

TORTURE, WAR, AND THE LIMITS OF LIBERAL LEGALITY

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Returning a year ago from my fifth visit to Vietnam I was struck by the strong unacknowledged links between the ongoing torture debate in the United States that has resulted from the treatment of suspected terrorists after 9/11 during the Bush presidency, and the wider legacy of one-sided warfare, especially as waged against the darker peoples of Third World countries. In June, 1968 when I first visited Hanoi in the midst of the Vietnam War I was deeply impressed by the bravery and tenderness of the Vietnamese people in the face of the high-tech military onslaught daily being inflicted on the country. I was at the time appalled by the cruel realities of modern warfare being waged against a defenseless society that was basically at a pre-industrial stage of development, and by the related realization that this war was being planned and executed in distant Washington by the liberal elite of America ('the best and the brightest') in air-conditioned ascendancy during the presidencies of John F. Kennedy and Lyndon Baynes Johnson. It was a war, especially in what was then North Vietnam, in which total command of air and sea meant that death and destruction could be imposed at will on Vietnam without ever worrying about any kind of retaliation.

Prior to this direct experience of the Vietnam War over forty years ago nothing I had read or heard had really prepared me for this encounter with one-sided warfare, and this unawareness is part of a continuing problem of great magnitude, most recently

evident in the attacks launched by Israel on a helpless Gaza, and carried on for twenty-two days, between December 27, 2008 and January 18, 2009.ⁱ My experience of one-sided warfare in Vietnam had a transforming effect on my attitude toward that particular war and with regard to my own government's level of responsibility. Before the visit I had actively, yet abstractly, opposed the war as unlawful and as an ill-advised and historically regressive colonialist venture. While in Vietnam, and subsequently, I came to identify existentially with the emancipatory struggle of the Vietnamese who were being massively victimized by these American war policies. For me this shift from intellectual critic to citizen/partisan made an enormous psychological and political difference, deepening my anti-war engagement and creating a kind of solidarity with the Vietnamese heroic effort to achieve self-determination by way of political independence.ⁱⁱ

Returning to the United States from Vietnam in 1968 I was frequently interviewed by mainstream news and TV journalists who were interested in my meetings with high government officials in Hanoi, especially the Prime Minister of North Vietnam, and by proposals for ending the war that had been entrusted to me for delivery due to the absence of inter-governmental contact at the time. I was thankful for the attention given my central diplomatic message that peace was in all likelihood attainable by way of diplomacy. It is of more than passing interests that these proposals set forth by Hanoi in 1968 turned out to be more favorable to U.S. political objectives than the arrangements negotiated four years and tens of thousands of casualties later by Henry Kissinger (for which he received a Nobel Peace Prize that he accepted, but was more honorably refused by his able negotiating partner, Xuan Thuy). Washington dismissed the proposals I was

asked to convey, clearly continuing to believe wrongly that its war strategy would eventually yield positive results, and be vindicated.

But what struck me most at the time was the total disinterest of the mainstream media and most of my friends in those aspects of my Vietnamese experience that touched on the one-sided nature of the war and its horribly inhumane effects on a poor peasant society of the sort that existed in Vietnam. This disinterest was as true for journalists who seemed clearly critical of the war, such as Hedrick Smith of the NY Times and Charles Collingwood of CBS, as it was for more conservative and hostile pro-war journalists I encountered such as Pat Buchanan and William F. Buckley. My liberal academic colleagues at Princeton and elsewhere were eager to hear about my contact with Vietnamese leaders, but not about my observations on the fundamentally unacceptable character of such an unequal encounter. Their anti-war concerns were focused on the imprudence, costs, and failure of American policies in Vietnam, but they seemed completely disinterested in the logic and implementation of one-sided warfare that was devastating North Vietnam while leaving the United States free from any risk of retaliation. Of course, this legacy of indifference has far deeper roots, going back to the strategic bombing patterns of the latter stages of World War II, especially the use of atomic bombs against Hiroshima and Nagasaki.ⁱⁱⁱ And perhaps more revealingly in the overall Euro-American approach to race and imperial rule in Africa, Asia, and Latin America powerfully depicted in important books by Sven Lindquist and Vinay Prasad.^{iv}

This indifference was perplexing to me then, and remains so now, but it also bears on what is a most dangerous and unacceptable disconnect between condemning a reliance on torture while silently accommodating, or at least not vigorously protesting against the

tactics and actualities of one-sided warfare of the sort that has plagued Iraq since 2003, exhibited in the Gulf War in 1991, as well as in the NATO Kosovo War of 1999, has been at the core of Israel's approach to occupied Palestine since the Second Intifada (2000), especially evident in Israeli practice of targeted assassinations, Lebanon War of 2006, the Gaza blockade established in 2007, and the Gaza War of 2008-09.^v In fact, of course, the Vietnam experience temporarily complicated the American war discourse, not because of its deeply abusive character, but because it ended in defeat, resulted in more than 58,000 American combat deaths, exposed the deceptions and deceits of a wartime government, and alerted the country for a while to the immense dangers of an imperial presidency. But the 1990s overcame the so-called 'Vietnam syndrome,' that is, the name given to the post-Vietnam reluctance to use force in Third World settings. What overcame the Vietnam syndrome were the easy, that is, one-sided victories in the First Gulf War (1991) and Kosovo War (1999). Indeed, after the NATO victory in Kosovo without a single combat casualty, American militarists were talking about the real prospect of zero-casualty warfare in the future. Of course, the Iraqi ordeal has put a temporary stop to this ultra-militarist variant of triumphalism, and there is now talk of an 'Iraq syndrome' that policymakers in Washington fear may inhibit future American interventions. What never became problematic in assessing the lessons of the Vietnam War, and in my view should have been the most troubling reflection, was the magnitude of Vietnamese casualties (estimated to be 3-5 millions) and the ratio of loss on the two sides. Among the many retrospective insider accounts of the Vietnam War, including the moralizing memoir of Robert McNamara, was the utter insensitivity to these concerns of mine.^{vi}

But the disturbing underlying problem persists. The United States, and some of its allies, rely on and seeks to sustain and enhance a posture of military dominance enabling the pursuit of political goals throughout the world. And this dominance basically relies upon American technological superiority in warfare that enables it to inflict limitless devastation on a foreign country anywhere on earth without fearing retaliation at home. It is an accepted idea in national defense planning in all countries to develop the most effective weaponry that is technologically and financially feasible. This disposition is reinforced by strategic thinking about how to inflict maximal damage in battlefield situations and as an instrument of coercive diplomacy. The U.S. Government, without any serious domestic challenge, has carried this image of national security to absurd limits, currently with an annual military budget about equal to that of the entire rest of the world. Such budgetary excess is needed to pay the costs of maintaining a network of about 1,000 overseas bases, navies in every ocean, and a multi-billion dollar investment in the militarization of space. The purpose of this rampant militarism is to further a grand strategy that is so overwhelming as to undermine the will of adversaries to offer resistance.^{vii} It is notable that none of the main candidates for the US presidency in 2008 ever questioned this orientation toward war and over-investment in a militarized conception of security, which has huge opportunity costs given the challenges of global warming, poverty, the AIDS pandemic, as well as negative trade balances, economic crisis, and a huge national debt. The liberal elite completely ignores this massive waste of resources associated with maintaining this American military machine, or believes that it

would be political suicide to question reliance on this dysfunctional and grossly immoral militarism.

If this pattern of liberal acquiescence is a more or less accurate postulate, then how can we explain the liberal sense of moral outrage about the revelations of torture at Guantanamo and Abu Ghraib during the Bush presidency? I am arguing that torture is an individualized and personalized instance of one-sided violence in which the perpetrator inflicts unspeakable pain while facing no risk of retaliation and generally insulated from accountability under law. It is, in my view, this contrast between the helplessness of the victim and the total control of the perpetrator that properly causes such moral revulsion. There is also a lesser pragmatic form of objection that questions the effectiveness of torture as a means of acquiring reliable information and repudiates torture because of its assault on the professionalism and morale of the military.^{viii} I am more concerned here with the principled objections that have led torture to be *unconditionally* prohibited, and verbally repudiated even by its most vigorous advocates in the Bush presidency.^{ix} In effect, those American leaders who have authorized torture to gain information have resorted to euphemisms such as ‘an alternative set of procedures’ or ‘enhanced interrogation techniques,’ the nature of which could not be disclosed. Such sleazy acknowledgements of ‘torture’ in close proximity to a denial is, in effect, a recognition of the ethical/legal hegemony of the anti-torture consensus. That is, even those anti-liberals who authorize ‘torture’ feel obliged by the general climate of opinion to reassure the public that they do not engage in torture, a truly Orwellian conundrum.^x

Of course, for liberal legalists this official posture of evasion, associated with the denials of Bush, Cheney, Rumsfeld, and Tenet, since 9/11 is, as it should be the case, totally unacceptable. The prohibition on torture, embodied in the 1984 Convention Against Torture, is probably the most important international agreement in the field of human rights and deserves to be respected, and not cynically manipulated to provide rationalizations for engaging in the very behavior that has been prohibited. John Yoo, David Addington, Alberto Gonzales, Jay Bybee, Stephen Bradbury, and a series of lesser legal mercenaries have worked hard since 9/11 to put a legalistic mask on the criminal tactics employed by the U.S. Government in its war on terror. But we must still ask ourselves why the liberal consensus that is so impressively mobilized in defense of the anti-torture norm should not show comparable interest in the gross moral outrages associated with one-sided warfare that impact on far more lives, indeed on entire societies. Liberal legalists could argue plausibly that one-sided warfare remains lawful so long as military targets are selected in a manner that respects civilian innocence, and even here the legal prohibitions are somewhat controversial when it comes to application. The prohibitions are embodied in international humanitarian law and the customary law of war on the basis of rather vague abstractions about ‘discrimination,’ ‘proportionality,’ and ‘necessity.’ In contrast, the anti-torture norm seems direct and specific, and constitutes a deliberate practice that is clearly separated from ‘the fog of war.’^{xi}

A realist answer as to the neglect of one-sided war by liberals might suggest that underlying issues of war, peace, and security are beyond the current reach of effective law and morality, and that it is in the nature of sovereign states to be as successful as possible in wartime, inflicting maximum damage on their enemy, and doing their best to

limit damage and casualties to themselves to the extent possible. Furthermore, it is to be expected, given the strength of nationalism and sovereignty, that during a war an almost absolute value would be placed on the lives of one's own citizens, while regarding the lives of civilians in the enemy state as of virtually no consequence, except possibly in relation to public relations. This indifference to enemy civilian casualties is revealing, and is evidenced by the Pentagon refusal to keep statistics on such losses in the ongoing Iraq War. What information on Iraqi civilian casualties is available depends on information collected by reliable civil society actors, such as the British health NGO, Lancet and the online <antiwar.com>.^{xiii} These responses to the challenges posed by one-sided warfare, attributed to anti-torture liberals are unsatisfactory, and move us only a small and somewhat arbitrary step back from the attitudes and behavior of the apologists for torture in the debate on detainee treatment and interrogation methods.

What is at stake here is the whole attitude of the political culture toward the use of violence against vulnerable people, whether singly as in torture situations or collectively as in instances of one-sided warfare. My contention is that there exists a self-serving split consciousness associated with liberal legality that is properly sensitive to abuses directed at individuals while being morally far less unconcerned with the abusive structure of warfare, which inflicts collective punishment on a massive scale, especially as between rivals of grossly unequal technological capabilities. This split explains the absence of mainstream political debate surrounding the defense budget, reliance on nuclear weaponry, and the way force is used against distant, darker peoples. This split is particularly glaring in the post-9/11 world with its focus on counter-terrorism. In effect,

one-sided warfare combines the worst features of torture and terrorism, if the latter is associated, as it should be with the use and scale of political violence against the innocent. The doctrine of ‘total war,’ that became operative for both sides in World War II, provided the rationale for massive and repeated indiscriminate bombing of German and Japanese cities, was deliberately and unabashedly aimed at terrorizing the civilian population in enemy societies so as to demoralize the society to the extent of abandoning the war effort.

The concern over one-sidedness was disguised to some slight extent in the context of the major wars of the past century: World I and II, the Cold War. In these three instances, the level of technological sophistication on the two sides seemed roughly equal, at least at the outset of the conflict. Yet the absence of serious moral questioning of policies that deliberately sought to inflict massive death on the civilian population in World War II is notable, even granting the hypothesis that the victors fought a necessary war consistent with the postulates of the just war doctrine, at least with respect to recourse to war (jus ad bellum) if not the conduct of the war (jus in bello).^{xiii} No doubt that World War II remains widely regarded as a just war, an indispensable war to defeat Nazism and Japanese imperialism. This helps explain the reluctance to raise questions about the moral and legal status of the tactics used by the victors.^{xiv} But it was in the course of this war that the ethos of one-sidedness became mainstream, with little objection raised at the time or later to the deliberate targeting of helpless civilian populations in the urban centers of Germany and Japan. Occasional assertions of lament, as in Robert McNamara’s passing observation that had the United States lost the war to Japan, he and Curtis LeMay, a strategic air commander, would have been subject to

prosecution for war crimes are noted, but pass quickly into the societal unconscious of victors. The horror of Hiroshima and Nagasaki has raised some critical comment, mainly in retrospect and by more radical social critics, but at the time was widely lauded as a means to bring a just war to a rapid end.^{xv} Putting aside the controversy about facts, whether Japan would have surrendered in any event and whether a similar effect might have been achieved by demonstrating the destructiveness of an atomic bomb by detonating it in an uninhabited area, there was little notable dissent then or later. This gross insensitivity was reinforced by the outlook associated with ‘victors’ justice’ that scrutinizes and passes moral/legal judgment on the behavior of losers while granting a comprehensive exemption from accountability to the victors. Perversely, this has generally meant that the perpetrators of one-sided warfare enjoy impunity while the leaders of victim states may be subject to criminal prosecution. For instance, in relation to Iraq, Saddam Hussein and his lieutenants are prosecuted and punished, while George W. Bush and entourage possess an unchallengeable impunity.^{xvi}

During the Cold War, a central role for weaponry of mass destruction was formalized, and became the mainstay of strategic doctrine, ‘mutual assured destruction.’ E.P. Thompson aptly condemned this willingness to use such weapons on urban population as an ‘exterminist logic,’ but it was not seriously criticized by the liberal establishment.^{xvii} There are two issues intertwined here, both of which relate to the torture debate: first, one-sidedness and non-reciprocity; secondly, victimizing the innocent. At the latter stages of World War II both issues were raised, while the Cold War raised mainly the issue of civilian innocence and omnicidal war. In the torture context, the one-

sidedness is integral to the situation, while those who are mainly innocent of involvement with terrorism are swept up in the wide net of detention, and seem to be the overwhelming majority of the victims of unfounded suspicion who are flagrantly denied a presumption of innocence. By introducing the issue of innocence, there is of course no implication that it is permissible to torture anyone, however certain their connection with prohibited activity. That is the whole purpose of an unconditional prohibition, that is, a rule that is not subject to exception.^{xviii} In these respects, one-sided war is different than torture. War can under certain conditions be lawful, and in very rare circumstances, moral (as in the war against fascism or in certain wars of liberation), and international law is deficient in its failure to condemn one-sided war directly. It does condemn partially, if ineffectually, and indirectly, through the general rules of customary international law that prohibit the use of force against civilians and non-military targets. But deference to ‘military necessity’ is so strong in war settings as to make these restraints virtually irrelevant. Beyond this, the self-defense loophole in relation to war, combined with the veto power of the permanent members of the UN Security Council, effectively grants an exemption from the law of the Charter with respect to war making by geopolitical actors, and in the present historical setting, especially to the United States. If this was not enough, there is no effort whatsoever to regulate one-sided warfare, and effectively, international law and morality do not challenge or even debate the acquisition or reliance upon one-sided military superiority. Such issues never arose in the public discussion of either ‘successful’ recent instance of one-sided warfare: Gulf War I or Kosovo War. Indeed, the American commentary on such one-sidedness is generally celebratory in tone, an attitude inscribed in Western political consciousness in colonialist settings where

greatly outnumbered European troops prevailed over the indigenous masses in Asia, Africa, and the Americas, compiling favorable casualty ratios of anywhere from 1:100 to 1:1000. What I am arguing here is that the prohibition of ‘torture’ has been benevolently inscribed in the political mentality of liberal legality, but the reliance on one-sided warfare stirs no comparable moral concern. Is this a reflection of the *legalist* side of a political consciousness that reacts so strongly to torture because there exists a valid, widely endorsed legal norm? Or is this better understood as an expression of the *liberal* side of the political consciousness that defers to political realism when it comes to matters of war and security? It would seem that both elements are to varying degrees present, allowing such cognitive dissonance to pass virtually unnoticed.

When apologists for post-9/11 torture are challenged about reliance upon ‘alternate’ procedures they fall back in one way or another on rationalization about the need to make America secure, or more vividly, to save American lives.^{xix} This was very much a motif of Bush’s September 6th wordplay simultaneously repudiating and acknowledging torture. If we think back, asking ourselves, ‘where have we heard this before?’, the answer is ‘in the aftermath of Hiroshima and Nagasaki.’ This was the mask worn by American leaders to hide one of the worst of modern atrocities, and generally accepted by the liberal mainstream, indeed, it was Harry Truman who lent his authority to such a rationalization of criminality. The main line of revisionist critique of the atomic bombings was to produce evidence that the attacks had hidden motives (to warn the Soviets, to ensure American control of the Pacific, to satisfy the thirst for vengeance) or that it was not needed (Japan was ready to surrender).^{xx} The use of such a weapon against an essentially defenseless civilian population was not made a centerpiece of the critique.

Even those who decried the ensuing suffering and were disgusted by the wrongfulness of such an attack did not connect their concerns with the manner with which modern warfare has evolved. There were concerns about the future implications for humanity of such weaponry, unlocking the apocalyptic imagination, shifting discussion to preventing such a catastrophe in the future. In the end, even this appeal to elemental species survival went unheeded. It became obvious that biological prudence as a cultural commitment was no match for the lure of technological mastery in relation to war. Put differently, prevailing views about the links between national security and military capabilities were so strongly entrenched in bureaucratic structures and ideological commitments to governmental survival that the political risks and moral costs of relying on and being targeted by exterminist threats never became a public issue for debate in democratic societies.

I would not want to minimize the conceptual and operational difficulties associated with the repudiation of one-sided warfare. It is almost impossible to comprehend how a government in an established sovereign state would continue to prepare for war without seeking to take full advantage of its technological capabilities to improve its prospects of success. Further, the definition of 'one-sided' is relational, and the implementation of a posture of renunciation would depend on self-restraint and voluntary compliance in a variety of circumstances. At the same time, significant inroads on one-sided warfare could be made by a more conscientious adherence to international humanitarian law and by the unconditional repudiation of geopolitical 'wars of choice,' that is, non-defensive wars.^{xxi} The abuses mentioned above, including the use of atomic bombs, would have been avoided if the United States had exhibited respect for the

customary international law of war and the United Nations Charter. Almost every instance of one-sided warfare in the Third World involves non-defensive wars and unlawful recourse to force.^{xxii}

There is a further dimension that is relevant here. The normative incoherence of the liberal repudiation of torture combined with an acquiescence in nuclearism and one-sided warfare, is perceived understandably by much of public opinion as either inexplicable or a display of hypocrisy. In contrast, militarists and conservatives who accept the postulates of sovereignty as the foundation of security, are free from such ambiguity. They enjoy the benefits of normative coherence. If it is okay to bomb cities, adopt a doctrine of 'total war,' and celebrate victories in one-sided wars, then it is surely acceptable to 'torture' for the sake of avoiding that omni-present ticking bomb or to save American lives. And to the extent that liberal energies are devoted to showing that there will never be a ticking-bomb or that such tactics do not save American lives, it often becomes a losing game. If the argument against torture is made to rest ultimately on facts and contextual interpretation rather than on the unconditional moral authority of the norm it can never be won, *except verbally*, and we have seen that this doesn't count for much. And once torture is allowed for exceptional instances, the exception slides naturally until it becomes the operative rule. If torture can potentially extract life-saving information, who knows whether any captured or detained person possesses such information. Every person may know of a ticking-bomb!

In conclusion, there are several interdependent arguments being made: (1) the ethical resemblance between one-sided warfare and torture should be acknowledged, and addressed; (2) the moral impossibility of effectively repudiating torture without also rejecting one-sided warfare needs to be confronted; (3) the difficulty of rejecting one-sided warfare without drawing into question the primacy of national sovereignty and state survival in conceiving of ‘security’ also requires analysis and assessment; (4) the further difficulty of isolating one-sided warfare from warfare in general must be faced.

Such a formidable agenda is daunting, but to evade the challenge is to succumb to a political culture that implicitly endorses torture and terrorism on a massive and unrestricted scale so long as it is labeled ‘war.’ The historical record demonstrates that one-sided warfare that has been consistently and frequently waged for centuries, especially against the darker peoples of the Third World, as well as against indigenous peoples everywhere. The position taken here is not meant to weaken the important campaign against post-9/11 torture, but rather to expand and deepen that struggle, and implicitly to offer an alternative approach to state violence to that taken by liberal legalists.

ⁱ At least in the Vietnamese setting, the victimized side had some capacity to shoot the planes down, and on land to mount punishing ambush and surprise attacks on the superior American ground forces. In Gaza, the resisting forces under the command of Hamas had no capacity to neutralize Israeli weaponry, and was able to respond only by launching primitive rockets that did little damage, and what damage was done violated international humanitarian law because the rockets were aimed at Israeli civilian targets. The threat of such attacks upon Israelis in southern Israel should not be minimized despite the small level of actual harm inflicted, but it did not alter the one-sidedness of the military encounter, or the moral questions raised thereby. See Falk, “Israeli War Crimes: Why It Matters,” *Le Monde Diplomatique*, March 2009, 12-13.

ⁱⁱ By citizen/partisan I refer to an orientation toward conflict based on *conscience* and *sympathy* rather than national affiliation. Although I am loyal to the ideals of America, I

reject the postulates of *tribal patriotism*, unquestioning loyalty to the state. For this reason, also, I would favor the repudiation of treason as a crime.

ⁱⁱⁱ An intriguing alternative mode of moral reasoning involves reflections on the use of the atomic bomb in 1945 and the Holocaust. See Robert Jay Lifton and Eric Makusen, *The Genocidal Mentality: Nazi Holocaust and Nuclear Threat* (New York: Basic Books, 1988).

^{iv} See Lindquist, *'Exterminate the Brutes,'* (New York: The New Press, 1996) and Prashad, *The Darker Nations: A People's History of the Third World* (New York: The New Press, 2007).

^v Whether the terminology of war should even be used given this absence of reciprocity seems like a serious issue. The whole idea of war is of an encounter between opposed armed force, not necessarily equal, but with a mutual capacity to inflict serious harm on the adversary. In this sense, war is a contest of wills *and* capabilities. In a one-sided conflict, the encounter is either ended when the side with capabilities decides to stop or the side without capabilities gives up its posture of resistance, and surrenders. As the Vietnam War illustrated, the militarily dominant side can still lose the war because in the end the contest of wills proved more decisive than defeat or comparative losses on the battlefield. In the Gaza War of 2008-09 critics of the military operation were instinctively reluctant to call it a war, and instead referred to the undertaking as 'a massacre' or simply as 'slaughter' or 'atrocities.'

^{vi} See Robert S. McNamara (with Brian VanDeMark), *In Retrospect: the tragedy and lessons of Vietnam* (New York: Vintage, 1986).

^{vii} Of course, this kind of thinking is anachronistic insofar as the main security threats come from actors other than territorial states. This military mega-machine is virtually useless against such threats as are associated with transnational terrorism and international piracy.

^{viii} These issues are vividly explored by Jane Mayer, *The Dark Side* (New York: Doubleday, 2008).

^{ix} The approach taken to deny torture while affirming the security rationale for practices that are generally regarded to be torture is most fully described in a speech by President George W. Bush. "President Discusses Creation of Military Commissions to Try Suspected Terrorists," White House, Sept. 6, 2006; other American leaders endorsed this approach, including Dick Cheney, Donald Rumsfeld, and the head of the CIA, George Tenet. Government lawyers reinforced this way of evading the torture norm, most notably, John Yoo, David Addington, Alberto Gonzales, Stephen Bradbury, and Jay Bybee. The torture norm is considered universally binding as a matter of customary international law, but it is also embodied in a 1984 treaty ratified by the United States. Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (1984).

^x Only a few advocates of torture are brazen enough to call a spade a spade. The most notorious advocate, in this vein, is undoubtedly Alan Dershowitz. See Dershowitz, "The Torture Warrant: A Response to Professor Strauss," *New York Law School Law Review* 48:275-294; Dershowitz, "Tortured Reasoning," in Sanford Levinson, ed., *Torture: A Collection* (New York: Oxford University Press, 2004), 257-280

^{xi} For comparison of the torture prohibition with attitudes toward war see Henry Shue, “Torture,” in Levinson, note 10, 47-60.

^{xii} According to Lancet reports, the Iraqi civilian deaths attributable to the U.S. invasion and occupation between March 2003 and October 2006 was 655,000. The more recent figures compiled by <antiwar.com> list as of April 2009, 1,310,110 Iraqi deaths due to the war. This appalling statistic does not include the number injured. Also, the costs of war need to take account of the more than 5 million displaced Iraqis, as well as the extensive physical damage and destruction of cultural heritage.

^{xiii} There is a large literature addressing these issues. One of the most influential texts written from a liberal legalist perspective, with strong realist sympathies, is Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 3rd ed., 2000). For a wider and imaginative inquiry that looks at the history of bombing through the prism of one-sidedness see Sven Lindquist, *A History of Bombing* (New York: New Press, 2001).

^{xiv} For a critique of the war crimes trials after World War II that prosecuted surviving Japanese military and political leaders, while exempting American leaders from comparable scrutiny see Richard H. Minear, *Victors’ Justice: The Tokyo War Crimes Tribunal* (Princeton, NJ: Princeton University Press, 1971); see also the dissent at Tokyo by the Indian judge who challenges the basic charge of aggression made against the Japanese defendants. Radhabinod Pal, *International Military Tribunal for the Far East: Dissident Judgement* (Calcutta, India: Sanyal, 1953).

^{xv} It was perhaps the most notable feature of President Obama’s April 5, 2009 speech on nuclear weapons in Prague was an acknowledgement of a special responsibility due to past behavior: “As a nuclear power—as the only nuclear power to have used a nuclear weapon—the United States has a moral responsibility to act.” It is interesting that the *Wall Street Journal* in an angry editorial entitled “The Nuclear Illusionist” picked out the same sentence, derisively calling it a “barely concealed apology for Hiroshima is an insult to memory of Harry Truman, who saved a million lives by ending World War II without a bloody invasion of Japan.” *Wall Street Journal*, April 7, 2009, p. A14.

^{xvi} Small inroads on the impunity of the powerful result from some national courts claiming so-called universal jurisdiction to prosecute even such individuals if their physical presence can be obtained by way of extradition or detention. The Pinochet litigation in Britain gave rise to an expanded interest in the potential role of universal jurisdiction in strengthening international criminal law. For a thorough exploration of these issues see Stephen Macedo, ed., *Universal Jurisdiction* (Philadelphia, PA: University of Pennsylvania Press, 2004). Even without actual prosecution, the threat of extradition or detention alters travel plans, and implies at least potential accountability. On a more symbolic level, are civil society initiatives that organize citizen tribunals that consider evidence of individual responsibility for war crimes and other crimes of state, and may shape the legitimacy climate that could be conducive to the establishment of boycotts or calls for divestment as occurred in the anti-apartheid movement. For a notable attempt along these lines see Müge Gürsöy Sökmen, ed., *World Tribunal on Iraq* (Northampton, MA: Interlink, 2008). The initial effort was prompted by the Vietnam War, and initiated by the British philosopher Bertrand Russell, and known as ‘the Russell Tribunal.’ For the record compiled, see John Duffett, ed., *Against the Crimes of Silence:*

Proceedings of the International Russell War Crimes Tribunal (Flanders, NJ: O'Hare, 1968).

^{xvii} See E.P. Thompson, "Notes on Exterminism: The Last Stage of Civilization," in E. P. Thompson, ed., *Beyond the Cold War: A New Approach to the Arms Race and Nuclear Armageddon* (New York: Pantheon, 1982), 41-79; for a more characteristic liberal view based on living with nuclear weapons see Joseph S. Nye, *Nuclear Ethics* (New York: Free Press, 1986).

^{xviii} See David Luban, "Unthinking the Ticking Bomb," Georgetown Public Law Research Paper No. 1154202, [http://papers.ssrn.com/sol3/papes.cfm?abstract_id=1154202](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154202); also Kim Scheppele, "Hypothetical Torture in the 'War on Torture," *Journal of National Security Policy and Law* 1:285-340

^{xix} See Bush speech of Sept. 6, 2006, note 5.

^{xx} See e.g. Gar Alperovitz, *Atomic Diplomacy: Hiroshima and Potsdam: the use of the atomic bomb and the American confrontation with Soviet Power* (London, UK: Pluto, 2nd ed., 1994).

^{xxi} See Richard Falk, "Renouncing Wars of Choice: Toward a Geopolitics of Nonviolence," in David Ray Griffin and others, *The American Empire and the Commonwealth of God* (Louisville, KY: Westminster John Knox Press, 2006), 69-85

^{xxii} An arguable exception was the Gulf War of 1991, which did proceed as a result of a mandate from the UN Security Council and was legally validated as a defensive response to Iraq's invasion and annexation of Kuwait. Even here there are legal/moral ambiguities in the failure to give diplomacy an adequate opportunity to restore Kuwaiti sovereignty and by the targeting of the civilian infrastructure of Iraq in a manner that would foreseeably cause widespread civilian casualties.