perpetrators, but allowing the possibility of a lawsuit. At best, such lawsuits produce some monetary compensation, as they are viewed as torts, rather than what they are, attacks on the physical integrity of persons (Scott 2000).

Many environmental hazards are incompensable, as are the results of torture, disappearances, and the like: neither the malformed children of Fallujah and their parents, nor the families of those who have been raped or have "disappeared", can and should be simply receiving money as compensation. Nor should those who were exposed to radiation through uranium mining or to cyanide or mercury because of gold mining or paper mill operations, be given simple compensation for the harms they are suffering. In all these cases, the ecological and biological harms are too grave to be considered simply a business-related loss. The health of those affected will not be restored, nor will the ecology of their communities, simply by the influx of money. Hence the very paradigm of procedural rights may be necessary, but not sufficient, to address the physical, material and substantive harms incurred.

Substantive Rights

> Man has the fundamental right to freedom, equality, and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. (Declaration of the United Nations on the Human Environment 1972; see also Collins 2007: 131 n.75)[1]

[1] It is ironic that at the time of the Stockholm Conference the United States—which vehemently opposed the inclusion of a similar right thirty years later (in the Rio Declaration)—proposed the inclusion of a specific right to a clean environment in the Stockholm Declaration.

Although one may well suffer from deprivations of a civil, political or procedural nature, and suffering may indeed be due to non-physical causes, human suffering is most closely related to a person's physical, biological organism; in fact most deprivations that impose suffering in this sense are closely related to the right to life. Not only is this close connection not recognized in law, as exemplified by the copious jurisprudence dealing with torture and other grave human rights violations as "torts" (Scott 2001), but even the sparse but significant existing case law found in the decisions of the ECHR concerning severe environmental health damage (*Guerra v. Italy* 1998; *Lopez-Ostra v. Spain* 1991; *Onerdyliz v. Turkey* 2004; *Fedeyeva v. Russia* 2005), instead of invoking the right to life and the right to health, rely on such euphemisms as those expressed in the European Covenant of Rights and Freedoms, Article 8(1) —that is, "the right to family life" when describing children's grave diseases and trauma from environmental sources. No doubt having a child who is severely ill with, say, anorexia, vomiting, nausea and other grave health problems does indeed disrupt family life.

But it is strange to cite as determinant the *effect* of the injuries to a child's health and normal development on her family's life, rather than refer directly to the injuries themselves and the affected child. The reference to "privacy" is equally problematic. Both elocutions are carefully coupled in order to avoid the direct and much simpler reference to the right to life, from which the right to health derives.

The clearest of these references is in the American Convention on Human Rights (1969):

> Article 4(1): Every person has the right to have his life respected. This right shall be protected by law and in general from the moment of conception. No one shall arbitrarily deprived of this life.
> Article 5(1): Every person has the right to have his physical, mental and moral integrity respected.
> Article 5(2): No one shall be subject to torture or to cruel, inhuman or degrading punishment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

The African (Banjul) Charter on Human and Peoples' Rights (1981) is equally clear:

> Article 4 – Human beings are inviolable. Every human being shall have the right to respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment, shall be prohibited.

As well, Article 16 protects the right to health and article 24 the right to "a general satisfactory environment, favorable to their development".

Hence, the question remains: why is that the ECHR prefers such a roundabout use of some selective consequences and effects of the violation of the human rights of children and others, rather than rely on the description of the basic violation itself as the most well-established and widely accepted principle of law? As article 3 of the Universal Declaration of Human Rights (1948) proclaims, "Everyone has the right to life, liberty and security of person".

It is clear that no one has attempted to reconcile the right to life with the vague and essentially incorrect language of the European Charter of Human Rights and Freedoms. It remains unclear whether it is only the effort to be "politically correct" (that is, in line with the feminist thought after *Roe v. Wade*, 1973; a dated and illogical decision that has acquired an undeserved iconic status), or whether perhaps there is also an additional concern that to permit such unequivocal principles to be accepted will bring a dangerous precedent to case law and to the states who might be facing an unwanted and costly responsibility. Yet, if we consult the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1980), we note that several articles are unclear on such issues: article 10(b) simply refers to "family planning access" as a right of women; article 12(1) is concerned with the safety of working conditions of women, as is article 11(f); article 5(b) concludes that "the interest of the children is the primordial consideration in all cases", thus pointing clearly away from the primacy of abortion rights, explicit in the constitution of most developed North/West States, including Canada and the US in North America.

However, it seems clear that, by refusing to accept the clearest appeals to the inalienable right to life, whether for one or another specific political concern, much is lost to the rest of the collective of humanity, much that might be useful to ensure if not the elimination, at least the mitigation of much of human suffering. Some have argued that human rights have been manipulated though the modern "trend to 'politicize' human rights" (Beyani 1999: 21). International law in general has also been considered from the standpoint of the "constitutionalism", an approach that places "a premium on law over power, but also over other normative orders" (Klabbers 2009: 81–124). Klabbers contrasts his defense of constitutionalism (with its basis in "consent" and its "democratic pedigree") with universalism. He acknowledges that his position would disappoint "committed universalists". He is right: neither democratic

roots, nor even "dual democracy" (that is democratic conditions both in states and in the international community; Peters 2009: 342–352) can possibly support the basic rights of humanity, as they

> do not sufficiently take into account the needs of the global community, the possibility or reality of universal values, or the existence of *jus cogens* as either precursor or a manifestation of the community interest. (Klabbers 2009: 124)

It is precisely this major point that supports the conclusions reached thus far: in law, both state interests and excessive reliance on forms of "democracy" and "consent", designed to support plunder and neoliberal imperialism instead, are insufficient, as the continuing disregard of human suffering and human rights amply demonstrates. In contrast, the universal interests of peoples can better rely on the basic human rights that give rise to obligations *erga omnes* (*Barcelona Traction Light and Power Co. Ltd*. 1970).

It is only by reaching this level of universality that we can find the starting point from which to defend basic human rights. It is difficult to acknowledge that even the constitutions that purported to defend the rights of women, or the right to property, both foundational in today's world, may result in ignoring the most solid basis available in domestic and international law (that is, the right to life and the related right to health) because of political implications. Yet neither corporate legal persons nor states can be forced to face the "vast stretches of human suffering" that Baxi condemns, as long as today's *status quo* continues to support the "lawless world" we appear to live in (Sands 2005). It is a symptom of that "lawlessness" that state terrorism is not openly indicted, that neither torture nor other forms of counter-terrorism are immediately viewed as unacceptable, and that the novel area of ecological or environmental rights (intrinsically connected to the right to life) are not respected, even in the manner that "family life" or "privacy" are. This connection between human life/health and the ecological conditions of the human habitat are explicitly present and supported in the reports and other materials from the World Health Organization (WHO 2008, 2009; Tamburlini and Licari 2004), as well as in the scholarly work on public health law, especially the Draft Convention on Public Health Law proposed by Lawrence Gostin (Gostin 2008: 331–392).

I have argued that this connection between life and health is perhaps the most important and necessary legal advancement to ensure that the most basic human rights can be respected (Westra 2006). Yet even within

this scenario there are some glimpses of respect for human rights that emerge. First, the UN General Assembly, on 13 January 2011, in its 65th Session, reissued an updated Advisory Opinion on "the Legality of the Threat and Use of Nuclear Weapons" (Resolution adopted by the General Assembly, on the Report of the First Committee), and we'll return to this resolution below. Second, and much closer to the main topic of this work, is the ECCHR Center for Constitutional Rights Preliminary Indictment brought Pursuant to the Convention Against Torture against George W. Bush, alluded to earlier in this chapter. Although it could not have been enacted because, as we saw, Bush did not travel to Switzerland, it will be important to discuss that document in detail in the next section.

George W. Bush: "Indictment for Torture"

> Empires communicate in two languages. One language is expressed in imperatives. It is the language of command and force. This militarized language disdains human life and celebrates hypermasculinity. It demands. It makes no attempt to justify the flagrant theft of natural resources and wealth or the use of indiscriminate violence. (Hedges 2011)[2]

We have connected state terrorism and the plunder of natural resources because, for environmental rights, there is at least no effort to demonize the victims, as in the case of today's "terrorists", or, in earlier days, "socialists" and "communists". Torture, renditions, and disappearances are described as part of a fight against "the enemy", but the ongoing theft of resources coupled with the disregard of the desire of many not to be forced to tolerate industrial "development" cannot be described as the response to "enemies", let alone as part of a "war on terror".

Hence it is helpful to view together the various failures of human rights instruments to extend protection to the human collectivity, even as we focus on a particularly brutal aspect of imperialistic practice: the use of torture. This unusual "indictment" supports my point: only *jus cogens* norms, giving rise to *erga omnes* obligation, may, if a state is willing, bring to justice these grave violations of human rights. It is encouraging, as a start, to note that George W. Bush is about to join Harry Kissinger and Benjamin Netanyahu (and possibly Pinochet)—that is, the category of

[2] See www.trughdig.com.report/item/recognizing_the_language_of_tyranny_20110206; "Recognizing the Language of Tyranny".

heads of state and other VIPs—who can no longer travel to Europe with impunity.

> *National Lawyers Guild International Committee:*
> According to international law experts in New York based Center for Constitutional Rights (CCR) and the Berlin based European Center for Constitutional and Human Rights (ECCHR), former presidents do not enjoy special immunity under the Convention Against Torture (CAT). Over 60 international human rights groups signed on to the letter of Denunciation[.][3]

It is significant that George W. Bush (President of the US from 20 January 2001 to 20 January 2009), took an oath "to preserve, protect and defend" the Constitution of the United States (Indictment for Torture: 1). This human rights document starts with an "Overview of Detention Policies and Torture Programs", starting with the Directive (memorandum of notification) issued by Bush on 17 September 2001, in which he authorizes the CIA "to capture suspected terrorists and members of Al-Qaeda, and to create detention facilities outside the United States where suspects can be held and interrogated".[4]

Swiss Senator Dick Marty's 2007 Report to the Council of Europe states that Bush "had been personally involved in the conception and discussion of this new strategy", which entailed the creation of "paramilitary teams to hunt, capture, detain, or kill designated terrorists anywhere in the world" (May 2007: 5).[5]

Another important step was taken on November 13, 2001, as Bush authorized that military commissions would try detainees so that they would not be subject to "principles of law and rules of evidence", as would be the case were they to be tried in regular US courts. The deliberate setting aside of democratic legal procedures was intended to be used for "a broad category of persons believed to be, or have been, linked to acts of international terrorism", and the latter is understood as anything (including "preparatory acts") that might cause "adverse effects" not only to US citizens or to the US as a whole, but also to "its policies". Thus, once again, it is not only direct injury that is at stake but, as in the case of "counter-insurgency"(as we noted in Chapter 4), any attack on the ideology and *status quo* of the US is equally beyond discussion.

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[3] From http://ccrjustice.org/ourcases/current-cases/bush-torture-indictment.

[4] "[T]he directive has yet to be publically released"; see "Timeline History of Harsh Interrogation Techniques", www.npr.org/templates/story.php?storyId=103376537.

[5] See http://assembly.coe.int/Documents/WorkingDocs.Doc07/edoc11302.pdf.

The next important step was Bush's decision that the "third Geneva Convention did not apply to the conflict with Al-Qaeda or the Taliban, hence they would not receive the protection afforded to prisoners of war" (Yoo and Delahunty 2002).

At this point, having reviewed only the first 5 pages of this document, we can easily respond to Chief White House Counsel, Alberto Gonzales, whose "Memo to Bush" of January 25, 2002, asserts that the "new paradigm" of the "war on terror" renders obsolete the Geneva Conventions' limitations on "questioning enemy prisoners" (Indictment: 5, no.18). But even the briefest review of the material discussed in Chapter 4 regarding the support of terrorism in Central and South America demonstrates that, rather than a "new paradigm", what we encounter here is simply more of the same: more blatant, more openly practiced, but based on the same total disregard of human rights, and of the "principles of international law" that Nixon and others practiced and supported.

Here we have "counter-terrorism" instead of "counter-insurgency", and the 3000 deaths of 9/11 to support Bush's claim that the defense of US interests demands nothing less than the total regression to a situation where power and violence dictate the only "language" that is appropriate to "others", who might be contrary to our present ideology, whether or not they are involved in subversive Colin Powell's advice to reverse his determination of January 18th regarding the Geneva Convention and its applicability. Indeed, Bush issued a memo on February 7, 2002, which called for detainees "to be treated humanely and to the extent appropriate and consistent with military necessity". According to the Red Cross, the CIA program

> included transfers of detainees to multiple locations, maintenance of detainees in continuous solitary confinement and incommunicado detention ... [including] the infliction of further ill-treatment through the use of various methods either individually or in combination, in addition to the deprivation of other basic material requirements. (ICRC 2007).

The ICRC Detainees CIA Report indicated that the whole program

> was clearly designed to undermine human dignity and to create a sense of futility by inducing in many cases, severe physical and mental pain and suffering, with the aim of obtaining compliance and extracting information, resulting in exhaustion, depersonalization and dehumanization.[6]

[6] ICRC CIA Report at 7–9 indicated detainees' details of torture including waterboarding, prolonged stress positions, beatings, confinement in a box, prolonged nudity, sleep deprivation, exposure to cold temperature, and prolonged shackling.

Some of these "enhanced interrogation techniques" were videotaped, especially those showing the interrogation of Abu Zubaydah, whose torture included waterboarding "for 83 times": these tapes were destroyed by the CIA, with impunity. The ill treatment and torture imposed on these detainees "constituted cruel, inhuman and degrading treatment" (Indictment: 9). As well, the same array of "enhanced interrogation techniques" were used on Khalid Sheik Mohammed, including the "deprivation of sleep for 180 hours", and "threats to kill his children" (Indictment: 11).

Through the whole period, Bush continues to assert his right to place those in CIA detention "in secure sites beyond the reach of the law" (Indictment: 11). The Parliamentary Assembly of the Council of Europe published a Report on the "transfers" and confirmed torture in locations in Poland and Romania (Indictment: 12). In March 2008, Bush "vetoed legislation that would have banned the CIA from using "enhanced interrogation techniques" (Eggen 2003). Another detainee, Mohammed al Qahtaini, was subjected to the "First Special Interrogation Plan":

> [The] plan, which began on Nov. 23, 2002 and ended 16 January 2003 included 48 days of severe sleep deprivation and 20 hours interrogation, forced nudity, sexual humiliation or religious humiliation, dehumanizing treatment, the use of physical force against him, prolonged stress positions, prolonged sensory overstimulation, and threats with military dogs. (Indictment: 13)

Without continuing to list the horrific examples disclosed by the ICRC and by various other reports compiled by human rights groups, and groups representing judges and lawyers, all concluded that what was involved are acts of torture under international law, as are the enforced disappearances, deliberately practiced at the behest of the US government under George Bush, for the purpose of extracting information (Indictment: 32–34). The Indictment concludes with several examples taken from relevant case law, and we will return to those cases in the next chapter.

At this time, it is important to note that state terrorism was used, under the guise of "self-defense"—a vague determination—in a self-styled "war on terror" that could not, in any case, justify any of the acts described and promoted in clear violation of human rights and international law regimes. Below we will consider yet another important move, germane to the present enterprise, although perhaps not as significant as the Bush "Indictment": the UN's renewed effort to eliminate and proscribe "the threats and use of nuclear weapons"; an important step, at least on paper, toward the defense of human rights and the elimination of yet another face of state terrorism. Before that we will consider the historical continuity from earlier state terrorism to its present instances.

The Link between "Counter-insurgency" and the "War on Terror": From Guantanamo to Abu Ghraib

> With a signature and a few scrawled words, Donald Rumsfeld cast aside America's international obligations and reneged on the tradition of valor to which President Bush had referred. Principles for the conduct of interrogation, dating back more than a century to President Lincoln's instructions of 1863 that "military necessity does not admit of cruelty" were discarded (Sands 2009: 3).

The paragraph above refers to the Action Memo on the subject of "counter-resistance techniques", which recommends using only Category I and II interrogation techniques. The memo also says:

> While all Category III techniques may be legally available, we believe that as a matter of policy, a blanket approval of Category III techniques is not warranted at this time. Our Armed Forces are trained to a standard of interrogation that reflects a tradition of restraint. (Sands 2009: 3)

Yet despite the "tradition of restraint" to which the memo refers, the secretary of Defense, William J. Haynes II, General Counsel, approved all three categories for use at Guantanamo Bay. Category I "comprised two techniques, yelling and deception". Category II included 12 techniques aiming at humiliation and sensory deprivation, including stress positions (e.g. standing for a maximum of four hours), falsified documents, isolation for up to thirty days, deprivation of light and auditory stimuli, 24-hour interrogations, removal of religious/comfort items, removal of clothing, forced grooming (such as shaving of facial hair), and the use of individual phobias (e.g. fear of dogs). Category Three required approval by the Commanding General of Guantanamo and legal review. It included the use of light force (e.g. poking and pushing); the use of scenarios designed to convince the detainee that death or severely painful consequences were imminent for him or his family, exposure to cold weather or water, and the use of a wet towel and dripping water to induce the misapprehension of suffocation (water-boarding).

It is important to keep in mind that his memo's provisions go far beyond what is permitted by the US Army "interrogators' guide-line"; as well, the memo's recommendations "were inconsistent with the Common Article 3 of the Geneva Convention". Finally, there had not been a "broader process of consultation" before signing the memo, and General Richard Myers, Chairman of the Joint Chiefs of Staff, who should have signed it, did not (Sands 2009: 7).

Essentially, there are several major assumptions that permeated the whole "illegal torture" scenario. First, of course, was that the context was

the inappropriately named "war on terror" (see Chapter 1 for a discussion of that point). Second, as Haynes and others declared, was the idea that "this conflict was unique" (in contrast, the same expression used by the Haynes Memo was common coin in the US teaching of techniques to combat "counter-insurgency", and in general techniques suggested as part of the support of state terrorism in other countries; see Chapter 4 for discussion). The third issue was that although "this was war", as far as the White House was concerned, "none of the detainees at Guantanamo, whether Taliban or Al-Qaeda, could rely on the protection expected from the Geneva Conventions, because they were not part of a state, and thus could not claim "rights under a treaty binding only to states"; as well, they wore no uniforms or insignia (Sands 2009: 40–41).

Thus not even common Article 3 would apply. This effectively created a legal black hole at Guantanamo (Sands 2009: 22). The fourth and final assumption was the double misconception that (a) "torture of suspected terrorists under interrogation would not be unlawful if it could be justified on grounds of necessity or self-defense" (Sands 2009: 23) and (b) aggressive interrogation techniques were required to get information necessary to protect the American people (Sands 2009: 23), despite the fact that the new techniques did not work. In contrast, the Approved Military Armed Forces Manual on interrogation (FM 34–52) was all about "building rapport with detainees", whereas coercion produced only "unreliable material" (Sands 2009: 59):

> According to the FBI group, the DIA team was 'adamant' that its more aggressive plan was preferable, despite the absence of evidence that such techniques worked. (Sands 2009: 140)

At any rate, the Commander of JTF-GTMO, Major General Geoffrey Miller, "failed to monitor and supervise the interrogation of Al-Qahtaini"; this allowed subordinates "to make creative decisions" in an environment requiring extremely tight control (Sands 2009: 251; *Hamdan v. Rumsfeld*). Major General Geoffrey Miller was eventually transferred to Abu Ghraib in Iraq in August 2003. Because of the Iraq conflict, the Geneva rules should have applied; yet "that didn't stop General Sanchez authorizing techniques that were not listed in FM 34–52 that plainly violated Geneva and that were included in the Haynes memo" (Sands 2009: 185).

The operating procedures in use in Guantanamo Bay were used, and memos written for Guantanamo directed policy choices for Abu Ghraib (Sands 2009: 185). It is not necessary to repeat the thorough and painstaking research amassed by Philippe Sands in his volume, which is strongly

recommended for anyone intent on understanding the sequence of events leading to the ongoing abuses of human rights and state terrorism masquerading as "self-defense" and "the need to save American lives". Sands makes a very important observation as he traces the subversion of legal principles of justice, and of lawyers' ethics, from Nazi Germany and the Nuremberg tribunals to a similar elimination of principles and the corruption of the morality of lawyers in government in the highest levels of the White House.

Instead, without returning to the past and a different country and situation, and despite the insistence on the fact that the "war on terror" is a "new" sort of conflict, we can trace the continuity between the state terrorism in Central and South America simply by citing Major General Michael E. Dunlavey, who was looking at detainees "who were in it with their heart and soul, whose goal was the destruction of our culture as we know it, and our way of life" (Sands 2009: 46). Similar words could have been said by Nixon and others regarding "socialists" and "communists" during the 1950s, 1960s, and beyond, with a very similar disregard not only of the most basic human rights, but also with a total disregard for truth and reality. As noted in Chapters 1 and 2, the main reasons for 9/11 and other ongoing instances of suicide bombers and terrorism since the time of the resistance to dictators in South America is *not* the desire to destroy "American culture and way of life"; rather it is, as Osama bin Laden said explicitly, the desire to preserve their own culture and way of life, while at the same time bringing the abuses and attacks against it to the attention of the international community. It is because most Western powers, led by the US, insist on turning these goals on their head—so to speak—that this call for protection has unfortunately gone unheeded. Bush's tentative indictment has been a step in the right direction in the effort to recognize some of the "faces" of state terrorism in their true nature. In the next section we will consider another positive step.

The UN General Assembly Follow-Up to the Advisory Opinion on the Legality of the Threat and Use of Nuclear Weapons

> The International Court of Justice has issued an advisory opinion of great weight on the legality of nuclear weaponry. It is the first time ever that an international tribunal has directly addressed this gravest universal threat to the future of humanity. (Falk 1998: 147)

Before considering the International Court's Opinion on this question, it is best to consider the context in which these weapons are developed, and

the International Pleadings of Australia and New Zealand as part of that context. Nuclear power, in all its applications, represents one of the most hazardous products and processes on earth (Shrader-Frechette 1982). As such it is one of the clearest cases demanding immediate concern and legal action on several fronts: it is hazardous in the mining of its required materials, and throughout the "fuel cycle" (Shrader-Frechette 1982: 15; Draper 1991); it is hazardous in all its uses, not only as a weapon (Shrader-Frechette 1982: 25–44); and it is especially hazardous in it disposal phase (Shrader-Frechette 1993). Nuclear power is indeed "risky business" from cradle to grave (Draper 1991), and the results of its impact exhibit all the characteristic harms this work confronts: immediate harm to human health, delayed threats to health, life and normal function, and long-term harm to the "diversity of life" (Wilson 1992) and to its very survival, through direct and indirect (genetic) impacts (Colborn et al. 1996). Finally, it is extremely and unpredictably hazardous through its disposal (Shrader-Frechette 1993; Goodwin 1980: 417–449).

It is not hard to find extensive and clear philosophical support not only for the immorality of the use of nuclear weapons, but also for threats intended as nuclear deterrence (Wasserstrom 1985: 15–36; McMahan 1985: 141; Ullman 1985: 191–212). In law one finds direct reference only to two aspects of nuclear power use: (i) testing; and (ii) the threat and use of nuclear armaments. This is somewhat surprising; the occurrence of terrible accidents such as Chernobyl, as well as the routine production of low-level ionizing radiation through the normal, peacetime operation of nuclear power stations, has not been officially pursued in international law, to the best of my knowledge, although both have been discussed in the literature (Handl 1997: 29). For instance, despite the presence of an old, often malfunctioning power station like Fermi (right over the Canadian border in Windsor, although it is located between Michigan and Ohio), no legal cases have arisen from these hazardous circumstances.

On the other hand, Nevada has been battling federal orders to accept substantial quantities of radioactive waste, but (so far) the Yucca Mountain site has been successful in refusing to accept the facility, as officials agreed that they should and could not "impose something voters do not want," and because "leaving a potential catastrophe for the future is not an ethically defensible option" (Shrader-Frechette 1993: 250–251).

On the question of the legality of atmospheric nuclear testing, Australia and New Zealand instituted separate proceedings against France before the International Court (Ragazzi 1998: 173). Atmospheric nuclear tests clearly spread unwarranted radioactive material indiscriminately to any

and all countries adjacent to the tests. Even France, who wanted to test, did not attempt to conduct such tests over its own soil. France must have recognized that the atmospheric tests were neither desirable nor risk-free, as they defended their strategy; France claimed it needed to perform these "last tests" in order to end atmospheric testing altogether. This declaration ensured that the International Court did not pronounce either jurisdiction or the merits of the cases, relying on the obligation undertaken explicitly by the French government (*Australia v. France*; *New Zealand v. France* 1974).

But the importance of the case does not lie with the majority view expressed above. Rather, the four judges who wrote a forceful dissent (Judges Onyeama, Dillard, Jiménez de Arechago, and Sir Humphrey Waldock) asserted that the "object of the applicant States was to obtain a declaratory judgment" instead (ICJ Rep. 1974; Ragazzi 1998: 175). The pleadings in these cases show that the intentions of the states were not simply to stop France on this single occasion, but to make a universal point of principle. France, according to these pleadings, had violated important rights: the protection of New Zealand's sovereign rights to be free of radioactive fallout and contamination. This was described as a right that belonged to "all members of the international community" (Ragazzi 1998: 175).

Hence, especially for New Zealand, the obligation was *erga omnes*, and all States possessed correlative rights of protection. The fact that France (with China) had not been a signatory to the Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water (Moscow Treaty, 1963) was not relevant (Hussain 1984: 245). Nevertheless, the additional fact that 104 states did become parties to the Moscow Treaty over the next 10 years enabled Australia and New Zealand to argue that "customary rule had gradually emerged" in the international community, and New Zealand was able to assert at the same time the *erga omnes* character of France's obligation (Ragazzi 1998: 177). Ragazzi "infers" that the obligation is indeed *erga omnes,* from the following arguments found in the pleadings:

> the obligation
> (a) is stated in "absolute" terms (the dictum refers to "absolute" and "unqualified" obligations);
> (b) reflects a "community interest" (the dictum refers to the "concern of all States");
> (c) protects fundamental goods, namely "the security, life and health of all peoples" and the "global environment" (security, life and health are also

some of the basic goods protected by the four examples of obligations *erga omnes* given in the dictum);
(d) has a prohibitory content (like the four examples given in the dictum);
(e) is not owed to particular States, but to the "international community" (the dictum refers to the "international community as a whole"); and
(f) its correlative rights of protection 'are held in common' (the dictum provides that "all States can be held to have a legal interest" in the protection of obligations *erga omnes*). (Ragazzi 1998: 179)

The "dictum" here referred to is the one found in the *Barcelona Traction* case. This argument is of foundational importance, because it introduces the principled approach sought later by the WHO in opposing the use of nuclear weapons.

The WHO submitted a question to the International Court of Justice (ICJ) requesting an advisory opinion on "the legality of the use by a state of nuclear weapons in an armed conflict", as follows:

> In view of the health and environmental effects would the use of nuclear weapons by a state in war or other armed conflict be a breach of its obligations under international law including the WHO constitution? (Adv. Op. [1996] ICJ Rep. 66)

Several states argued that the question went beyond "the WHO's proper activities". The Court added (Para. 10) that:

> … three conditions must be satisfied in order to found the jurisdiction of the Court when a request for an advisory opinion is submitted to it by a specialized agency: the agency requesting the opinion must be duly authorized, under the Charter, to request opinions from the Court; the opinion requested must be one arising within the scope of the activities of the requesting agency; and this question must be one arising within the scope of the activities of the requesting agency. (Kindred et al. 2000: 363)

Despite the interest and the competence of the WHO to assess and evaluate the health effects of the use of nuclear weapons, at first the Court judged that the final condition had not been met, as the WHO was not a state able to wage a war, or enter into a conflict.

Hence the UN General Assembly had to bring the question to the Court once again. The Court held that neither "customary" nor "conventional" international law authorizes specifically the use of nuclear weapons (by 11 votes to 3); that the threat or use of nuclear weapons is also not specifically permitted; and that

> … it follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international

> law applicable in armed conflict, and in particular the principles and rules of humanitarian law; however, in view of the current state of international law, and of the elements of facts at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake … (the President casting his vote to break the 7 to 7 tie)

This opinion, despite its ambiguous tone, was viewed as an important decision, and it shows the transition from state treaties as sole arbiters of the status of nuclear armaments, to an opinion whose history and background served to bring a normative issue to the forefront of public opinion (Falk 1998: 172).

Falk traces the history of the movement that culminated in that request, from several groups in civil society, as

> the push to achieve elimination [of nuclear weapons] often merges with the view that weapons of mass destruction cannot be reconciled with international humanitarian law. (Falk 1998: 172)

Falk shows how world opinion, as well as the work of many committed non-governmental organizations, prepared the ground for the very possibility of asking for an Opinion, from the time of the 1985 London Nuclear Warfare Tribunal, where those weapons were defined as "unconditionally illegal"; hence, that even a threat of their use would amount to a "crime against humanity" (Falk 1998: 173).

The main point that emerges is that neither politics nor economic factors, nor even the advantage of groups of nuclear states, could be allowed to decide on the use of these weapons. Hence, at first the UN General Assembly and the WHO referred a difficult question to the World Court, and although the question could be evaded as "health" narrowly construed not the use of weapons, later, an Opinion was given. Implicit in both the original request by the WHO and the eventual opinion is the fact that "nuclear weaponry, with its global implications, raises question of legality that affect not just the citizenry of the nuclear weapons states, but the entire world" (Falk 1998: 174).

This position supports, once again, the *erga omnes* status of the question at least in principle, given the careful phrasing of the Court's statements. Falk does not use this language in regard to either the question or the Opinion itself, but he adds:

> Although not so formulated, the radical element in this request was to transfer the question of nuclear weapons policy from the domain of geopolitics,

> where it had remained since the first attacks on Hiroshima and Nagasaki, to the domain of international law. (Falk 1998: 175)

And if it has not transferred the question to treaty law, clearly both incomplete and insufficient to deal with this global threat, then Ragazzi's argument for placing its normative aspect among the few *jus cogens* norms generating an *erga omnes* obligation appears to be correct.

The Current Resolution (A/RES/65/76)

> Convinced that the continuing existence of nuclear weapons poses a threat to humanity and all life on Earth, and recognizing that the only defence against nuclear catastrophe is the total elimination of nuclear weapons and the certainty that they will never be produced again ... (Follow-up to the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons, RES/65/76)

In this manner the "follow-up" document starts its recommendation. The next paragraph, referring to "Reaffirming the commitment of the international community to the realization of the goal of a nuclear weapon-free world, through the total elimination of nuclear weapons", appears to be more naïve than convincing. Most of the "noise" regarding nuclear weaponry and the possible means and will for producing them, are presently centered on Iran, a country that repeatedly disclaimed any intention of producing such weapons, and without any present history of aggressive intentions.

As expected, this misplaced focus ignores completely the presence of nuclear weapons in Israel and the US, both countries with an undeniable recent and ongoing history of aggression to other countries. Hence, the question that arises is who is part of that "committed" international community? Who takes seriously the "solemn obligation" undertaken in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons?

As in the case of the Convention Against Torture, there should be no exceptions, no possible cases where the use of such weapons would be allowed: why then are some countries are allowed to keep substantial inventories, thus courting disaster at home with something that is so highly toxic "from cradle to grave"? As well, any serious concern about terrorism should add a convincing weight to abolitionist arguments, and the recent use of so-called "spent uranium" by both US and Israel should be explicitly condemned, given that the use of radioactive weapons and material should not be viewed as different and separate from the use of other nuclear weaponry, given its terrible effects on civilians of both present and future generations (Alaani et al. 2011).

Thus, while it makes sense to include this declaration in the group of available principles and documents that would support state and international responsibility to avoid various manifestations of terrorism in order to support human rights, we cannot rest too much hope on this resolution, given the long history of resolutions that remain "unheard", as well as unapplied (despite the intimate connection between their content and the basic principles upon which the United Nations is founded, as we saw in the earlier chapters of this work). It is doubtful that any UNGA Resolution will become anything more than a paper tiger unless the whole UN, and especially the Security Council, are radically reformed (Westra 2011a,b).

Yet there is something positive to be learned from this document: it is the fact that the UN, successfully or not, views itself as responsible for the attempt to protect the human rights of humanity, and we will return to this point below, as it is a basic one. In the next section, we will consider the bare principle of state responsibility as it is viewed and applied from moral to legal systems.

State Responsibility: From Hans Jonas to *Parens Patriae*

> This concept of positive responsibility invokes an affirmative call to guard and protect. He used the archetype of the parent/child relationship to explore his concept of guardianship. At this junction it is important to recall that he sought to develop a moral concept that applied both to the private and the public sphere. (Taylor 2010: 211; see also Jonas 1984: ch. 5)

The main starting point in Hans Jonas's work, as early as 1984, was that human power to harm has increased exponentially, and hence the responsibility to avoid harm must grow at an equal pace. This new and extreme form of responsibility extends temporally to the inclusion of future generations, and spatially to include all life, even beyond human life, as our life depends on the quality and the health of all others. The meaning of responsibility acquires a special depth, similar to the notions of "stewardship" or "trusteeship", concepts that can be found in legal discourse, as well as in morality (Taylor 2010: 211–212).

But perhaps the most important doctrine that flows conceptually from Jonas's position in recent and earlier jurisprudence is the doctrine of *parens patriae*. *Parens patriae* is certainly not new, although recent developments of its use in US jurisprudence are indeed novel, if we consider the inception of the doctrine departs from its origins in "wards and liveries". In fact, a prominent example of its use in that connection appears in international law, in the iconic "Separate Opinion" of Judge Christopher

Weeramantry (*Gabcikovo Nagymaros* 1997). In contrast, Canadian case law shows a clearer continuity with the original British use, as it emerges primarily in cases concerning children, the mentally handicapped, and others who could not speak or decide for themselves.

The *Parens Patriae* Doctrine: An Old Principle with Varied Applications

> *Parens patriae* is an ancient common law prerogative which "is inherent in the supreme power of every state... [and is] often necessary to be exercised in the interests of humanity and for the prevention of injury to those who cannot protect themselves". (*Late Corp. of the Church of Jesus Christ of Latter Day Saints v. United States*).

There is a history of protective jurisprudence, dating back as far as the Middle Ages. In its most recent instantiations, the *parens patriae* doctrine has been used to support judicial decisions that deal with the protection of those who cannot speak for themselves, especially in the case of health issues, at least in Canada (*E.* (*Mrs.*) *v. Eve* 1986; *Winnipeg Child and Family Services* (*Northwest Area*) *v. D.G.F.* 1997).

The language of these judgments is extremely suggestive and well worthy of attentive study. But before turning to the cases, it might be useful to review briefly the history of the doctrine. The doctrine of *parens patriae*, despite its Roman name, is entirely a common law doctrine, and while the Canadian Supreme Court makes use of it, for instance, it does not exist in Quebec law (Morin 1990: 827–924; *Droit de la Famine* 1988). It is perhaps an anomaly that a doctrine with a Roman name and origin is presently only found in the common law, as Morin indicates in his description of the doctrine's historical background (Morin 1990: 827–924).

Until 1873 a fundamental dichotomy prevailed in Britain's legal system. From the Middle Ages, royal tribunals used the "communeley," but the great majority of cases were heard by the lords and the local courts. Only rarely did the king, as "fountain of justice", participate in decisions of the courts through the person of his Chancellor, who until the 16th century was, at the same time, the king's confessor, hence perhaps the use of the Latin phrase (Morin 1990: 830; Baker 1979: 273).

The Chancellor's aim was the promotion and the triumph of equity principles, learned in his study of Roman law. The rules guiding these judgments and their results eventually became codified, hence "precedent" was born (Baker 1979: 273). The doctrine was used for custody and

guardianship matters involving the relation between the lord and a minor, perhaps one whose father might have been a tenant of the lord before his death, so that guardianship was required until such time as the child could be recognized as a tenant in his stead, at age fourteen.

Eventually the "Court of Wards and Liveries" was instituted by Parliament, after 1540 (Morin 1990: 32), and this court remained in operation for some time. The concept of royal protection was substituted in the 15th century by a "Court of Chancery", which kept the concept of wardship alive, and was able to introduce a novel move by 1792, when it forbade a violent father to interrupt his son's schooling and continue with his guardianship (*Skinner v. Warner*).

Although the Court of Wards was abolished, the concept of "wardship" remained as an aspect of its *parens patriae* jurisdiction:

> In time wardship became substantively and procedurally assimilated to the *parens patriae* jurisdiction, lost its connection with property, and became purely protective in nature. (La Forest 1986: para. 35)

The inception of the use of the doctrine thus explains both its Latin roots and its evolution from the protection of a minor's economic interests, to the protection of children's interests, *simpliciter*. Without any further effort to trace its antecedents, we will now turn to its development use, in order to see whether its development renders the doctrine applicable to the protection of human beings in general. The classic statement of the modern principles that govern state intervention in the best interests of the child can be found in Rand, J.'s judgment:

> The view of the child's welfare conceives it to lie, first, within the warmth and security of the home provided by his parents; when through a failure with or without parental fault, to furnish that protection, that welfare is threatened, the community, represented by the Sovereign, is, on the broadest social and national grounds justified in displacing the parents and assuming their duties. This in substance, is the rule of law established for centuries and in the light of which the common law Courts and the Court of Chancery, following their differing rules, dealt with custody. (*Hepton v. Maat* 1957: 607–608)

La Forest, J. ties recent cases to their British background:

> It will be obvious from these provisions that the Supreme Court of Prince Edward Island has the same *Parens Patriae* jurisdiction as was vested in the Lord Chancellor in England and exercised by the Court of Chancery there. (La Forest 1986: para. 39)

A further point worthy of note: the increasingly wide reach of the doctrine, giving the courts the ability to protect children from injury. In *Re X* (a minor), Latey, J. cited "a passage from Chambers on Infancy (1842), p.20 that indicates that protection may be accorded against prospective as well/as present harms". With this statement we come a lot closer to the possibility of protecting health, in the sense we have been seeking to find explicitly (without much success): in legislation. If "prospective harm" is explicitly a part of the *parens patriae* doctrine, then it is not only a juridical tool to be used after some crime has been committed or to prevent some obvious injustice. It could be instead especially powerful when there is an unconsented medical treatment at issue, as there it can be used "to prevent … damage being done". A similar approach exists in the US (*Stump v. Sparkman* 1978). In another American case, Matter of Sallmeier (378 NYS 2d 989 (Sup. Ct., 1976), at para. 991), the Court said:

> The jurisdiction of the Court in this proceeding arises *not by statute,* but from the common law jurisdiction of the Supreme Court to act as *parens patriae* with respect to incompetents. (*Moore v. Flagg*; Matter of Weberlist, 79 Misc. 2d 753, 360 N.Y.S. 2d 783) [emphasis added]

Essentially there are two possible approaches included in the doctrine: the "best interest" approach and the "substituted judgment" approach (La Forest 1986: para. 64). What is relevant from our point of view is the fact that *neither approach* needs a "person" in order to protect. In fact *parens patriae only* comes into effect when the rights of the individual needing to be protected are not those of a "person", able to think and decide or even to protect her own interests.

We noted the use of the doctrine/principle in the case of "incompetents" or—in general—for those who are not able to protect themselves from harm. Hence the doctrine is particularly appropriate for the protection from harm of future/unborn generations, as well as those who are first harmed by any exposure (that is, children and infants), as the research of the WHO and other epidemiologists and scientists indicates (Licari et al. 2005; Grandjean and Landrigan 2006; Westra 2006). Essentially, the particular physical configuration and growth pattern of children makes them particularly vulnerable to all forms of pollution, whether chemical or air/water-based, and the WHO research supports this fact.

Temperature variability is also particularly hazardous for infants and children, as are the droughts and floods that are endemic to climate change, together with the spread of vector-borne diseases that follow global warming (Patz et al. 2005: 310–317). However, even a cursory

consideration of the general "collective" of humankind indicates that all citizens are affected in varying degrees although pregnant women, infants, children and the elderly are sure to be the first to suffer grave effects from climate change, as do the poor and other vulnerable populations.

In *Georgia v. Tenn. Copper Co*. the Supreme Court affirmed that "the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether … its inhabitants shall breathe pure air" (*Georgia v. Tenn. Copper Co*. 1907: 237; cited at page 39). The second seminal case for *parens patriae* standing in the US is *Snapp v. Puerto Rico ex rel. Barez*, which noted that there had been a "line of cases … in which States successfully sought to represent the interests of their citizens in enjoining public nuisance" (*Alfred L. Snapp and Son, Inc. v. Puerto Rico ex rel. Barez*, 1982: p.4 n.10), where a "test for *parens patriae* standing" is identified:

> A state: (1) "must articulate an interest apart from the interests of particular private parties, i.e., the State must be more than a nominal party";
> (2) "must express a quasi-sovereign interest"; and
> (3) must have "alleged injury to a sufficiently substantial segment of its population."

In addition, the Court in this case identified two kinds of "quasi-sovereign interests" as follows:

> (1) protecting the health and well-being … of its residents and (2) securing observance of the terms under which [the state participates in the federal system. (*Snapp v. Puerto Rico ex rel. Barez* 1982: p.41 n.11)

From our perspective only the health and well-being are relevant as we seek a possible future application of this doctrine to protection of basic collective human rights anywhere.

At any rate, here we encounter the first possible difficulty to advocating a wider use of the *parens patriae* doctrine. These are "quasi-sovereign states", which must acquire the parental standing necessary to legislate or use for the protection of all, or even a "significant segment" of their people. If the doctrine were to be used elsewhere for the protection from harms, especially in the global setting, it should be incorporated within international law, and, when collective human rights breaches occur, it should be used in international courts.

The problem that arises is which entity could, logically and legally, take the place of the "parent" whose responsibility for its "dependent' children would indicate the applicability of the doctrine. Perhaps for the EU it could be said that all the citizens of the states within it are in a position

similar to that of citizens of individual states with the EU in a position somewhat similar to the US Federal government. But it is much harder to envision a similar "parental" role for the UN, even aside from the fact that—to my knowledge—this doctrine has not been appealed to by either the UN or the EU in any environmental case thus far.

Parens Patriae; Weeramantry and Global Responsibility

> We have entered an era of international law in which international law subserves not only the interests of individual states, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare. (Christopher Weeramantry, Separate Opinion, *Gabcikovo Nagymaros Project* (Hungaria/Slovakia), 1997, ICJ 4, Judgment of 25 September; hereafter Weeramantry 1997)

Although this is not an explicit appeal to the *parens patriae* doctrine, it is unequivocally an appeal to *erga omnes* obligations to replace "*inter partes* adversarial procedures" in international law (Weeramantry 1997: 115), a theme to which Weeramantry returns repeatedly. Like the possibility of environmental catastrophes, the disregard for human dignity, life, and the tenets of humanitarian law entail catastrophic consequences for humankind. There are various concepts that come together in *parens patriae*, and it will be instructive to see what some of these interwoven strands are, when they apply to states as "parents" with "standing with special solicitude", as found for instance in *Massachusetts v. EPA* (2007), or in *Snapp v. Puerto Rico ex rel. Barez*. *Massachusetts v. EPA* was considered a seminal case for the US application of *parens patriae*:

> [T]he *parens patriae* doctrine provides states as special litigants, with an alternative means to establish standing in federal court, and does not require states to meet the injury, causation, and redress ability elements of the Lujan test. The sentiment of special solicitude which the Supreme Court afforded Massachusetts in *Massachusetts v. EPA*, inherent in the *parens patriae* doctrine. (Ahn 2010: 627)

The question was whether the State of Massachusetts could request the EPA "to regulate the emissions of greenhouse gases from new motor vehicles under the Clean Air Act" (Ahn 2010: 638; US Clean Air Act 2006). The point of commonality between the doctrine's use in the environmental context and the argument we are seeking to introduce to link *parens patriae* to the protection of human beings from torture and other forms of state terrorism is that states are acknowledged to have a "quasi-sovereign" interest in the health and welfare of their citizens (Ahn 2010: 638). As well, the use of the doctrine may trigger another related

principle: that of "special solicitude", apparently an acknowledged aspect of the responsibility of states for their citizens. What is particularly noteworthy is that the state in each case is not resting on its proprietary interests, hence economic motives play no part in these cases. In Massachusetts, "virtually all residents are affected by climate change, and the state's quasi-sovereign interests are different from the interests of the state's residents" (Ahn 2010: 640).

The residents' interests were in the protection of their own safety; in contrast, the state's interest was an expression of its responsibility in the face of a global threat. Somewhat similar to the "special solicitude" acknowledged in this case is the special responsibly the Canadian Federal Government has, as its "fiduciary obligations" toward its First Nations, which oblige it to go beyond treaty requirements, and to act in a way that will reflect a position of trust, over and above the observance of the letter of the law.

This "special solicitude", beyond normal proprietary interests, restores some link with the original concept of *parens patriae* as well as reconnecting it to the Canadian sense of state responsibility for infants, incompetents and, in general, those incapable of protecting themselves.

Another case hingeing upon responsibility and solicitude toward children and future generations is the case of *Minors Oposa v. Secretary of the Department of the Environment and Rural Resources*:

> This case, however, has a special and novel element. Petitioners minors assert that they represent their generation as well as generations yet unborn. We find no difficulty in ruling that they can, for themselves for others of their generation and for succeeding generations, file a class suit. Their personality to sue on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned. (*Minors Oposa v. Secretary of the Department of Environment and Rural Resources* 1994: 200)

This appears to be the only judgment that appeals specifically to intergenerational equity (Barresi 1997: 10), in international law. Barresi goes on to point to the significance of the case: "it was decided by a national court on principles of intergenerational equity for future generations of nationals of that national state" (Barresi 1997: 10). This, I believe, is only partially correct: appeals to future generations for ecological purposes and to preserve "environmental rights", a "nebulous concept" according to Davide, J., have far wider implication that the protection of the area's citizens, present and future, as they affect a much larger proportion of the Earth than appears, *prima facie*, to be the case (Wackernagel and Rees 1996).

From our point of view, what is particularly important is the appeal to *parens patriae* doctrine, as the minors request explicitly "protection by the State in its capacity as *parens patriae*" (33 ILM 173 194). I concluded the discussion of the rights to health and the environment of children and the preborn in *Environmental Justice and the Rights of Unborn and Future Generations* (Westra 2006) by finding the *parens patriae* doctrine as the best approach to governmental/institutional responsibility for the rights of the first generation. I noted that the doctrine progressed from initially being used purely for economic/inheritance problems, to juridical use in cases that are exclusively medical and protective. Now we note that the same doctrine is used for the protection of life and health of children and future generations, by means of the preservation of naturally "supportive" ecology.

Nevertheless, despite its explicit support of intergenerational equity and the novel use of *parens patriae*, subsequent cases did not follow in the footsteps of *Minors Oposa*. In fact, in 1997 the courts in Bangladesh took an opposite position (*Farooque v. Government of Bangladesh* 1997).

However, once again, we are faced with the responsibility of states vis-à-vis their own citizens. The Convention Against Genocide and all *erga omnes* obligations in international law seek to extend that responsibility and that solicitude to the collectivity of humankind, as Jonas proposed. In that case, *parens patriae* would have a powerful role when used in an appropriate manner, using "quasi-sovereign power"; that is, through a supranational institutional setting beyond individual states. In fact many scholars have argued for supranational protection against plunder, "development," and other harms that result from globalization, where the only supranational power is the economic one of the WTO and the IMF, as well as the stranglehold held by the US-led Security Council, where power alliances and state interests invariably supersede human rights.

Global Responsibility v. State Interests: Security Council Veto, 18 February 2011

A clear example of the dangerous supremacy-and-control can be found in the SC Veto of February 18, 2011. The Statement of Philip C. Wilcox, Jr. (Wilcox 2011) reads as follows:

> The US Veto in the United Nations Security Council on February 18, of a draft resolution demanding that "Israel cease all settlement activities in the occupied Territory including East Jerusalem", and reaffirming that settlements

> are illegal, undermines American interests in the Middle East and prospects for a two state peace.

Wilcox also remarks (a) that "negotiations over the past 17 years have utterly failed to break the impasse over Israel's occupation and settlements policies"; (b) that "the settler population has expanded from 281,000 in 1993 to 557,800 in 2010" and "the settler population in the West Bank alone grew by 15,000 in 2010"; and (c) that, despite the US's insistence that the UN should "stay out of Israeli–Palestinian peace-keeping", the UN recognized Israel in 1948 and has passed numerous important Resolutions for the protection of human rights, for that region.

In its own interest, as well as the interests of the many whose human rights are and have been violated, it seems obvious that "the US needs a new policy" for that region. This simple example demonstrates clearly why the possible application of an important and potentially useful doctrine like *parens patriae* in the international sphere would be utterly dependent upon a radical reorganization and a forceful empowering of the United Nations, ensuring its independence from the semi-colonial yoke imposed upon it by the US and its allies (that is, allowing the UN full self-determination in accordance with its own stated principles, rather than in the interests of the US).

At any rate, we have noted the possible applications of the *parens patriae* doctrine for the protection of human rights, at least regarding the citizens of a state. It is illuminating to also consider the role *parens patriae* has played in the rights of "dependent Indian nations" in the US. That role shows the power of the doctrine for both good and evil, while it also helps to understand the role it could have in a truly global setting, provided the "quasi-sovereign" power it could wield could be vested in a truly independent and principled institution.

Parens Patriae as "Sword and Shield"

> [T]he doctrine of *parens patriae* refers to the public policy power of the state to usurp the rights of the natural parent or legal guardian, and to act as the parent of any child or individual who is in need or protection, thus creating the guardian–ward relationship. (Clarkson and DeKorte 2010: 1162)

The "dual edge" of the doctrine is clearly evident when we consider its historical role regarding Indian "dependent nations" in the US. First, it was used upon the arrival of Europeans in North America as—despite the important legal and moral work of Francisco de Vitoria—European

sovereignty was established with no consultation or accommodation of Indian prior self-government. Hence, according to US law, Indian nations have no jurisdiction to prosecute and convict non-Indian men for crimes committed, for example, against Indian women, such as domestic violence, rape, and a number of other human rights breaches (Clarkson and DeKorte, 2010: 1120–1122). The authors explain:

> This gaping void in necessary and essential jurisdiction was created in the wake of the Supreme Court ruling in *Oliphant v. Squamish Indian Tribe*, 435 US 191 (1978) … This void allows non-Indian offenders to attack an Indian victim on a reservation … [and] a tribe may only respond to incidents of domestic violence if both the victim and the assailant are Indian.

Thus, the Indian tribes' status as "wards" of the Federal Government does not work in their favor, as *parens patriae* was "the very legal doctrine originally issued to subjugate Indian country" (Clarkson and DeKorte 2010: 1119). Today, and in recent times, its function is not to protect, as it should be. In contrast, the fact that Indian nations do possess some version of self-government may help to transform the doctrine from its past role as ineffective "shield" to a powerful "sword" to be used for their protection, given the "inherent limitations on tribal sovereignty" (Clarkson and DeKorte 2010: 1154).

In fact, if the US Federal Government "holds *parens patriae* authority over Indian affairs", then whatever lacks in the performance of their "wardship" can be viewed as actionable, "shirking federal duty", as "the self-appointed guardian fails to perform its essential function of guarding" (Clarkson and DeKorte 2010: 1155). It is instructive to review the early statement of the original US position, because(as we have argued) in some sense it could be viewed as parallel to the position of the UN in relation to position of the vulnerable global citizens, whose multiple plights have been reviewed in this work, from exposure to brutal, cruel torture, to many other forms of state terrorism, from deprivation of vitally necessary resources, to the infliction of health damaging forms of "development", to the ongoing neglect of UN-guaranteed human rights in most areas of the world.

In 1860, the case of *United States v. Kagama* stated the origin of the relation between Indian tribes and the US government as follows:

> These Indian Tribes are the wards of the nation. They are communities dependent on the United States for their food … Dependent for their political rights … from their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises a duty of protection, and with it the

> power. This has always been recognized by the Executive and by Congress, and by this [C]ourt, whenever the question has arisen. (*United States v. Kagama*, 118 US at 383–384)

This represents the relation between quasi-sovereign nations and a supranational power (in that sense); that is, the US Federal Government. The argument here proposed considers the relation between "we, the people" and the UN. In 1948, the Declaration of Human Rights clearly reached beyond the community of states to that of all people. As a self-proclaimed protector and defender of human rights, the UN, it can be argued, should consider that not "treaties" with Indian nations should apply, but rather the multiple conventions, declarations and resolutions emanating regularly from their organization, and also to establish a *quasi-parens patriae* relationship between the UN and its organs, and the collectivity of humankind, whereby its power (in fact its very *raison d'être*), would guarantee to humanity the duty of protection.

In that case, their failure to extend such protection would be reason enough for legal action in the International Court of Justice, not only on the part of affected peoples and communities but, in certain cases, perhaps even on the part of states/nations themselves. The UN's "shield" of guardianship should not fail, and those affected by any such failure should use their own power and "sword" to ensure justice for their own communities. We will return to this issue in the next chapter as we start by considering the mandate of the UN.

CHAPTER SIX

AN ANTIDOTE TO STATE TERRORISM? THE UNITED NATIONS AND THEIR RESPONSIBILITY, POLICIES AND PRACTICES

The Need for Justice and Respect for Human Rights (a Reprise of the Argument of the Previous Chapters)

> Many different conclusions have been reached as to whether the ICJ has powers of 'judicial review" over acts of the Security Council, which spring from quite a different perception of the nature of such a function. If what is meant is an automatic constitutional process of review with compulsory effect, both the UN Charter and the statute of the International Court of Justice are silent in this respect. (Lamb 1999: 363)

The previous chapters indicated that terrorism and grave human rights breaches seem to go hand in hand with globalization and the retreat of state sovereignty. We have also noted that states themselves, perhaps in their effort to regain lost powers and prestige, have attempted to direct their energies to novel ways of controlling and directing public policy beyond their borders, without outright conquest. They have also attempted to control international resistance to their internal and external practices, by demonizing the protesters as "insurgents" or "terrorists", and establishing "counter-policies" with total disregard of previous and current international law commitments in human rights and humanitarian law.

The phenomenon discussed in these pages is a complex one, as "state terrorism" presents itself with many faces, each one representing an attempt at justification and legality, as each mask hides the true nature of each practice. These are not wars (see Chapter 1)—at least, not the outright war of aggression proscribed by international law. At most it is a "war on terror", presented and publicized (inaccurately and illegally) as a "war of self-defense". In chapter 2, the second inaccurate assumption regarding state terrorism is laid bare: "terrorists" are not criminals. But non-state terrorism gives rise to a long list of criminal activities on the part of the state involved, and the numerous breaches of human rights that flow from state terrorism are also listed in this chapter.

Chapter 3 separates sharply the mental element, the intent and motivation of non-state terrorism, from the same aspects of state terrorism.

Essentially, the quest for self-determination, actual self-defense, and the support of one's rights to human dignity and the practice of one's culture or religion, are all rights supported by international instruments originating from the United Nations, or sanctioned by them. The pursuit of profit, the plunder of resources, and the determination to form power alliances in order to extend a nation's dominance in a specific region do not enjoy the same support in international law.

Chapter 4 discusses the less acknowledged aspects of those state pursuits and their oppressive, imperialistic policies, most often accompanied by illegal, violently repressive means, which constitute other ongoing faces of state terrorism. Chapter 5 considers what is presently available in national and international law to counter these problems, which are both blatant and insidious.

We question once against the proliferation of human rights instruments, and note a recent attempt to indict former US president Bush for the support and practice of torture of his administration. In addition, we note the continuity between different faces of state terrorism, between the covert policies directed at many Central and South American states, and the better-known practices at Guantanamo and Abu Ghraib.

Chapter 5 also considers yet another UN Resolution, condemning nuclear weapons, and concludes with a discussion of state responsibility and *parens patriae* doctrine. It is the latter that inspires the present quest for a re-examination of the UN, its principles, its purposes and mandates, and its relation with some of its organs.

The United Nations: Its Principles, Purposes and Mandates

> *Article 1(1) United Nations Charter*
> To maintain international peace and security, and to that end, to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of peace, and to bring about by peaceful means and in conformity with the principles of justice and international law adjustment or settlement of international disputes or situations which might lead to the breach of the peace.

Rudiger Wolfrum traces the legislative history of the charter (Wolfrum 2002: 33–47). He notes that the terms "peoples" refers to the populations of the member states. Similarly, the Preamble states what has been determined: "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small". Hence, at least the Preamble cites "fundamental

human rights" and the "rights of men and women" before those of nations. It is also apparent that the Charter includes clearly normative elements (Rees 2002: 15), and that it exhibits features parallel to those of the constitutions of member states. The Preamble, therefore, is "an integral part of the charter" as it outlines "some of the motives of the founders", and as a guideline to future interpretations (Wolfrum 2002: 37).

We can then be sure that all further aspects of the charter, starting with article 1, are interpreted according to the original intent of the document as a guideline. Article 1(2) returns to the principle of "equal rights and self-determination of peoples"; and Article 1(3) refers to "international problems of an economic, social, cultural or humanitarian character" as "promoting and encouraging respect for human rights" (Wolfrum 2002: 39). It is important to remember that the achievement and conservation of "peace and security" is the overarching aim of the UN Charter, without abandoning its "close link" with "disarmament, decolonization and development" (Wolfrum 2002: 41). A danger to "international peace and security" is found not only in aggression, but also in "hegemonic behaviour", with its serious threat to the "balance of power" (Wolfrum 2002: 43; GA Res. 34/103, December 14, 1979).

States, therefore, must not "threaten, or cause, a breach of the peace". Even more important, international peace and security must be maintained "in conformity with the principles of justice and international law" (Wolfrum 2002: 43). The "equality of peoples" is supported by the "right to self-determination" (including self-government), but without necessarily supporting secession (Wolfrum 2002: 44).

The right to self-determination is mentioned in Article 1(2), but also Article 55, which lists it not only as a "purpose" (i.e. mainly as a political aspect of the Charter) but as a "principle". As a principle, its binding legality is not in question (Doehring 2002: 49). It is important to examine further this principle, as it is so basic to many of the faces of state terrorism discussed in this work. That is the key issue in this chapter: to review the aims and principles at the UN in practice, especially the "enforcement" aspects of the Security Council (SC)—an organ of the UN, which therefore should be guided by these very principles, before reaching decisions on the need to sanction or to intervene in various situations around the world.

Of course, to say that the SC should be so bound is not enough, and we will examine the reality of that situation below, as various recent studies argue for the opposite position instead (Oosthuizen 1999: 549–563; Manusama 2005: 605–620).

Even in earlier times, the League of Nations considered that "entrusted powers had the duty to guide the peoples under colonial power to independence and thereby to strengthen self-determination at least in the so-called A-mandated territories" (Doehring 2002: 51). But after the new "trusteeship" of the UN (Doehring 2002: 51; *International Status of South-West Africa* 1950: 128 ff.), self-determination is to be promoted, and the very practice of the United Nations in recent times as well as the numerous General Assembly (GA) resolutions that have supported it confirm this (Doehring 2002: 52). However, self-determination was not clearly defined as—for instance—it could not be used to protect a majority who had no desire to separate from the country where it resided, or even to have its own self-government; the African black majority simply wanted constitutional rights equal to those of the white minority with whom they shared the country of South Africa (Doehring 2002: 52).

At any rate, decolonization was viewed as particularly significant in regard to self-determination, and the 1966 Human Rights Covenant, Article 1, needs to be qualified in order to refer to the treatment of a minority and their inalienable rights, if their rights have been disregarded (Doehring 2002: 54). The problem of definition also persists in the jurisprudence of the ICJ (*Western Sahara* 1975: 12ff.) and, in one case, "it stated that he right to self-determination has an *erga omnes* character" (Doehring 2002: 55; *East Timor*, ICJ Rep., 1995, p. 90).

It is necessary to understand fully the right to self-determination, because of its relevance to the motivation for present day terrorist activities. Decolonization is clearer:

> Decolonization deals with the abolition of foreign rule over a specified territory with the population distinguishable from that of the governing state. (Doehring 2002: 55)

The right to self-determination, however, applies to "an ethnic group which owing to its nationality, formed part of the population of a state, but which, nevertheless, distinguished itself from the majority of people from that state because of its special character or attributes" (Doehring 2002: 55). These definitions support "the exercise of the 'offensive' right to self-determination", but international law still lacks a "formal procedure" to ensure that these rights be respected.

Thus we have arrived at the main point of this preliminary discussion of the UN Charter; Doehring himself states, "there are cases where a complete disregard for the right to self-determination might justify the use of force" (Doehring 2002: 61). An example is the right to self-defense; that is,

as people are entitled "to defend their independence under Article 51 of the Charter, *jus ad bellum* can be lawfully exercised by the state under attack" (Doehring 2002: 61).

In addition, wars of liberation, the final goal of which is decolonization, are considered a concern of international law (Uibopuu 1982: 1405), hence a military struggle against colonialism would be justified (Doehring 2002: 61; Additional Protocol I to the Geneva Conventions, December 12, 1977, Art.1). This struggle may include "foreign domination and racial discrimination", as Doehring adds:

> However the question still remains as to the conditions under which such a fight for liberation is legally permitted … Only oppression of the very brutal kind thus constituting a severe violation of human rights would justify armed self-help. (Doehring 2002: 61)

This section on self-determination in the is somewhat inconclusive, as no specific legal instrument explicitly sanctions the right to "self-help" as Doehring characterizes it. Nevertheless, "oppression of a very brutal kind" certainly fits the situation of Palestine, among others, as one of the major motivations for terrorism. In contrast, the US-styled "self-help" (that is, their "war on terror" or counter-terrorism practices), like the earlier "counter-insurgency" policies we have discussed, do not originate from "oppression of a very brutal kind" but from other motives, such as the quest for hegemonic control, which is explicitly proscribed by the UN Charter, as we have seen.

At any rate, the argument proposed in the previous chapter (i.e. the UN's basic support and defense of human rights as an integral component of its mission) appears to be confirmed by the authoritative work of *The Charter of the United Nations: A Commentary* (Simma 2002), in which appears both the text by Doehring referred to above and commentaries by other writers referred to below. Even though the commentators acknowledge that there is no present instrument that would indicate the path, both appropriate and legal, to self-determination of peoples when other countries and alliances militate against it, at least it appears that the claim that this goal corresponds to the basic mandate of the UN cannot be questioned.

In the next section we will consider the role of the SC in order to trace, if possible, the relation between actual practical decisions reached on behalf of the international community, the UN and the SC, and the principles of the UN Charter, which the SC is supposed to implement and defend.

The Security Council and the Mandates and Principles of the UN Charter

> *Article 24*
> (1) In order to ensure prompt and effective action by the United Nations its members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility, the Security Council acts on their behalf.
> (2) In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations[.]

This article is neither clear nor uncontroversial, and the same can said about the role of the SC in general, and the legal discourse on the topic reflects both a lack of clarity and diverse sides to the debate regarding its role and function. In the *Commentary*, Jost Delbrück notes several difficulties in the wording of the Article, starting with the meaning of "primary responsibility":

> ... in principle, the organs charged with the peace-keeping function of the organization of the UN as a while, i.e. the SC and the GA, would act in parallel and concurrently, but that in discharging its peace-keeping function in a given situation the SC would only be granted priority over the GA with regard to the time of taking the first step and/or in political terms. (Delbrück 2002: 445)

Yet if, as it appears to be the case, the SC enjoys "priority" over the GA, it is indeed "designated as the politically more important organ" which, according to the intention of the authors of the Charter, it is supported to be in order to take prompt action for the maintenance of peace. However, because the SC does not enjoy priority over the ICJ, and the principles and purposes of the UN as a whole are necessarily the boundaries within the SC can legally act (despite the fact that its decisions rest primarily on "political criteria"; Delbrück 2002: 447), it is difficult to decide the SC is truly "unbound".

It cannot act "arbitrarily", and its discretion is not "completely unlimited" (Delbrück 2002: 448). Some smaller states have proposed that the SC should report to the GA, which would then hold the stronger position, but it seems that the SC is not subordinate to the GA in any way. This ambiguous situation is aggravated by the fact that (a) "its composition is no longer representative of the overall membership of the UN", and (b) it is still dominated by the so-called "great powers".

Despite the guarded language of this "interpretation", the very fact that the legitimacy of the SC is questioned, and that the author concludes that

"reform" has become an urgent "necessity", attests to the "increasing number of grave violations of human rights" (Delbrück 2002: 452) that are occurring almost daily.

Against the background of this official understanding, and given the silence and inaction on the part of the SC in relation to the long list of violations we have discussed in the previous chapters, we will turn to a fairly recent work that questions the relation between the SC and the law embodied in the UN Charter and its other organs:

> Playing the Devil's advocate, it is argued that ultimately there are no international legal limits to the UN Security Council's enforcement powers ... the conclusion reached is that the UN Security Council has unfettered powers when dealing with the maintenance of international peace and security issues. (Oosthuizen 1999: 549)

Gabriel Oosthuizen acknowledges that even if we conclude that this is the case, the very notion that a UN organ may operate *legibus solutus* (unbound by law) is problematic in itself, although it is certainly easier to agree that not all SC decisions constitute, *ipso facto*, international law (Oosthuizen 1999: 550). As we noted above, the UN has been viewed as a primarily political organization, yet its "principles and purposes" define the legal parameters within which its organs must operate.

A telling discussion arises in the *Travaux préparatoires* for the important Article 1(1) discussed in the previous section. Speaking of a proposed requirement that Article 1(1) "must conform with the principles of justice and international law" (which was eventually rejected), Wolfrum says:

> This notion, however, was rejected on the grounds that it might unduly limit the functions and powers of the SC. The view was expressed that it was important that the SC should have the power to bring about an end to hostilities without considering whether one side could legally have recourse to armed force. (Wolfrum 2002: 52)

Nor can any specific mention of the limits imposed by international law be found in other Articles which direct or explain the functions of the SC. Chapter VII, starting with article 39, outlines the heavy responsibilities of the SC:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

This difficulty and the legal implications it entails were already noted some time ago. Hans Kelsen wrote that "the purpose of the enforcement

action under Article 39 is not to maintain or restore the law, but to maintain or restore peace, which is not identical" (Kelsen 1951: 294). Since 1951, however, one can list many issues where the SC was unable or unwilling to protect or restore the peace by any means, which renders the acknowledged lack of legality that emerges even more troubling.

Oosthuizen argues that the UN members may have the right to determine whether the SC decisions were arrived at "in accordance with the UN's procedural rules" (Oosthuizen 1999: 556). However, it seems as though no one (that is, neither the members nor the GA itself) may judge whether the SC actually acts in accordance with either international law or the principles and purposes of the organization of which it is an organ.

As far the members are concerned, all treaty obligations incurred are secondary to the Charter's principles, which prevail in all cases (see Article 103). A further question may well be whether obligations to the principles of the Charter might even prevail over customary international law, should a conflict arise (Oosthuizen 1999: 558). Nevertheless, there are some rules which are absolute and non-derogatory: Oosthuizen believes that *jus cogens* norms are equally considered to be secondary, although others take the opposite position, as we shall see in the next section.

Jus Cogens Norms and the Power of the Security Council

> [A]ll discretionary powers of lawful decision-making are necessarily derived from the law, and are therefore governed and qualified by the law. This must be so if only because the sole authority of such decisions flows itself from the law. It is not logically possible to claim to represent the power and authority of the law, and at the same time, claim to be above the law. (ICJ, Rep. 110 [1998] *Lockerbie*)

In the previous section we noticed the political content of the SC powers, as well as the uncertainty of its relation to the GA, as none of the related articles of the Charter appear to shed light on the situation in a definitive way. However, the question of the interface between the mandates of the SC and the possible limits imposed upon it by *jus cogens* norms is not clear. Alexander Orakhelashvili says:

> But if a relevant norm is peremptory, then states cannot derogate from it, establishing an organization with the power to act in disregard of *jus cogens*. Therefore, *jus cogens* is an inherent limitation on any organization's powers. (Orakhelashvili 2005: 60)

Thus it is not only states but all organizations' activities that must be limited by peremptory norms and, in general, cannot claim legitimacy for their operations, if they do not observe such legal constraints (Orakhelashvili 2005: 60). As well, the ICJ and other recent jurisprudence support the fact that the SC is not "unbound by law" (Namibia 1971: 50–52; *Tadic* 1996: paras 20–28). In fact, "the view that Council is not entitled to modify legal rights, act as a legislature, impose permanent settlements has very strong doctrinal support and seems to dominate the doctrinal debate" (Orakhelashvili 2005: 61; see also Bowett 1994: 92; Graefrath 1998). But the question is whether the role of *jus cogens* may serve to modify the unclear position of the SC in regard to the GA and the Charter. This is a major point, as *jus cogens* norms exist for the protection of the international community at a fundamental level. They are the essential principles of morality and, as such, their main concern is "the safeguard of the community's interests, and it is this feature that supports their non-derogability.

It is important to note that upholding these basic norms means that the Charter's concerns indeed transcend the rights of states, as they address directly the protection of the rights of humankind:

> As Judge Lauterpacht emphasized in Bosnia, *jus cogens* unconditionally binds the Security Council. The Conceptual basis of this approach is clearly explained in the doctrine: the Security Council must respect peremptory norms because the core values protected by *jus cogens* are not derogable or waivable in the sense of *jus dispositivum*. (Orakhelashvili 2005: 63; *Bosnia and Herzegovina v. Yugoslavia* 1993; see also Doehring 1997: 99)

In contrast, Oosthuizen acknowledges the "formal recognition of *jus cogens*" but he argues that in "practical" international law "it is regarded as being more or less negligible" (Oosthuizen 1999: 559), and perhaps this is part of the problem under discussion. *Jus cogens* ought to limit the freedom of action of the SC, but most of its actual resolutions do not appear to reflect these legal and moral limits. We need to ask, what is the "substantive context" of such limitations?

Article 24 of the Charter requires that the SC should comply with the principles and purposes of the UN Charter, and the following article clarifies this relation further (Orakhelashvili 2005: 67; Bowett, 1994: 92). In most cases under the categories stated above, the substantive details support the relative limitations. For instance, Chapter VII is only legal when it is authorized, when it complies with the principle of proportionality, and when collective security is at stake (Orakhelashvili 2005: 63–64).

The right of people to self-determination is *jus cogens*, and that right might include "the permanent sovereignty over national resources" (Orakhelashvili 2005: 64). Equally solid is the status of universal human rights instruments, and the general Comment 29 of the Human Rights Committee confirms that this is the case.[1]

General Comment No. 8 (International Committee on Economic, Social and Cultural Rights) addresses the relation between such human rights treaties, as well as the Universal Declaration of Human Rights, in relation to the imposition of sanctions, according to Chapter VII (Orakhelashvili 2005: 66; ICESCR Committee, General Comment No.8 1997: para.7). Humanitarian law, like much of human rights law, has an *erga omnes* character, hence *jus cogens* should also rule the conduct of armed forces in conflict.

We can therefore conclude that, in principle, "*jus cogens* applies to the acts of the Security Council directly and immediately as distinguished from applicability through the UN Charter, or treaty interpretation" (Orakhelashvili 2005: 69).

The more obvious problems, however, are not doctrinal, but practical, as there appears to be a clear "normative conflict" between SC resolutions and *jus cogens* in many cases. See for instance the following:

> Resolution 242 called for a "just settlement of the refugee problem in Palestine". Just settlement can only refer to a settlement guaranteeing the return of displaced Palestinians, and other interpretations of this motion may be hazardous. The Council must be presumed not to have adopted decisions validating mass deportation or displacement. More so, as such expulsion or deportation is a crime against humanity or an exceptionally serious war crime. (Articles 7.1(d) and 8.2(e) ICC Statute; Orakhelashvili 2005: 80; Quigley 1998: 192)

The total failure of any effect following upon that resolution is obvious today, as gross violations of human rights, war crimes, and apartheid continue with impunity (Westra 2011b: Ch.5). Equally vague (and apparently futile) is resolution 1483 (2003) on Iraq, where the "properly constituted, internationally recognized representative government of Iraq" appears to be purely aspirational at time of writing, eight years later.

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[1] The Human Rights Committee, General comment 29 states: "the enumeration of non-derogable provision in article 4 [of the ICCPR] is related to, but not identical with the question whether certain human rights obligations bear the nature of peremptory norms ... the category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4 paragraph 2. State parties may in no circumstances invoke Article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law[.]"

In addition, any number of other resolutions regarding Bosnia (resolution 1713, 1991), Sierra Leone (resolution 1260, 1999), Libya (resolution 748, 1992) or the Former Republic of Yugoslavia (resolution 1203, 1998) include the threat of the use of force (Westra 2011b: Ch.5). It is possible, in principle, to challenge the inappropriate resolutions, but that appears to be equally problematic: both SC obligations to *jus cogens* and the probability of challenging resolutions that do not comply with *jus cogens*, or even with the principles of the Charter, seem to remain purely theoretical. We will consider this issue in the next section.

Can Security Council Resolutions Be Challenged?

> *Recalling* its relevant resolutions 242 (1967), 338(1973), 446(1979), 452 (1979), 465 (1980), 476 (1980), 478(1980), 1397(2002), 1515(2003), and 1850(2008),
> *Reaffirming* the applicability of the Geneva Convention relative to the Protection of Civilian Persons in time of war, of 12 August 1949 to the Palestinian territory, including East Jerusalem, and other Arab territories occupied since 1967,
> *Reaffirming* that all Israeli settlement activities in the Occupied Palestinian Territory, including East Jerusalem, are illegal and constitute a major obstacle to the achievement of peace on the basis of the two-state solution,
> *Condemning* the continuation of settlement activities by Israel, the occupying Power in the Occupied Palestinian Territory, including East Jerusalem, and all other measures aimed at altering the demographic composition, character and status of the territory, in violation of international humanitarian law and relevant resolutions[.] (United Nations Security Council, 18 February 2011/24)

This SC resolution, vetoed by the US, confirms the conclusion of the previous section about the vagueness of the SC's mandate. Even more important, it suggests a further, more serious problem regarding the SC's obligations: the problem of its culpable omissions, which is additional to the resolutions that recommend the illegal use of force. It seems that what the SC does not recommend or prescribe is even worse than what it does, from the standpoint of its compliance with the principles of the UN Charter.

At a glance, the number of relevant resolutions that have not made any impact on the ground is staggering. As well, if the overarching purpose of the UN, as expressed both in the Charter and in the other instruments which represent its policies, is the elimination of conflict and generally "keeping the peace", then it seems that omitting a resolution that offers an outright condemnation of illegal acts that have been supporting an ongoing conflict ought to fit precisely with the principles of the UN. Thus,

while SC resolutions that threaten force or ask for sanctions, which often entail severe deprivation for the population of sanctioned countries, offend *jus cogens* and the principles of the Charter, surely omitting to "blow the whistle" on the ongoing illegalities and war crimes on the part of Israel does both as well.

These vetoes condemn Palestinian citizens to remain targets of ongoing crimes against humanity, war crimes, the crime of apartheid, illegal occupation, and the deprivation of the basic resources needed for the support of life. Those who impose those conditions do so with impunity, as they ignore the law as well as the strong opinion of the international community, witness this last vetoed resolution.

However, it bears repeating, whatever might be the case regarding the scholarly legal opinions regarding this issue, the *practical* options lag far behind. The means available include "protest" (Angelet 1998); hence, once more in principle, protests originating from many states might convince the SC to modify its stance. But, as we can easily see in the vetoed resolution cited at the start of this section, a large number of states convinced of the importance of a resolutions is simply not enough, as the "real powers" (the US, UK, Germany and France) are not in their number.

Hence, *pace* Orakhelashvili, it is not the *quantity* of protesting states but the *quality* (that is, who they are) that is the only determining criterion. Another possibility might be the "refusal to carry out" the SC decisions, as states might "refuse compliance especially if a resolution offends against *jus cogens*" (Orakhelashvili 2005: 85), and Doehring, for instance, argues that "the Council is under a duty to consult a state that is unwilling to carry out the resolution conflicting with *jus cogens*" (Doehring 2002: 108–109).

Finally, again only in principle, it might be possible to have a "judicial review" of a resolution, although the only cases that might have come even close to such an event have been few, and date from some time ago (*Lockerbie* 1998; *Certain Expenses* 1962; and *Namibia* 1971). Yet, if the SC can be considered *not* to be *legibus solutus*, far more important would be the presence of mechanisms to ensure that protests against its constant inaction, or judicial reviews to rectify these omissions, might be available to those affected by the results of inaction and omissions. At this time, it seems as though only UN-appointed rapporteurs and the international media may bring these outrages to the attention of the international community. Rapporteurs have no power, and some are not even allowed in the country at issue, to judge first-hand the extent of the violations of human rights that occur. A case in point is the recent fate of Richard Falk, who was

detained at the airport in Israel, then flown back and not allowed to complete his mission, in flagrant disregard of the UN's mandate.

In conclusion, the purpose of this work is a complex one: at the root, of course, it is the effort to lay bare the true nature of state terrorism, beyond the masks that hide it. But it is not sufficient to research and list such grave problems, without any attempt to propose possible solutions. In fact, removing the masks of which we spoke discloses the gravity of a situation where, it seems, neither the UN Charter (some term it the Constitutions of the International Community) nor the most fundamental principles of law and morality can be assured of respect and application to various global situations.

What emerges is that grave problems arise from a geopolitical situation that remains unchecked and unchanged, governed from the standpoint of legal regimes where neither principles of law nor a solid normative framework appear to rule. Thus, it is necessary to discover whether the powerful organizations that may mandate the necessary changes to redress the effects of state terrorism can be depended on to perform their protective work. Even more fundamentally, we need to probe the very role of the UN, to discover what might be its responsibility in regard to those affected by state terrorism in its multiple manifestations.

The discussion of this section has indicated that, unfortunately, the organization charged with ensuring peace and cooperation among nations, hence with the protection of the basic rights of the human collectivity, might not be "unbound by law", but tends to act in the interests of the most powerful states, rather than to enact and enforce its own mandated purpose. This leaves the UN with a responsibility it may not be able to meet within the presently existing forms of global governance. I have discussed this question in more detail elsewhere, proposing various ways of correcting the moral and legal *lacunae* present between the UN and its organs (Westra 2011a).

It is not our purpose at this time to return to that discussion. Rather than confronting institutional and governance failures prevailing today and proposing practical changes, the question I would like to raise is whether, at least in principle (thus returning once again to theory), the ultimate responsibility of the UN might lie directly to the collectivity of humankind. Before attempting to answer that question, the 2004 report entitled *A More Secure World: Our Shared Responsibility* (Report of the Secretary General's High-level Panel on Threats, Challenges and Change, UN Doc. A/59/565, henceforth UN 2004) should be discussed, and that will be the topic of the next section.

"A More Secure World: Our Shared Responsibility"?

> The United Nations must make better use of its assets in its fight against terrorism, articulating and effecting a principled counter-terrorism strategy that is respectful of the rule of law and universal human rights. (UN 2004: Foreword by United Nations Secretary-General Kofi Annan, viii)

This report was written in 2004, and it raises some of the questions we have been asking in this work. Part I, "Towards a new security consensus", starts by stating the reason for the creation of the United Nations in 1945; that is, "to save future generations from the scourge of war". It then adds that even beyond that, the present threats have multiplied since then, as they now extend to:

> … poverty, infectious disease and environmental degradation; war and violence within states; the spread and possible use of nuclear, radiological, chemical and biological weapons; terrorism, and transnational organized crime. (UN 2004: 1)

The report also acknowledges that no state can stand alone and that collective strategies are needed to match the collective responsibility we bear. However, it is hard to understand how we can share responsibility for threats and ongoing breaches of human rights while the people of the world are, for the most part, powerless to act to initiate the changes they believe in, even in democracies such as Canada, for instance.

As well, given the lack of transparency and the misinformation that reign in all areas of policies originating from powerful states and their allies, the tasks of responsibility are rendered so onerous as to be almost impossible. Those who believe that responsibility requires clear and complete information are treated like criminals or worse (see Private Manning and Julian Assange of Wikileaks fame).

The importance of prevention regarding the six clusters of threats listed in *A More Secure World* presents another major challenge today, as their causal origin is neither sought nor faced in this report, aside from a few generalities about poverty, migrations, and environmental degradation, which remain less than enlightening, given their lack of specificity, or any effort to list and understand the causes explicitly. In fact, the starting point of this report acknowledges that, in order to ensure preventive action for security the first thing we need is "development".

Not only is this a false starting point but, by this choice, the report manifests a deep ignorance (or, as some might say instead, a "willful blindness") to the reality on the ground, as they propose as a "cure" one of the major causes of the many threats listed, especially those in the first

grouping: poverty, infectious disease and environmental degradation. In Chapter 4 I discussed many of the faces and masks of development, and their deleterious effects upon the human rights of people.

Thus, until the interface between development and globalization, and the harmful ecological footprint that ensues, based on the unsustainable emphasis on "growth" (Rees and Wackernagel 1996), are openly acknowledged and incorporated into public policy and global governance, it will be impossible to move forward to improve the effectiveness of the UN. A "more effective United Nations for the twenty-first century" (UN 2004) is indeed needed to address the following issues:

- The General Assembly has lost vitality and often fails to focus effectively on the most compelling issues of the day.
- The Security Council will need to be more proactive in the future. For this to happen, those who contribute most to the Organization financially, militarily, and diplomatically should participate more in Council decision-making, and those who participate in Council decision-making should contribute more to the Organization. The Security Council needs greater credibility, legitimacy and representation to do all that we demand of it.
- There is a major institutional gap in addressing countries under stress and countries emerging from conflict. Such countries suffer often from attention, policy guidance and resource deficits.
- The Security Council has not made the most of the potential advantages of working with regional and sub-regional organizations.
- There must be new institutional arrangements to address the economic and social threats to international security.
- The Commission on Human Rights suffers from a legitimacy deficit that casts doubts on the overall reputation of the United Nations.
- There is a need for a more professional and better organized Secretariat that is much more capable of Concerted action. (UN 2004: 4–5)

Given the number and the gravity of the threats that face us, the report acknowledges that "the United Nations has exchanged the shackles of the Cold War for the straightjacket of Member State complacency and Great Powers indifference" (UN 2004: para. 13). It also acknowledges the vast difference between the world in 1944 and the world in 2005. However, as far as the threat of terrorism is concerned, the report says it is facilitated by new technologies, but does not explore its causal roots: *why* it happens increasingly everywhere is a question that is not even asked; hence, no answer is attempted.

Referring to 9/11, the report says, "We have yet to understand the impact of these changes" (UN 2004: para. 16), but does not ask why 9/11 and related terrorist threats happen. In Section II, the report addresses the question of rapidly spreading infectious disease (para. 19), and the reasons for these newfound "threats without borders" is well understood. The same does not apply to terrorism, although at para. 22 "The link between poverty and civil war" is detailed; but somehow the further link to the desperation of people fighting for survival as individuals and as peoples, and for their dignity and Charter-supported rights, is not acknowledged. Yet the Report says:

> Collective security institutions have proved particularly poor at meeting the challenge posed by large-scale, gross human rights abuses and genocide. This is a normative challenge to the United Nations: the concept of State and international responsibility to protect civilians from the effects of war and human rights abuses has yet to truly overcome the tension between the competing claims of sovereign inviolability and right to intervene. (UN 2004: para.36)

This paragraph, coupled with para. 39, which admits "an unwillingness to get serious about preventing deadly violence" (while para. 43 adds, "When the institution of collective security responds in a ineffective and inequitable manner, they reveal a much deeper truth about which threats matter"), opens the door, it would seem, to the much-needed radical reforms of both the UN in general and the SC in particular.

At any rate, the report "considers that current global structure are woefully inadequate for the challenges ahead" (UN 2004: para. 56; Manusama 2005: 608). Manusama notes that:

> Most of the recommendations rightfully try to target underlying causes, including the scarcity of natural resources, violations of minority rights, and the proliferation of small arms and light weapons. (Manusama 2005: 10; see also UN 2004: paras. 91–97).

But I have seen little evidence of any quest for specific causality in relation to any of the major problems the report cites. This is the best it can offer:

> War and ongoing instability in Iraq and Palestine have fuelled extremism in parts of the Muslim World and the West. This issue is complex and multi-dimensional and defies simplistic categorization. (UN 2004: para. 75)

The paragraph continues by referring to "extremist groups" who will have the ability to foster perceptions within the west and the Muslim world of cultural and religious antagonism. But this is not really a serious, in-depth effort to seek out the causes of war, instability, and "antagonism" in

Palestine and Iraq; how about outlining the illegal aspects of the situation, especially in Palestine? Why not mention explicitly the illegal settlements, the ongoing and illegal occupation, despite the efforts of the international community to see change? And why describe those who are antagonistic in the West's position as "extremists"? This view is shared by a significant part of the international community, especially an overwhelming majority of academics in universities, who organize "Israeli apartheid weeks", demonstrations, and even put together expeditions to sail to Palestine in the effort to bring aid, assistance and support to the oppressed Palestinian people: hardly a coalition of "extremists".

Perhaps it is hard to find explicit material attempting to answer the questions we have been raising in this work. Therefore we might do better to seek out directly the questions we want answered in the report.

Four Questions: Answers in the 2004 Report?

We need to find answers for the main issues we are attempting to clarify:

1) Is there a better definition of terrorism than the ones we discussed in Chapter 1?
2) Is there a clear definition of self-defense?
3) What can be done about the flawed performance of the SC in relation to terrorism and other recent "threats"?
4) What is the role and the responsibility of the UN?

Before discussing terrorism as "The Threats we Face", *A More Secure World* addresses the question of "public health defences" (paras. 142–144), but only from the standpoint of health care, rather than from that of health itself. It is the latter that is the focus of the commitment of the World Health Organization for everyone in the world, according to their latest report (WHO 2009). It is not simply a question of supporting "the work of the WHO investigations and response coordination" after the fact, after an event involving biological threats of pandemics involving infectious diseases. It is part of what we have described as the effect of a face of state terrorism, through hazardous and unconsented "development" (see Chapter 4).

Both environmental and health-related harms go far beyond the spread of new or returning infectious diseases, or the use of some chemical substance. Those infectious diseases, for instance, spread through vectors that are sensitive to climate change and are facilitated through modern

travel. The latter is a choice, to be sure, but the former is not. Paragraph 144 ends as follows:

> The Security Council should consult with the WHO Director-General to establish the necessary procedures for working together in the event of a suspicious or overwhelming outbreak of infectious disease. (UN 2004)

But neither public health nor environmental degradation are threats that should be handled after the damage has occurred, as most often it is either much more costly to remedy after it occurs, or the damage might even be irreversible.

This is also the case with terrorism: instead of specifying more and more complex procedures at borders and airports, and complex regimes in international law, the first step might be the sincere attempt to redress the inequities and illegalities that foster resentment, and eventually anger and desperation, together with a deep distrust of international instruments and courts. Such an approach is also parallel with the *jus ad bellum* that renders a war legal: every attempt should be made to settle differences peacefully to reach an understanding before turning to the use of force. Just as in the case of environmental or public health harms, action that prevents the harms is far less costly in economic terms, as well as in human lives.

In any case, para. 145 states:

> Terrorism attacks the values that lie at the heart of the Charter of the United Nations respect for human rights; the rule of law, rules of war to protect civilians; tolerance among peoples and nations; and the peaceful resolution of conflict. Terrorism flourishes in environments of despair, humiliation, poverty, political oppression, extremism and human rights abuse; it also flourishes in the context of regional conflicts and foreign occupation[.] (UN 2004)

Here we see a summing up of much of the argument for the motivation of terrorism advanced in the earlier chapters of this work. If these are basic values in the Charter, then it would seem obvious that the prevention of terrorism entails the prevention or redress of these conditions, most of which arise from illegal actions, so that part of the fault for the spread of terrorism would seem to lie with the UN and the SC's failures to protect these values or prevent/mitigate the illegal actions that give rise to the despair, humiliation and political oppressions that go hand-in-hand with human rights abuses.

Para. 148(a) proposes "Dissuasion, working to reverse the causes or facilitators of terrorism". But the emphasis continues to be on "better

counter-terrorism instruments", rather than the origins and etiology of terrorism. However, the SC is asked "to proceed with caution" (para. 152) regarding the maintenance of "terrorism lists" and the "absence of review or appeal for those listed": in any case, the "challenge of prevention" is not met by these directives, while the justified anger of the targeted groups from which most terrorist acts originate can only be fueled by such vague and incomplete attempts to ameliorate the current situation.

However, the report acknowledges that "Achieving a comprehensive convention on terrorism, including a clear definition, is a political imperative" (UN 2004: para. 159). As well, it recognizes that a consensual definition stumbles on two major issues: (1) that the definition of terrorism should also include states' use of force against civilians; and (2) that people under foreign occupation have the right to resistance. For the latter, it adds that "there is nothing in the fact of occupation that justifies the targeting and killing of civilians" (para. 160).

The language of para. 160 is strange indeed, especially as the UN and the SC tolerate without sanctions the ongoing "targeting and killing of civilians" in Palestine, on the part of Israel, as well as the current (2011) massacre of "insurgents" against the Libyan dictator Muammar Gaddafi. A consensus will not be reached until the selective focus of both the UN and the SC changes to a more even-handed treatment of peoples and issues, and the crimes against humanity perpetrated in the name of counter-terrorism are unmasked and punished in the appropriate courts.

The second question we raised is related to this argument, as the rights to self-defense of occupied and victimized people should help to clarify the importance of the second "stumbling block" cited in the report. The discussion of Article 51 reiterates the "restrictive" understanding of self-defense, as a state, believing itself to be under threat, can only attack if "the threatened attack is *imminent*, no other means would deflect it and the action is proportionate" (UN 2004: para.188).

The report also adds that the burden of convincing the SC to permit military action lies with the threatened state, and if the SC is not convinced then other strategies may be pursued, as "unilateral preventive action" is a grave danger since "allowing one to so act, is to allow all" (UN 2004: para. 191). Part IV, "A More Effective United Nations for the Twenty-First Century" views the immediate review of the SC as a major challenge: it should be changed "to increase both the effectiveness and the credibility of the Security Council, and … to enhance its capacity and willingness to act in the face of threats"(UN 2004: para. 248). Paragraph 249 adds details

about the required reforms, including bringing into the decision-making process countries "more representative of the broader membership, especially of the developing world" (UN 2004: para. 249(b)). The aim is clearly to "increase the democratic and accountable nature of the body" (UN 2004: para. 249(d)). But both increased representation and even a proposed system of "indicative voting" can do little or nothing to modify the veto powers in the hands of a so-called "great power", intent on pursuing its own interests with little regard for those of other state and peoples, let alone for the principles and purposes of the UN and its "normative framework".

Some provisional and aspirational answers have emerged from this UN report, but it is difficult to maintain any optimism at this time, in the light of the lack of progress in the last seven years. In 2011, many of the aspirations expressed in the report have not come to pass. In fact, if anything, the situation is much worse now than it was at that time, as an illegal war was waged by Israel in 2009–2010, in the face of repeated reports of specific UN rapporteurs and of the whole oft-repeated "normative content" of the UN resolutions and declarations.

In 2011, despite pleas from the US and Europe, Israel remains totally unmoved and defiant, as it vows to continue with its illegal settlements. Perhaps it might seem one-sided and even the expression of bias to focus so much as we have done on the situation in Palestine. But, given our topic and the emphasis on the Muslim aspect of terrorism the West cultivates, it seems appropriate to consider primarily a situation that remains, whatever the fine words expressed by the UN report, a festering sore of human rights abuses, illegality, apartheid, war crimes and crimes against humanity.

We have attempted to answer the first three of our four questions with some of the material emerging from the report. But the final question is not directly addressed there, and it requires a much broader approach. We will consider that issue in the next section.

The Role and Responsibility of the United Nations

> From a time when individuals were barely "subjects" of international law, governments now have many affirmative obligations toward all persons within and outside their territory, during war and peace; and the importance of these obligations has served to raise the violation of some of them to include criminal responsibility of offenders. In a word, the accountability of individuals has grown with the liability of governments. (Ratner et. al. 2009: 9)

We must start by considering the very nature of responsibility or accountability. According to Ratner, individual responsibility or accountability concerns "the various targets" of human rights violations (or "atrocities", a term he prefers to the one used in this work, "state terrorism", which includes crimes against humanity, crimes against peace, war crimes and the like). This may be "individual, group or state responsibility" (Ratner et al. 2009: 16). In addition, the nature of legal responsibility may be either civil or criminal.

We have been considering primarily "group" and "state" responsibilities, but, as we discuss terrorism, both responsibilities are essentially framed by the requirements of international law and its "constitution", represented by the Charter of the UN. Since the Nuremberg Trials, criminal responsibility can be invoked for "acts against human dignity … crimes against peace, crimes against humanity, and war crimes" (Ratner et al 2009: 16). In fact, Article 9 of the Nuremberg Charter declares that "groups or organizations" could be criminally responsible (Ratner et al 2009: 16).

State criminal responsibility is harder to define as it is judged to be difficult to separate "non-criminal violations of international law" or "delicts" from crimes as specified in the ILC 1980 Draft on State Responsibility, especially Article 19 (Report of the International Law Commission to the General Assembly on the Work of its Thirty-Second Session; Weiler et al. 1989).

But what we are trying to assess at this time is whether there is any clear-cut responsibility on the part of a supra-national organization (that is, the United Nations itself). It is significant that almost all that we have discussed points to a specific fact: the UN is directly responsibility for the people it represents. This responsibility is only partially diminished by the responsibility the states bear toward their citizens. The most grave obligations based on *jus cogens* norms are imposed through state constitutions (for instance the Convention Against Genocide, the Convention against Racial Discrimination or the Convention Against Torture), but they all originate from the UN, and ultimately it should monitor their application through its organs.

Ratner refers to "responsibility (accountability)" as though the two concepts were identical. Perhaps it is so in law, but from a conceptual point of view, accountability follows responsibility, and sometimes the two are not vested in the same entity. Thus the UN should be viewed as "responsible" to all the peoples, but it might need still an institution to which it is accountable, in case the responsibility's obligation has not been fulfilled.

For example, the UN is not responsible for the attacks on the Palestinian people: Israel bears that responsibility. But the argument of these pages suggests that the SC, thus the UN, should be *accountable* to the Palestinians, given its principles and purposes, and the mandate with which the SC has been entrusted. But if the UN is thus almost identified with the SC, and if the GA can neither control nor restrain the SC when its resolutions or its omissions offend *jus cogens*, then perhaps what is required is another judicial entity (perhaps the ICJ) to perform that service, although we must admit that that Court is as much a part of the UN as the SC is; hence the present impasse.

The problem lies with *jus cogens*-based obligations, when citizens of various states everywhere perceive grave problems and (as noted) have the right to protest in most countries, although in some countries there might be serious repercussion from such demonstrations. The problem remains because such demonstrations most often remain an end in themselves, as very little ensures the forceful expression of popular beliefs, or reactions are limited and delayed.[2]

For instance, most G8 and G20 meetings face large and forceful demonstrations, which make absolutely no difference to the *status quo* and the functioning and goals of those meetings. Most of the world protested against the Iraq war to no avail, and the demonstrations against Israel's treatment of Palestine are almost a weekly event in the West. But none of these protests are taken seriously, and both the US and Canada do much to undermine the work of activists and outspoken academics who address these issues in their courses, in public forums, or in the press.

On May 25th, 2001, Richard Falk delivered a memorable Plenary Address at a conference on "the future of global governance", entitled "Law, Legitimacy and Globalization: Crises of Global Governance". Two points he mentioned were particularly relevant for this work. The first was the emphasis on the role of "soft power", as he termed it (i.e. the peaceful campaigns of boycott and divestment against Israel, or the presence of humanitarian aid ships for Gaza, which Falk viewed as the continuation of peaceful resistance, in the spirit of Gandhi and the resistance against apartheid in South Africa).[3]

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[2] See for instance the UN Security Council Resolution 1973 (2011) on Libya, coming to be after interminable debates, while the freedom fighters in that country were ruthlessly and systematically killed, and their resistance eliminated.

[3] See www.huffingtonpost.com/robert-naiman/why-we-must-sail-to-gazab6861751.html.

The second point is what Falk described as "dormant laws and principles", and I will return to that point in my concluding words.

The present question is, does the UN fail in its protective role when the human rights abuses flagged by these protests are not even taken to be worthy of a SC resolution against the violation, let alone some proposed redress? In some cases, a resolution is issued by the SC, but neither monitoring nor serious change follows. If the UN's mandate is the protection of all "the people", then it would seem as though, at least in regard breaches of *jus cogens*, generating *erga omnes* obligations, the UN might have a responsibility that exceeds that of single states.

Jus Cogens Norms and *Actio Popularis:* The Interface

> The violation of an *erga omnes* obligation may justify claims without the nationality link. This issue forms a part of the broader problem of the legal interest of an applicant State, in particular the admissibility of *actio popularis*. (Orakhelashvili 2008: 518)

Actio popularis is considered specifically by states, although most are reluctant to appeal to it. Orakhelashvili traces the history of the notion from its earliest use:

> the court, in its 1962 judgment understood *actio popularis* as a natural consequence and continuation of the Mandate provisions; the nature and the content of the oblations enshrined in the Mandate required the recognition of *locus standi* of the non-directly affected States. (Orakhelashvili 2008: 522; see also Dugard 1973)

The question is whether a state can sue in the public interest "in the absence of a direct legal interest" (Orakhelashvili 2008: 518), and in 1966 there appeared to be no clear admission of the existence of *actio popularis* in international law. But the Court reversed its position:

> In *Barcelona Traction* the Court singled out obligations *erga omnes* assumed not merely towards the individual states, but also towards the entire international community. (Orakhelashvili 2008: 522; Ragazzi 1998: 212)

Even more relevant than its presence in *Barcelona Traction* is the Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Arechago and Waldock in *Nuclear Tests* (Orakhelashvili 2008: 524; Joint Dissenting Opinion 1974: 369–371), as *actio popularis* appeared to be particularly relevant in that it referred to the wide-ranging deadly pollution arising from such tests.

In sum, *actio popularis* is viewed as a "substantial and inviolable link between the substantive law and procedural capacity" (Orakhelashvili 2008: 524), although several other international instruments appear to support the right to sue in the public interest (Orakhelashvili 2008: 526). Of course, because of the link between obligations *erga omnes* and *actio popularis*, although it is worthy of note that many international instruments refer or allude to it, it is not necessary that they should do so, as *erga omnes* obligations do not derive their peremptory character from treaties, but are such even without other treaty-based mention.

However, in our case, the problem remains: a state may appeal to the ICJ, but what can it do when the GA and the SC remain unresponsive? Even more problematic, what can a community, a minority, or even a collective do in such cases? Our present focus is on the UN's responsibility before anything happens that requires applying to the ICJ or the ICC for redress, and—most of all—its responsibility in principles (as we noted the ongoing failures of both the GA and the SC to step in, in cases of ongoing breaches of *erga omnes* obligations).

What becomes increasingly clear is that, although there is support for *actio popularis*, as there is for *erga omnes* and *jus cogens* both as doctrines in principle and in some of the jurisprudence of the ICJ, practical applications, especially recent ones, are not easily found. This problem accompanies *jus cogens* in its conflict with many SC resolutions, as Orakhelashvili adds:

> To understand whether a decision of the Council offends against *jus cogens* requires ascertaining the intention of the Council behind a given decision through the careful analysis of the text of a resolution, to find whether, in acting or failing to act, the Council intends to derogate from a peremptory norm or its effects, or legitimate the non-compliance with it, and then judging the established intention in terms of the applicable peremptory norms. (Orakhelashvili 2008: 459)

The Accountability of the United Nations and Its Organs

> Quis custodiet ipsos custodes? (Juvenal)

The United Nations (together with all its organs) is an organization, rather than an individual; hence it is particularly hard to ascribe responsibility to it, and even harder to hold it accountable, as it represents the last word in world law at this time. It shares the former difficulty with all other organizations, whether commercial or government-based. Yet, as I have argued

elsewhere (Westra 2004), given the violent nature of the harms under consideration, when violence of some sort is perpetrated (or—as Ratner has it—when "atrocities" are committed), thus resulting in grave breaches of human rights, it may be helpful to seek some precedent in domestic and criminal law. The United Nations is responsible in two ways, for both of which it should be held accountable for its failures, even though neither the UN nor its organs are the ones committing the crimes/atrocities of which we are speaking:

1) First, the UN is responsible for the general legal infrastructure it supports, for the acts of its organs, and for the general "climate" that fosters the activities of what we have termed state terrorism, as well as the impunity with which those acts are perpetrated.
2) Second, the UN has willingly and explicitly taken the role of protector, almost of "guardian", of the people of the world collectively. Any role that is undertaken by an individual or by an organization may be carried out more or less competently. The question in this case is, if the UN has stated its intent to carry out its purpose according to the guidelines it has designed, what should follow if these purposes are not carried out as well as they could have been, and if the UN is not fulfilling its role in an equitable and satisfactory manner?

The first of these two points will be addressed in this section. The answer to the question in the second point will be addressed in the subsequent section. A Canadian Amendment to the Criminal Code will be a useful tool to consider for both points, as we try to discover how to approach such a thorny issue. Although the former Bill C-45 (now an Act to Amend the Criminal Code, SC 2003, Section 21.1) has not been used in the jurisprudence in the last eight years, at least it exists as more than theory, and it does address a major issue of corporate/organization governance, as we shall see below.

Corporations were originally formed and given a juridical personality separate from that of the aggregate of their officers, shareholders, employees, and agents for one reason only: to ensure their economic protection, thus to encourage investment in their activities. It was never the intention of the legislators and the courts to declare that corporations would be granted a new form of immunity from criminal prosecution, similar to the immunity enjoyed by the representatives of states and those involved in activities on behalf of various nations. Thus criminal prosecution should equally be available when the accused is an organization (that is, a group joined in a common purpose) as well as a corporation. The example given

in Bill C-45 is that of a municipality. The substitution of "organization" for "corporation" in several sections of the Criminal Code is one of the objectives of Bill C-45.

Another main objective of Bill C-45 is to address the question of mens rea, which posed a serious difficulty for any court attempting to impose criminal liability to an organization. The inability to ascribe the requisite form of criminal intent on the part of corporations and associations ensured that a wide array of regulatory breaches for workplace safety and public health or environmental offences, would be viewed and dealt with as "quasi-crimes", rather than as the true crimes they are. Therefore, it might be useful to review briefly the actual changes Bill C-45 introduces in the Criminal Code, to show precisely where the bill does not go far enough to provide grounds to redress the wrong it clearly acknowledges by the changes it implements. I will also propose a possible international effect resulting from the implementation of the bill.

Bill C-45 and the Canadian Criminal Code

The main changes effected to the Criminal Code are as follows:

S1 (1) extends the definition of every "one", "person" and "owner" to include "an organization." In turn, "organization" means,

(2)(a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or

(b) an association of persons that

(i) is created for a common purpose,

(ii) has an operational structure, and

(iii) holds itself out to the public as an association of persons[.]

Here and in the amendments to Section 22.1, Bill C-45 ensures that a wide array of actors within an organization may be viewed as responsible for an offence, "whether by act or omission" (Section 22.1(ii)); it also ensures that, if the prosecution is required "to prove fault—other than negligence" (Section 22.2), then senior officers or representatives may manifest the requisite "mental state" also by "(c) knowing that a representative of the organization is or is about to be a party to the offence, or does not take all reasonable measures to stop them from being a party to the offence." The Bill also adds a Section (217.1) to define "the legal duty to take reasonable steps to prevent bodily harm", on the part of anyone who is in the position to direct and order how work is to be done.

In addition, several sections deal with making or causing to be made false statements with respect to the financial conditions of the organization (Section 362 (1) (c)), or, in general, committing fraud or causing it to be committed. For the sake of the present purposes, I will limit my observation and my discussion to the aspects of Bill C-45 that are directly relevant to this work, thus to crime related to human rights rather than white collar crime in general.

Bill C-45 and Corporate/Organizational Crime

The expanded definition of organizations is of cardinal importance in cases where the authority or other responsible senior party, or those directed by the senior individuals, who "depart markedly from the standard of care" (5.22.1) that could reasonably be expected, could be found to be Provincial or Federal officials. There is no case law yet to determine whether this interpretation might eventually be part of the positive developments arising out of Bill C-45, and of course "depart markedly" from the standard of care does not define the "standard of care" itself, nor precisely what a "marked" departure from a non-specified form of behavior might be; in fact it may be the case that the standard of "due diligence" (also largely undefined) that has been the expected test is not different from the standard included or implied by the changed wording of Bill C-45.

Another important point worthy of attention is that after Section 718.2, the Act now provides Section 718.21 on "organizations" and the "factors regarding the offence" that must be taken into consideration in sentencing. Some of the most interesting of these factors, in relation to our main concern, are:

(a) any advantage realized by the organization as a result of the offence;
(b) the degree of planning involved in carrying out the offence, and the duration and complexity of the offence;
[...]
(g) whether the organization was-or any of its representatives were -convicted of a similar offence or sanctioned by a regulatory body for similar conduct;
[...]
(j) any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.

Briefly, the first factor cited shows that economic advantage renders the offence graver; the second parallels the premeditation aspect as it renders a homicide committed by an individual a murder instead; planning may also include "conspiring", something that has become a crime in itself according to the Nuremberg Charter. Previous crimes are now admissible at sentencing: (g) recognizes that an organization does not require the same constitutional (Charter) protections as does the individual offender, at least implicitly. The commitment not to repeat the crime (j) also allows a degree of official intervention that is not possible with individual persons.

We can now consider the major difficulties present in the Criminal Code of Canada that Bill C-45 is intended to correct. The discrepancy between the consequences of organizational crime and the way it was treated in law is the "fact" that intent is hard to prove when the crime is not the "discrete, wrongful conduct of individuals" (Legislative Summary, p. 3), whereas the "identification theory" model of the corporation appeared to be insufficient to explain the responsibility of directors and officers for serious crimes.

In the Netherlands, Article 51 of the Criminal Code states that "offences can be committed by human beings and corporations" (Field and Jorg 1991: 157), and these offences include "battery and involuntary manslaughter", as for instance in the Dutch Hospital Case (1987).

The root of the problem is that criminal liability requires both *acts reus* and *mens rea*, thus

> … using the rule of vicarious liability, corporations were sued in torts for acts of their agents and servants. However, when there were civil wrongs, in which malice or motive were involved, the view of the court was that "no action could lie"—i.e. there is no cause for action because it is impossible for a corporation to have malice or motive. (Frenkel and Lurie 2002: 466)

The work of Peter French on CID Structure (French 1979, 1984), however, shows the contrary to be true. In brief, because corporations are viewed as making rational decisions through their decision-making structure, and because they are only juridical, not natural persons, corporations (now organizations) cannot lay claim to any human failing; that is, neither psychological nor emotional, nor yet any actual extenuating circumstances, could possibly make a difference to their implemented rational choices.

In the case of these legal persons, rationality therefore excludes both emotions and willful blindness as components of the reasonably expected consequences of their behavior. Thus, the corporate institutional "limited

liability" should not protect individuals within the organizational milieu from criminal and moral liability (Frenkel and Lurie 2002: 467). Thus criminal liability may be ascribed to an organization, but without eliminating individual liability. An individual who is convicted of a *mala per se* crime may be sentenced to imprisonment (Frenkel and Lurie 2002: 486); therefore the new additional requirement introduced by Bill C-45 (that is, the consideration of organizational criminality as well as that of the individual) will be basic to the sentencing of corporate organizational crime.

Some Consequences of Bill C-45

The best result of this bill is that it encourages an integrated approach to organizational crime: both the general, intended activities will be stigmatized by

a) heavy economic penalties;
b) disclosure (and sentencing considerations) of prior offences;
c) continued monitoring of corporate/organizational activities (comparable to the monitoring of parolees); and
d) full criminal prosecution and jailing of all those responsible not only for the decisions and execution of the crime itself, but also for the imposition and fostering of the corporate culture that permits (and in fact encourages) such activities.

Victor Ramraj says:

> We can consistently affirm the significance of the corporate criminal liability while denying both that corporations ought to be subject to the same principles of liability as individuals, and that constitutional rights ought to apply with equal vigour to corporations. (Ramraj 2001: 30)

Admittedly, Bill C-45 neither states nor defends any great moral or legal principle. It promotes no immediate supranational or normative response to ecocrime. Yet we cannot discount it as "useless", as some characterize all efforts to criminalize wrongful corporate activities. The new law does propose some substantive differences in our approach to corporate crime, and it supports some significant procedural improvements in Canadian law, and (perhaps indirectly) in international law as well.

Perhaps the most significant aspect of former Bill C-45 is the inclusion of the "corporate culture that permits and in fact encourages such activities". The institutional "culture" that encourages and fosters globalization

with its multiple harms to human rights, as well as supporting the "infallibility" of the US vetoes in the SC and its illegal practices in the "war on terror", is the source of most of the atrocities that must be eliminated, to give redress to the human rights breaches that continue. However, none of this goal can be realized without a radically changed UN "culture".

UN Responsibility and Accountability, and the *Parens Patriae* Doctrine

> Whatever happens to these two armies … the "peoples" on both sides must be accommodated at the end. The central principle of *jus in bello*, that civilians can't be targeted or deliberately killed, means they will be—morally speaking, they have to be—present at the conclusion. This is the deepest meaning of non-combatant immunity: it does not only protect individual non-combatants; it also protects the group to which they belong. (Walzer 2006: 4; see also McMahan 2009: 211–212).

The first question that arises is: what is the causative effect of the UN policies, and of their omission?

The analysis of responsibility for crimes committed jointly or through a collective body can also be found in war morality, particularly in the "principles of Nuremberg," where the question of moral and legal complicity in regard to violence is discussed in detail (Wasserstrom 1985). A recent paper by Judith Lee Kissell (1999) analyzes complicity as a multifaceted concept. "Complicity" includes "encouraging," "enticing," "enabling," "ordering," and "failing to intervene," and one can cite examples from antiquity to the present that all fit loosely under the general heading of complicity. Kissell says:

> For example, we count as accomplices Aeschylus/Aegisthus, who *encourages* Clytemnestra to kill her husband, Agamemnon; Shakespeare's Jago, who *entices* Othello to kill his beloved Desdemona; the mother who *enables* her child to become an alcoholic; the gangleader who *orders* a beating of a victim; the Western powers who, according to Margaret Thatcher, were complicit for *failing to intervene* in the former Yugoslavia. (Kissell 1999: 1)

These examples demonstrate the wide latitude we accord to the concept of complicity in a variety of settings. Wasserstrom limits himself to the discussion of complicity in a variety of settings. He limits himself to the discussion of complicity in war in his discussion of the Charter of the International Military Tribunal (1947) at Nuremberg. Articles 6, 7, 8 and 10 address two main questions: the substantive description of crimes, or

offenses, and the "conditions of individual responsibility" (Wasserstrom 1985: 136).

What forms of violence constitute war crimes? Article 6 describes them:

The following acts, or any of these, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility.

(1) Crimes against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.
(2) War Crimes: namely violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in an occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.
(3) Crimes against Humanity: namely murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. (Wasserstrom 1985: 136)

Under (2), "murder" is not necessarily described as immediate, or evident at first sight. From the perspective of moral philosophy, murder is equally a crime if it is slow or delayed, as it invariably is when it is environmentally induced through cumulative small doses of chemicals or toxins. The wanton destruction of cities, towns, or villages can also be interpreted in an environmental sense. Consider, for instance, "devastation not justified by military necessity." This is precisely why "devastation" as such (that is, as unconnected with war objectives) is termed a crime. "Crimes against humanity" (3) cover a lot of ground when they are defined (*inter alia*) as "other inhuman acts committed against any civilian population"; it offers especially fruitful grounds for our perspective as these crimes remain such "whether or not in violation of the domestic law of the country where perpetrated."

We can now turn to our focus in this section: what constitutes a conspiracy where individual responsibility is present, even in collective

actions. The first thing to note is that participation in a common plan or conspiracy is sufficient to ensure one's responsibility as an individual. As Wasserstrom puts it: "Conspiring to do certain things is itself a crime." But, even more than this, responsibility is derived from membership in a group (Wasserstrom 1985: 137). The language of culpable conspiracy, such as "encouraging," "enticing," or "enabling", fits well within being a member of a group.

Kissell defines conspiracy as "an offense in which one agent, the accomplice, becomes responsible for the acts of, and the harm caused by another agent, the perpetrator" (Kissell 1999: 2). Following this definition she adds: "complicity is an *offense* and not simply a collaborative action". Nevertheless, it is clear that even "planning," "encouraging," or even "enabling" are not in and of themselves harming anyone, when just two people are involved: the accomplice and the perpetrator. It seems as though the situation is totally different when a group is involved. The one who delivers a hate speech to a group cannot claim innocence, when the inflamed group acts violently in consequence of hearing the encouragement to hate. The speaker cannot just claim he did not participate in the violence, and stood aside from it.

Speaking of the relationship between accomplice and perpetrator, Kissell emphasizes their "asymmetric relationship to the harm"; but when group complicity is at stake, the case is not so clear. It is not obvious that one can always distinguish between "cause" and "contributions" when a group conspiracy is at issue. Hitler at first "encouraged," then "planned," and finally "ordered" and "enabled" the killing of millions of Jews. He can certainly be seen as a perpetrator anyway, although he probably never personally actively perpetrated a single violent crime.

For all that, we can (and must) say that Hitler was indeed blameworthy and personally responsible for causing the atrocities he did not personally perpetrate. Nevertheless his causal agency is far more than a contributing factor. Because of the authority he represented, his beliefs and his expressions, aside from the laws he enacted, were directly causative of the harms that ensued. In that case, it seems that Kissell is mistaken when she claims that causation and complicit conduct cannot be equated. She says: "I can think of contribution as *causal* in the broad sense of being the object of inquiry that justifies censure. However, because it is not the same thing as a physical cause, it need not satisfy the necessity requirement, which in any case complicit conduct cannot do" (Kissell 1999: 5).

Institutionalized Enablers and Their Complicit Responsibility

In contrast to the ordinary citizen, when we turn to the question of "complicity" and responsibility on the part of those in authority, the latter understood as a combination of expertise, and economic and political power, the analogical appeal to Nuremberg gains credibility.

This aspect of their causal connection to harm can be viewed in a different way, and it can be assimilated to Nuremberg's principle. Even "planning, preparation, or initiating or waging a war or aggression" is not necessarily done with the intent to harm civilians or to commit murder or extermination. On the contrary, often war plans begin with the quest for economic gain or economic protectionism—precisely the reasons prompting experts, institutions, and industry to pursue their joint hazardous activities.

Now the expression "responsibility is derived from membership in a group" (Article 10 of the Principles of Nuremberg) makes perfect sense. Conspiracy to commit crimes against humanity is never—to my knowledge—understood primarily as the desire to exterminate humans. It is a conspiracy that tolerates, maybe even expects, harmful side-effects and takes them in its stride to reach an ulterior purpose.

It is indeed difficult to ascribe responsibility for criminal activities resulting in multiple harms, whether these arise from acts that are committed or omitted. An even clearer example of what I would term responsibility for diffuse harm can be found in the aggravated assault case of *R. v. Cuerrier* (1998, 2 SCR 371). The case concerned a man who was advised by a public health nurse in 1992 that, because he was HIV positive, he was to use condoms when engaging in sexual intercourse, and that he was to inform all prospective sexual partners of his condition. Cory J., in his factual background exposition, adds, "the respondent angrily rejected this advice. He complained he would never be able to have a sex life if he told anyone he was HIV positive."

Eventually Cuerrier formed a relationship with KM, who, in February 1993, was informed by another public health nurse that, while her tests were negative, Cuerrier was indeed HIV positive. After their break-up, Cuerrier formed another sexual relationship with BH, again not disclosing his condition. Subsequently, when the second woman also found out, Cuerrier was charged with two counts of aggravated assault. In addition, a

question was raised about whether uninformed consent was still truly consent, given the dishonesty of the accused, who, Cory J. added, engaged in "fraudulent misrepresentation." Cory J. said:

> The possible consequences of engaging in unprotected intercourse with an HIV positive partner is death. In these circumstances there can be no basis for distinguishing between lies and a deliberate failure to disclose. Without disclosure of his HIV status, there cannot be true consent.

When Cuerrier was advised of his duties with respect to all future sexual partners, there was no specific person named or intended, nor was any question raised about his intent to do harm, or to cause death. But the possible death of any partner in his case could reasonably be viewed as a "consequence within the risk" (Hart and Honoré 1985: 94). Like the multiple harms we have described, the lack of openness and transparency on the part of the risk imposer was termed "fraudulent misrepresentation," and his actions described as "aggravated assaults."

In Cuerrier's case, the problem lies in the difficulty of proving *mens rea*, as we were dealing with multiple harms but one perpetrator. The case is different when we are attempting to prove responsibility on the part of an organization with multiple organs. But what emerges clearly from this case is that the omission of an act can be equally culpable as the commission of it.

Hart and Honoré provide a suggestion: "When joint or several tortfeasors have contributed to the same harm, the obvious rule is that each should be liable for the whole harm" (Hart and Honoré 1985: 235). This appears to be a better principle for both torts and crimes, because we can immediately start tracing back decisions and the application of regulations for months, maybe even years, and still find additional causes in a long series of contributory causes. In this case, as in most environmental cases, it would be almost impossible to isolate the *conditio sine qua non*, the closest or most proximate cause:

> What we do mean by the word "proximate" is that because of convenience of public, or a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical policy. (*Palsgraf v. Long Island* 1928, per Andrews J. in Hart and Honoré 1985: 90)

The question we must keep in mind is not about logic or practical considerations, however, it is about *justice*, beyond the rough approximation cited above. A better way of approaching causation in the case of "emergent risks" can be found in the case of *Snell v. Farrell* (1990, 72 DLR 4th 289). The question addressed in this case of medical malpractice was the cause of Mrs Snell's eventual eye nerve atrophy (and loss of sight) following

an apparently botched eye operation. The loss of sight resulted "from a loss of the optic nerve's blood supply." Neither the plaintiff's expert nor that of the defendant was "able to express with certainty an opinion as to what caused the atrophy in this case, or when it occurred." Sopinka J. continues, citing Turnbull J. (Court of Queen's Bench), who remarked that "the trial judge was satisfied that the facts of the case at bar" brought it "within an emergent branch of the law of causation, whereby the onus to disprove causation shifts to the defendant in certain circumstances" (*McGhee v. National Coal Board* 1973).

From our point of view, the most relevant statement by Sopinka J. appears in his discussion of "causation principles":

> The traditional approach to causation has come under attack in a number of cases in which there is concern that due to the complexity of proof, the probable victim of tortious conduct will be deprived of relief. This concern is strongest in circumstances in which, on the basis of some percentage of statistical probability, the plaintiff is the likely victim of the combined tortious conduct of a number of defendants, but cannot prove causation against a specific defendant or defendants on the basis of particularized evidence in accordance with traditional principles. The challenge to the traditional approaches manifested itself in cases dealing with non-traumatic injuries such as man-made diseases resulting from the widespread diffusion of chemical products, including product liability cases in which a product which can cause injury is widely marketed and manufactured by a large number of corporations. (at 294)

As noted in Chapter 4, Hart and Honoré (1985) argue that the three questions one needs to ask are "really one and the same"; that is, "is the consequence within the risk?".

This brief excursion into criminal law and the rules of causality, helps to clarify the responsibility of the UN and the SC, and in the next section we will consider the text of yet another SC resolution (1973), from March 2011.

UN Security Council Resolution 1973 (2011) on Libya

> Deploring the failure of the Libyan authorities to comply with resolution 1970 (2011),
> Condemning the gross and systematic violations of human rights, including arbitrary detention, enforced disappearances, torture, and summary executions,
> Expressing its determination to ensure the protection of civilians and civilian populated areas and the rapid and unimpeded passage of humanitarian assistant and the safety of humanitarian personnel [...] (UN Security Council Resolution 1973 (2011) on Libya)

Acting under Chapter VII of the Charter of the United Nations, this resolution was followed by swift and decisive action, establishing a "no-fly zone", and waging attacks from the air and the sea by armed forces from Europe (France, the UK, Italy and Greece), the US and Canada, and representatives from Arab states. Additionally, the resolution called for an immediate "arms embargo", according to paragraphs 9 and 10 of resolution 1970 (2011), a "ban on flights" and an "asset freeze", as imposed by paragraphs 17, 19, 20 and 21 of resolution 1970 (2011).

The point of referring to this recent resolution is not to debate its merits or its legality (although, based on media reports, these actions appear to be well-taken, at least initially). The point is to compare this resolution—and most of all its explicit reasons, and the actions that followed immediately—with the total inaction that followed the illegal occupation of Palestine by Israel, the building of the illegal wall, the 2009 war on Gaza, and the ongoing oppression of the Palestinian peoples.

When the UN speaks of "we, the people"—when it sets itself up as the protector and defender of human rights—these are everyone's human rights, not those of "preferred" countries, according to specific Western interests. As well, note that the SC Resolution 1973 claims legitimacy for its joint attack on Libya because of the actions of the Libyan government, including "the gross and systematic violations of human rights, including arbitrary detention, disappearances, torture"—all acts clearly in evidence in the US's "counter-terrorism" measures, practiced with total impunity, as discussed in previous chapters.

CHAPTER SEVEN

SOME TENTATIVE CONCLUSIONS TO A DISHEARTENING JOURNEY

> Start by doing what is necessary; then do what is possible; and suddenly you are doing the impossible. (St Francis of Assisi)

We need to recapitulate the argument of these pages in order to better understand the message that emerges, no matter how depressing that message might be. Starting with the missing definition and the problematic legal history of the concept of "terrorism" discussed in Chapter 1, perhaps we might have predicted what eventually emerged in the chapters that followed. "Terrorism" could not be properly defined in law because of the grave ideological differences between the wealthy North/West, led by the US, and the global South, with special emphasis on the countries with a strong Muslim component. The latter could not allow the rest to codify a definition that did not clearly distinguish between "terrorists" on one hand and "freedom fighters" on the other.

The basic premise here is that the powerful also have the power to decide on the details on what is and is not illegal, thus ensuring that international instruments could only adopt language that would permit them to continue to operate in their own interests, and to do so with impunity.

This combination of power and arbitrariness is also reflected in the conflicts we have noted between *jus cogens* norms and the activities of the Security Council (SC). The conflicts that the SC condemns, and those it does not, reflect the geopolitically motivated "balance of power" that actually emphasizes the vast gulf existing between the stated goals and aims of the United Nations and the ever-diminishing peace and security in the world we are witnessing.

Chapter 1 considered the two aspects of terrorism that are cited most often to attempt to define or "explain" it: (political) crime or war. But both can be seen to be insufficient to specify its parameters. After a brief review of the early literature on terrorism, the arguments moved to a general, non-legal understanding of the concept, starting with the attempt to unravel and understand its causes and motivations. The first aspect of a viable definition to be eliminated is terrorism as "war", so that a retaliatory "war on terror" emerged as both illegal and inappropriate as a

response to its occurrence. That response, as well as any instance of imposing unlivable conditions on a population or region, should be understood as an example of "state terrorism" masquerading as "self-defense", "counter-insurgency", or even—as we shall see—as the benign imposition of "development".

Chapter 2 examined the other commonly held view of terrorists as criminals, political or otherwise. Terrorism is akin to a revolutionary struggle, but not to simple criminal activity, which is free of any ideological impetus, and as such has no desire to proclaim its perpetrators and its cause. In contrast, any form of political struggle may exist when the state is not fulfilling its obligation to provide security and respect for the human rights of all its citizens.

However, recently, terrorism has elicited criminal consequences, as the US and other Western states have enacted measures that are clearly illegal, and even criminal, in themselves: neither "extraordinary renditions" nor the deprivation of citizens' civil liberties can be practiced and excused by the occurrence of a terrorist attack. In fact, the Convention Against Torture, for instance, has been ratified by all countries in the world, as has the Covenant on Civil and Political Rights; yet "counter-terror" measures ignore the prohibitions clearly stated in both documents.

Chapter 3 discussed one of the best-known motives for citizen rebellion, uprisings and even terrorism: the quest for de-colonization, independence or self-determination, culminating for instance in the insurrections of the so-called "Arab Spring" of 2011. The focus of the discussion is whether the undesirable, often unbearable conditions (including the deprivation of liberty and the right to self-determination) might provide a justification based on self-defense for violent, terrorist acts, and if so, under what conditions. The main point that emerges is that any of these disculpatory aspects (that is, being deprived of self-determination or independence) do not apply to the present responses of states, which then can be seen as expressions of state terrorism, even if they are intended as retaliation for terrorist acts. In contrast, the dire conditions under which some populations exist, whether they are occupied by a foreign power or oppressed by a despotic ruler, *may* provide if not an excuse then at least an understandable motive for their violent activities.

The utter despair that characterizes acts of self-immolation is the clearest example of the reason why the powerful nations that engage in so-called "counter-terrorism" are performing illegal acts, without any possible justification. In addition, rich and powerful nations also engage in other forms of "state terrorism" when the conditions of life imposed on certain

communities and areas include the deprivation of their resources and their means of survival. I argue that this form of "state terrorism" is imposed by so-called industrial "development", supported and legalized by local bureaucrats and governments, as well as by the institutions of globalization (such as the WTO).

Hence "development" itself can be one of the most obvious forms of oppression and state terror. Rather than improving living conditions of people through development projects, the results are often harm and deprivation for Indigenous and local communities. Still, no matter how harsh the conditions imposed by some powerful organization or state on unwilling recipients, the method of the protest and the eventual resistance needs to be questioned and evaluated.

Chapter 4 discussed various aspects of the project of neocolonialism. The terror imposed does not come from bombs, guns or explosives, but from the imposition of unlivable conditions. What remains constant, however, is the motivation of the states involved as they seek to establish or consolidate their power and economic supremacy. These "faces" of terrorism are not often recognized as such, although, for instance, the World Health Organization clearly connects poor social and environmental conditions to the disproportionate burden of ill health that affects those populations. Of course, the effects of guns, bombs or machetes are more immediately visible, but the harms imposed by these other faces of state terrorism are no less deadly in the long run.

Yet these practices are not new: particularly relevant is the history of "counter-insurgency", practiced and supported by the US in Central and South America, where many nations became the home of the "terrorized" as tortures and disappearances became the chosen method of practicing "counter-insurgency" (that is, repressing and eliminating unwanted ideologies). Thus the claim following 9/11, that it was an unprecedented event, justifying unprecedented and illegal measures in response, is clearly untrue. The response to 9/11 represents simply a continuation and an intensification of policies and practices ongoing from the 1950s (and earlier) on the part of the US in South America.

Chapter 5 discussed the responsibility for human rights in law. For the most part, procedural rights enjoy far better protection than substantive rights, although increasingly there are voices coming from the EU and from the international state that condemn "counter-terrorism" in all its aspects. The recent attempt to bring George W. Bush to court to face an indictment for torture and related war crimes did not succeed because he learned of it before flying to Europe.

But even without a successful trial, the mere existence of that attempt indicates that much of the world is now aware of the illegality of the so-called "war on terror" and of the related activities it has sanctioned.

In contrast, some recent cases seem to indicate that the responsibility of governments to ensure the safety and protection of all their citizens is gaining momentum, as does the appeal—often voiced—to global responsibility. It is unfortunate that the US Court of Appeals judgment of September 21, 2009 for the protection of the collective public health, won by several US states against various corporate deniers of climate change, was reversed in July 2011 by the US Supreme Court on procedural grounds. This final judgment never even considered the thorough, substantive analysis provided by the Court of Appeals in 2009, as it simply stated that those "technical and social issues" were best decided by the EPA, without any mention of the public health aspect of the issue.

Chapter 6 acknowledged that the argument of the whole work tends to confirm that terrorism, counter-terrorism and other grave breaches of human rights appear to be part of globalization, and that phenomenon, together with the ongoing retreat and weakening of the individual states in most of the world, provides fertile grounds for the many harms we have termed "faces" of state terrorism. Each face represents an unspoken attempt to justify violence through the alleged neutrality of economic policies and the desirability of improving the lot of the poor.

But globalization does not exist in a vacuum, isolated and protected from the effects of the rule of law in all its manifestations. The United Nations does not single out globalized trade as an exception to its explicit aims and to the declarations, charters and other instruments that make up international human rights law. Nor is any specific country's administration so exempted. Nevertheless, even a cursory review of SC resolutions demonstrates and confirms the presence of the unequal treatment that supports and defends the immoral and illegal acts of some countries against others. Those resolutions that might adversely affect the interests of the US and their friends are never allowed to pass. Hence the responsibility toward all countries and their people that the UN bears according to its own declarations is gravely compromised.

In Chapter 5 we noted the use that Native tribes in the US made of the *parens patriae* doctrine, as they appealed to a Federal Government that had repeatedly proclaimed that such tribes and nations were under its protection as "wards". The tribes' claim was a simple one: their situation indicated that the protective guardianship the US Federal Government had claimed had not succeeded; hence, like a guardian who failed in his

duty regarding a minor child, the government were at fault and should be charged with dereliction of duty.

In that sense, the *parens patriae* doctrine, initially used as a "sword", a weapon to subdue and control those tribes, could now be used as a "shield" instead; that is, it could be used to claim the protection and defense that had not been granted as promised.

Perhaps, *mutatis mutandis*, we could use a similar argument in regard to the UN and the SC, its organ and "enforcer". The UN too, through its Declaration, its support of instruments in defense of human rights in general, and of *erga omnes* obligations (and *jus cogens* in particular), has set itself up as the final arbiter of illegality and protector of human rights for all, without discrimination or favoritism (thus regardless of race, religion, ethnicity or gender).

I suggest that if this is truly part of its principles and purposes, it has failed in many respects, but especially so with regard to the multiple faces of state terrorism (or atrocities) it has tolerated, enabled and permitted. Many have proposed a radical overhaul of the UN, including this author (Westra 2011a), but the "world's constitution" (as many have termed its Charter), is far less in need of radical change than are its organs' implementation capabilities. The SC must be reined in by legislative controls; that is, the ICJ or a new organ should be given the right to oversee whatever the SC (a political, not a legislative institution) considers right and appropriate. Perhaps the UN might correct its flawed "wardship" record by appointing a separate body with the power to correct the present predominant position of "great powers" and their alliances, with clear limits imposed by law. A small committee of former ICJ judges should be easy to convene rapidly, in order to ensure prompt protection for the vulnerable.

After all, citizens in all countries form groups and alliances according to their interests, but it is only when such groups represent organized crime that members' interests supersede the law of the land. If the aim is to redress the gross, ongoing inequities and breaches of human rights created by state terrorism in all its aspects, it is imperative that powerful international alliances should be forced to submit to the same regimes as other international citizens, without exception; that is, they should be forced to accept the rule of law.

We can return to the paper where Richard Falk addressed this difficulty from a somewhat different angle. He acknowledged that there are a number of excellent solid principles in existing international law, but he preferred to consider not only the immense difficulties we have discussed in these pages, but also our own failures. We accept the present "horizons of

feasibility", which are linked to the "horizons of power" that the "Lords of Davos" continue to support, ignoring the ticking bombs of sustainability.

Thus, rather than buying into the hard power, which can only conceive of a world order based on "inequality and domination", we should regain hope and continue to support the "soft power" we mentioned above. As an extreme example of hard power law, Falk cites the example of nuclear weapons, which are, he says, "administered geopolitically" through an extraordinary mind game whereby the aggressive powers that have them are not even considered to be required to eliminate them, and some of their friends, like Israel, simply slip under the radar. In contrast, the weaker countries who attempt to acquire even nuclear power are criticized and even sanctioned.

Falk views the UN Charter and the Declaration of Human Rights (especially Articles 25 and 28) as clearly advocating what is necessary: it is "mandatory to have a global order that is conducive to respect for human rights". He views these documents as containing a "dormant" potentiality, which all of humankind is responsible to bring to fruition as a reality. No doubt the UN responsibility discussed in this chapter also appears to have the potential to remedy the present problems of global governance.

However I differ somewhat from Falk, as I am less convinced that the ongoing worldwide protests, even including the 2011 "Arab Spring" revolts, will actually result in achieving just forms of governance. Yet even the writing of works as critical as the present one entails that hope is not entirely extinct.

The journey of research undertaken in these pages is clearly not conducive to any optimistic outlook. When not only is morality ignored, but even law is thwarted and used as a tool to condone and justify immorality, rather than as a tool for justice, it is hard even to define what our realistic hopes might suggest. Perhaps the combination of brutality, disregard for the dignity of humankind, and mockery of laws and principles we have discussed represent such an utter evil that a strong global reaction may actually take place.

Scholars, lawmakers, and even citizens in Europe continue to write, speak, march or demonstrate in increasing condemnation of much that has been presented in these chapters. Perhaps that might provide the seed that will grow into a return to the principles of civilized existence, especially if the voices of those older traditions from Europe may be joined to the new, younger voices of countries of all continents, each of which has

its own equally worthy principles and traditions, but all of which exclude and denounce the policies and practices discussed in this work.

Silence and inaction would indicate complicity. Hence, perhaps we can follow St Francis in continuing to speak and write or demonstrate, as that is necessary. Eventually it might be possible to do more; then the reality that now seems to be unattainable may come to be.

POSTSCRIPT: THE ASSASSINATION OF OSAMA BIN LADEN

On May 2, 2011, Osama bin Laden was killed in his virtually unprotected compound by a raiding mission of 79 Navy Seals, who entered Pakistan by helicopter. Official reports make it increasingly clear that the operation was a planned assassination, multiply violating elementary norms of international law, beginning with the invasion itself (Chomsky 2011).

Indeed, the breaches of international law in this act are many. We will not revisit the main reason for the assassination at this time, the so-called "war on terror" (a term both inaccurate and legally incorrect, as Cassese put it; see Chapter 1). A further complication is the fact that bin Laden was not a general with the army of a country with which the US was at war. Perhaps like the other terrorists from his group, Al-Qaeda, the US administration viewed him as belonging to what Cassese terms "the flawed category of unlawful combatants" (Cassese 2005: 409).

The expression itself, Cassese adds, should only be used as "descriptive" (Cassese 2005: 409). A 2002 Israeli case defined the category as follows: " 'unlawful combatant' includes members of terrorist organizations and enemy forces who take direct part in terrorism and hostile acts against Israelis and Israel, but, if captured, are not entitled to prisoner-of-war-status" (Cassese 2005: 409, fn.8).

This designation represents a departure from the basic principles of humanitarian law, and in fact, a violation of that law (Cassese 2008: 410). Hence, neither the category to which bin Laden was consigned nor the "war" itself were legal. In addition, as Pakistan was not consulted, hence did not authorize the "mission", the enterprise itself was illegal from the start, as armed irruptions in the territory of another sovereign state are not permitted according to international law (Walsh 2001). In general, the Barrack Obama administration has attempted to kill many suspected terrorists (through drone attacks, for instance), while the Bush administration preferred to capture suspected terrorists and send them to Guantanamo Bay and other prison camps.

In bin Laden's case, it must be noted, he was not resisting arrest, although his wife apparently tried to defend him. The "*actus reus*" was committed by the US Navy's elite Seal Team 6 (Jones 2011), and the covert

operation, carefully and successfully planned by the US government and the CIA, ensured that the *mens rea*, or deliberate intent, was also present. In addition:

> If the foreign State acted illegally by carrying out an act *jure imperii*, without the permission of the territorial sovereign, it will lose its immunity with regard to subsequent liability claim as a legal consequence of its violation of international law. (Giegerich 2006: 228; see also p. 229, fn.108)

West German Chancellor Helmut Schmidt is cited by Chomsky as having told German TV that the US raid was quite clearly a violation of international law, and that bin Laden should have been detained and put on trial. In fact, we can contrast that criminal attack on an unarmed civilian on the part of US military with the peaceful and legal capture of Ratko Mladic in Croatia in order to convey him to the International Criminal Court in The Hague. Mladic, it is worth noting, had already been indicted for crimes against humanity and his victims numbered more than double the amount of people allegedly killed by bin Laden's orders.

Hence, not only was it certainly not a case of "justice is done", as President Obama proclaimed, but yet another egregious breach of war and humanitarian law—another example of war crime, to be added to a long list of such illegalities in the ongoing "war on terror".

Further illegalities include the lack of an inquest or post-mortem that would be required after a violent death. A resisting criminal may be killed, but bin Laden had not been convicted of anything, and nor did he resist: he was surprised and was shot in the back of the head. As well, the dumping of the body at sea recalls the dumping of bodies without benefit of inquests, trials or post-mortems, in various "disappearances" orchestrated with the aid of the US government in Argentina or Chile (see Chapter 4).

Much more could be said, but perhaps a consideration of the Nuremberg Trials and the ensuing principles might represent the most significant aspect of the assassination of bin Laden. All the Nazi criminals who were brought to justice were tried, although it was indeed in the "victors'" tribunals; there were no summary executions, and no dumping of bodies at sea took place, then or later, as various states fought to find and extradite criminals from that time. Some recent outraged commentators asked whether Nazi criminals were more worthy of respect than bin Laden, given the respect for the rule of law that characterized those Nazi trials, in direct contrast with the continuation of "counter-insurgency" practices and policies discussed in this work.

It is particularly poignant to consider one of the points brought out by Richard Falk in his recent talk (see Chapter 6), as he recalled that the main pledge of the "victors" of World War II main was that those crimes would never be repeated by those who presumed to judge and to condemn. It seems that their pledge has not been honored in recent times.

In relation to this illegal act, one should recall that even the staunchest defender of liberty, John Stuart Mill, argued that someone who incites a crowd to commit illegal acts by shouting "Fire!" in the crowded venue of a meeting is guilty of the ensuing harm that may follow his intemperate utterance. It seems that the Bush, Blair and Obama administrations have been shouting "Fire!" for a long time, together with Israel's leadership.

In fact, the July 22, 2011 massacre perpetrated in Norway by Anders Behring Breivik (and his possible collaborators) is yet another example of the results of those shouts. Breivik's own Manifesto stated:

> So let us fight together with Israel, with our Zionist brothers, against anti-Zionists, against all cultural Marxists/multiculturalists. (Petras 2011)

The popular media in the US initially blamed "Islamic extremists" for what they termed the "Norway 9/11". Then, when the picture of Breivik emerged, blond, blue-eyed, a Norwegian in a Norwegian police uniform, the tone of the reports changed: he was now described as a "lone madman", despite the fact that the series of events of July 22 could not have been orchestrated by one inexperienced man, but pointed instead to the existence of complicity, even possibly to the involvement of a strangely slow and totally inefficient Oslo police force (Petras 2011). The details of that ordeal will eventually emerge, but the ties with the hysterical "war on terror" and the ongoing demonization of Muslims everywhere cannot be ignored.

APPENDIX ONE

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Note: numbers in brackets preceded by *n* refer to footnotes.