

**From Paul Kahn, *Sacred Violence: Torture, Terror and Sovereignty*  
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Chapter Two: Torture and International Law

In the first chapter, I argued that political modernity was characterized by a shift from torture to war, from victims to conscripts. The disappearance of torture as a domestic practice of power, however, does not in itself suggest a similar disappearance of torture from the practice of international violence. Torture was traditionally applied against enemies – domestic and foreign – of the sovereign. Treason, in English law, was a broad category that, prior to nineteenth century legal reform, included not just direct threats to the life of the sovereign, but “any degree of violence in expressing opposition to parliamentary enactments.”<sup>1</sup> The transformation that I traced in the last chapter included reimagining the criminal: he is no longer an enemy of the sovereign, but only a fallen citizen. Nevertheless, there remains a large category of actual and potential enemies. If torture is the performance of sovereign violence against enemies, then, in the modern era, torture can be expected to migrate from an internal ritual of sacrifice to an external means of displaying and deploying the power of the state. The end is the same: the victim must speak the name of the sovereign. At war, we call that point of confession “surrender.”<sup>2</sup>

In broad scope, I don’t think the point can be denied: the destruction of bodies in modern warfare moves toward a generalized practice of torture. We have not so much abandoned the practice of torture as shifted the locus of an act of violent sacrifice – the genus within which torture is a specific cultural form.<sup>3</sup> The battlefield is strewn with the disemboweled and beheaded, with severed limbs and broken bodies. All have died a

terrible death in a display of sovereign power. To view the battlefield is to witness the awesome power of the sovereign to occupy and destroy the finite body. It is to stand before the modern, democratic equivalent of the spectacle of the scaffold. Viewing the battlefield from a certain distance, it is not even clear who is the object of sacrifice: the enemy and the conscript suffer the same threat and burden of physical destruction for the sake of making present sovereign power. Killing and being killed are bound together just as the sacral-monarch's power to take a life was always linked to his own sacrificial character. Coronation was a ceremony of rebirth, of life through death.<sup>4</sup> The emergence of the royal "we" follows upon the death of the personal "I." The power to take a life is always linked to the willingness to give up one's own life, for self-sacrifice marks the presence of the sovereign.

Lincoln described the democratic battlefield as "consecrated ground." It is the space within which the sacrificial character of modern politics shows itself. It is a field of reciprocal acts of self-sacrifice, in which enemies offer each other the occasion for displaying sovereign power. Arguably, the battlefield only makes sense as a space within which citizens might realize the possibility of transcending the finite conditions of their individual lives. There, they become more than themselves, which is why war figures in the modern imagination as such a powerful source of meaning.<sup>5</sup> Embedded in the practice of sacred violence, the battlefield exists in the same imaginative framework as the spectacle of the scaffold – a space for the showing forth of the creative-destructive power of the sovereign. Accordingly, it has the same vulnerability as the scaffold: when faith fails, when the sacred character of the sovereign is not seen, it presents just the awful – not awesome – sight of death and destruction. To modern, humane sensibilities, it

appears thoroughly inhuman, which is only another way of noting that the sacred has always been tightly tied to the polluted.

In this chapter, I take up a particular form of this failure of faith. Not that which characterizes the existential angst of the soldier who finds himself in the trenches of the First World War or the rice paddies of Vietnam – or the cities of Iraq – with no understanding of why he is there. For him, the sacrificial claims of the sovereign may sound more like rhetorical fraud than sacred speech. My topic here is not that individual crisis of faith, but a general shift in the representation of violence in the culture of modern international law. At issue is the failure of the possibility of faith – the death of sovereignty, not of a particular sovereign. If the wars of the first half of the twentieth century show us the power of the sovereign to demand sacrifice, the developments in international law, which follow those wars, resolutely turn away from any recognition of a connection between violence and the sacred.

This turn to international law and away from the violence of combat, is in many respects, a replay of a “humanization” of the criminal law that occurred almost 200 years earlier in the wake of the French Revolution. Then, the object of reform was the use of torture and corporal punishment within domestic penal practice.<sup>6</sup> I argued in the last chapter that it was not merely sympathy and Enlightenment ideals of reason that drove that earlier reform movement. Rather, it was a shift in the relationship of the subject to the sovereign – not a rejection of pain, but a relocation of the locus of sacrifice. The twentieth century “reform” movement is, in this sense, more revolutionary, for it rejects the very idea of sacrificial violence. That, however, cannot be done without rejecting the faith that supports the practice of political violence by grounding its sacred character in

the idea of the sovereign. This modern revolution appears to itself as the fulfillment of the Enlightenment ideal of a politics of reason, the end of which is individual well-being.<sup>7</sup> The radicalness of this claim is both its strength and its weakness, for reason can no more prove the death of the sovereign than it could the death of God.

Whether and to what extent faith in sovereign power – sacred violence – continues are questions that cannot be answered in the abstract. We can only say that whenever the connection between violence and the sacred is broken, the continued existence of sovereignty will be in doubt. Without that connection, a regime of sovereign states will be viewed as increasingly anachronistic. It will appear as an obstacle to the emergence of a global order of law under the guidance of reason. Conversely, wherever sovereignty remains a vital presence, the connection of violence and meaning will be maintained and the claims of international law will be in doubt.

### Torture and Warfare

Modern warfare has been the generalization of the practice of violent sacrifice that was at work in pre-modern displays of torture. Both work at the intersection of body and idea, and both work through the political psychology of degradation.<sup>8</sup> Torture is a kind of laboratory of degradation, while warfare is its generalized practice. Torture fell out of place within the regulative ideals of European combat in the nineteenth and twentieth centuries. Of what use is the rack once we have seen the trenches of the First World War or the strategic bombing of the Second? The executioner is an anachronism when political death has been thoroughly democratized. As a practical matter, torture lost much of its usefulness under modern conditions of warfare: enemy combatants are unlikely to have useful information when armies are organized in a strictly hierarchical

manner. Nor is there is any point in trying to shift the allegiance of particular victims when the outcome of the war turns on the performance of mass armies in the field or entire populations working to support the war effort. Such practical concerns, however, are really only incidental to the broad shift in the character and locus of sovereign violence. The form of the appearance of the sacred is never a matter of efficiency. Otherwise, religion would have had a very short life in the history of civilization.

Just as efficiency is not at stake, neither is moral progress. The move from torture to strategic bombing is not a moral advance. If we rank the different forms of sovereign violence on any normative scale other than that of physical destruction and death, we become complicit in that violence. Our own practices will always look more sensible to us than those of other cultures – including our own past. Westerners cannot help but feel a moral superiority to Muslims when, for example, they see that Sharia contemplates amputation and stoning as forms of punishment. But there is no universal moral calculus by which we can compare a lifetime in an American prison against an amputation.

Some theorists attempt to distinguish torture from combat by noting the asymmetry of power in the former. They focus on the helplessness of the torture victim before a torturer who acts in total disregard of his or her will.<sup>9</sup> But the question is, “compared to what?” Does one compare torture to law or to war? In both combat and torture, action is taken in disregard of the well-being of the other. The Western history of chivalry suggests that inflicting violent injury and maintaining dignity are not necessarily incompatible. We are, however, a long way from the age of chivalry. If combat preserves dignity today, it does so by denying any room for individual subjectivity. Killing and being killed occur on a field of anonymity.

Torture begins where an interaction between subjects with unique wills begins. In its combination of recognition and denial, torture is the paradigm of an illiberal act. Still, it is difficult to understand how combat is any more liberal a practice. Combat so deeply denies recognition of the dignity of the other that torture never begins because dignity is never glimpsed.<sup>10</sup> It is simply wrong to suggest that combat differs from torture because combatants must take account of the initiative of their opponents.<sup>11</sup> This is an effort to cast combat in the form of the moral economy of consent. The logic of warfare, however, is not that of a “fair” competition between consenting, *sui juris* subjects. That may have been the logic of the duel, but it is hardly that of national armies at war. Rather, the logic of combat seeks as its ideal a total asymmetry in the application of force.<sup>12</sup> Its end is to obtain a position from which no harm can result to one’s own side, while all the injury is suffered by the enemy. This is just the logic of total control obtained in the microcosm of torture. In both cases, one may hope to make this asymmetry so visible and so certain that the threat alone is sufficient to achieve one’s ends, whether confession or surrender. Combat, like torture, is more successful the less it actually has to be deployed, – in part because action generates far more contingencies than threat. But again like torture, combat cannot simply disappear entirely from the practice of violence. For the threat to remain, the belief that the act will be accomplished if necessary must be sustained.<sup>13</sup>

Nor is it the case that combatants, unlike torture victims, can simply take themselves out of the violence by laying down their arms – a right formally given them under the Geneva Conventions.<sup>14</sup> Under conditions of modern warfare, the capacity to communicate that choice is simply not available. Laying down ones arms before a missile attack makes no sense. Proof of this was seen in the first Gulf War on the “highway of

death,” as the Iraqi army fled Kuwait City. Again, the point is not just practical. Conceptually, soldiers are not free agents. They can be literally threatened by deadly force from their own officers; they can certainly be prosecuted, and punished by execution, if they make the choice to concede defeat on the basis of nothing more than their own free will.<sup>15</sup> In between the moment when combatants take up the task of self-sacrifice and that in which they effectively surrender, their situation is one of “being sacrificed.” In this in-between period, they are very close – politically and phenomenologically – to the classic victim of torture: each is made to bear the presence of the sovereign in and through the destruction of his or her body.

Warfare is simply not a practice founded on consent. Like torture, it is founded on sacrifice. Indeed, it is not too much to say that warfare wants to become torture: its logic moves toward the same asymmetry of power. When the battle situation appears as asymmetrical as the use of force in torture – when one side appears as pure victim – defeat becomes possible. So too does martyrdom, for one can choose death over life. This is just the position at which the analysis of torture in chapter one left us.<sup>16</sup>

Even were warfare conducted within the rules of humanitarian law, that would no more eliminate its underlying sacrificial quality than did the fact that the practice of torture in some European countries was subject to legal regulation. International humanitarian law may specify the class of potential victims and limit the means for their destruction, but it does not change the underlying logic of conflict: killing and being killed for the sovereign. Nevertheless, many people today have a sense that the war on terror is upending the progress of international human rights law and humanitarian law by returning to a prohibited practice of torture. They distinguish between lawful combat and

unlawful torture. They argue that this distinction is morally compelling. But is it? Is it moral advance or simply historical difference that creates the possibility of condemning torture while pursuing warfare?

### International Law

Classic international law of the nineteenth and early twentieth century was the law of inter-state relations. Individuals were not rights-bearing subjects within this system. An injury to an individual was cognizable as a matter of international law only insofar as it was an injury to the state of which he or she was a citizen.<sup>17</sup> Whether to pursue redress for such a legal injury was wholly a matter for decision by the state or states involved. Just as there were no subjects apart from states, there was no regulation of states apart from rules to which they had freely subjected themselves.<sup>18</sup> Since all international law was derived from state consent, all law had the same normative character. There was no hierarchy of norms – no *jus cogens* claims – except for the principle of sovereignty itself, which was the source of all other norms.<sup>19</sup> If one went so far as to think that a sovereign state must be free to withdraw its consent at every moment, international law risked dissolving into the tautology that state consent reaches no further than present state action. The response to this dilemma was to claim that the very idea of international law rests on the principle of “*pacta sunt servanda*” – treaties must be observed. Even here, however, a state that declined to follow its treaty obligations was not so much violating a superior norm as providing a ground for reciprocal action, and even war, on the part of an injured state. In a world in which the first principle is unconstrained sovereignty, every other norm is contingent. The world of international law was binding just as long as states remained committed to it.

Concretely, this focus on consent had a specific, practical meaning: a state retained absolute authority over the decision whether or not to go to war against any other state. That decision, as a matter of law, could be neither right or wrong. This was the meaning of sovereignty from an international perspective. International law did not regulate the decision for war or peace, but only offered a legal regime – the law of war or the law of peace – once that decision had been made.<sup>20</sup> The decision for war was a sovereign prerogative beyond any conceivable regime of law.<sup>21</sup> War was limited by politics – by alliances and threats – not by legal rules. This fact, that at the heart of international relations lay a sovereign right to have recourse to violence, sustained the question that was inseparable from every assertion of international law: is it really law?

International law in the second half of the twentieth century moved through two dramatic paradigm shifts. The first occurred with the founding of the United Nations. The Charter regime is based on the principle that unilateral state recourse to force is now illegal, apart from the single exception for self-defense. International law thereby entered the forbidden domain of sovereign recourse to war.<sup>22</sup> More than that, the Charter imagined an enforcement regime under the authority of the Security Council. Member states formally delegated this central feature of sovereign power to the Council. The link of sovereignty to interstate violence was thereby broken.

Of course, neither practically nor theoretically was there a clean break with the old paradigm. The major powers retained a veto. They had not delegated to the Council their own decision-making authority over violence, even if they had formally accepted the new legal rule. Practically, other states also continued to threaten and to use force against each other. More than ever, the shape of international relations in the second half

of the twentieth century was characterized by violence and the threat of violence. Had the new paradigm actually taken hold, it would have raised a critical question: what is sovereignty stripped of a capacity to demand sacrifice? Can we even speak of sovereignty in a post-sacrificial politics? That question was hardly even glimpsed in a world threatened by nuclear destruction, on the one hand, and countless smaller wars, on the other.

The second paradigm shift struggled for recognition throughout the Cold War but was not achieved, even as a theoretical matter, until the 1990s. This was to extend the international legal regulation of sovereign recourse to violence from state-to-state relationships to the relationship of governments to individuals, including a state's own citizens. Just as the earlier shift expanded the range of international-legal subjects – those with legal rights and obligations – beyond states to transnational institutions like the Security Council, this new shift expanded that range to include individuals. Indeed, the moral foundation of international law shifted from the protection of states against the use of force to the protection of individuals: it shifted from peace to human rights. At the start of the new century, international law, at least for many theorists and practitioners, has been reconceived. No longer the law of nations, it is the law of human rights.<sup>23</sup>

The first shift conceived of the United Nations as exercising certain delegated powers over states for the sake of their own well-being. This second move is more radical, conceiving of states themselves as exercising power delegated to them by a global regime of law, the constituent members of which are individuals.<sup>24</sup> Earlier, individuals had been thought of as instruments of state power; now, states are thought to exercise their powers for the sake of individuals. The institutional expressions of this new

paradigm are, first, a willingness to engage in humanitarian intervention and, second, the creation of international criminal courts. War and law continue as the twin forms of politics, but now both are turned toward a new cosmopolitanism at the center of which is the rights-bearing individual. Although neither institutional innovation has been very effective practically, both are symbolic of a profound challenge to the classic idea of sovereignty.

Under the first paradigm shift, war represented the antithesis of law; under the second, torture took the place of law's antithesis. Thus, torture in human rights law mimics the earlier place of war in the law of the Charter. Indeed, torture is cast as a sort of internal war – a war by a regime against members of its own national community. To prohibit both war and torture is to place the sovereign power of life and death under the rule of law.<sup>25</sup> The sovereign is to be stripped of its capacity for violence outside of law, whether applied externally or internally. This can happen only with the abandonment of faith in the sacred character of the sovereign and in the rituals of sacrifice that accompanied that faith. The international legal project of the latter part of the twentieth century is deliberately set against the claim that one confronts the sacred through sovereign violence.

The deeply felt, but little understood, link of sovereignty to violence easily led international law theorists at the end of the twentieth century to think that the emerging global order would be a post-sovereignty world. By that, they meant that there would be no space in the international order beyond legal regulation, and thus no space for the appearance of sacred violence. Law would go global and, with that, the sacrificial force of sovereign violence – whether directed outwardly or inwardly – would end. If state

violence is the problem to which law is addressed, then the elimination of sovereignty is the answer. Henceforth, state violence would be limited to law enforcement. As such, it would be a matter of substantial indifference who exactly exercised that violence.

Effective law enforcement could as easily be provided by external as by internal forces, and by private as by public forces. The questions are all practical.

What matters is the security of individual rights. Everything else is a means to that end.

Of course, one cannot simply declare the end of the sovereign state any more than one can eliminate torture by declaring it illegal. Instead, theorists spoke of institutional trends, emerging regimes, normative ideals, and long-term goals. The post-sovereignty world was that toward which we were heading. Networks, markets, and jurists – not politicians – would take us there, or perhaps we had already arrived while no one was quite looking.<sup>26</sup> If the threat of violence continued to inform state practices, one could turn to the courts for support in this new age of law. Torturers like Pinochet would be criminally prosecuted wherever they went, while states that continued to deploy the threat of sovereign violence – for example, in the shape of nuclear weapons – would be brought before the International Court of Justice. Only on closer inspection would anyone notice that Pinochet went home and the ICJ failed to declare nuclear weapons illegal.<sup>27</sup> The trends, after all, were in the right direction.

One could always point to the European Union as a post-sovereignty political arrangement. It was a regime wholly defined by law. As a consequence, it had eliminated war among its members and torture of its citizens. The human rights of its citizens were protected by transnational courts. It was structurally incapable of making a claim to occupy a sovereign space of violence beyond law. That the EU was not particularly

democratic was an issue to be addressed in the long term. In the meantime, its law would derive its legitimacy from expertise and from process. Indeed, progress in the project of the EU was measured by increasing restrictions on the sovereign right of members to veto proposed actions.<sup>28</sup> Only the unconverted could have imagined that, in 2005, voters would reject a European Constitution on grounds such as nationalism, religion, economic interests, and a fear of the Islamic other.

Given the historical centrality of violence to the self-conception of the sovereign nation-state, this turn to law as a force in opposition to violence is somewhat surprising. International law, after all, had long operated as an adjunct to that system of violence – protecting, not eliminating, the state’s right to take up arms. To understand what happened to international law, we must see it as a part of the much larger modernist project of liberal reform under the guidance of reason.

By the late twentieth century, international law had effectively become a political “counter-religion.” Jan Assmann describes a counter-religion as one that is constructed through an inversion of the values of the dominant religion.<sup>29</sup> By inverting the inversion, we can read the norms of the dominant religion out of the beliefs and rituals of the counter-religion. Thus, the first principle of the United Nations Charter is the prohibition on state recourse to force, which is to be enforced by the Security Council – a collective agent operating on a global scale. This is a perfectly inverted picture of the modern nation-state as it existed from the Age of Revolution until the end of the Second World War. Essential to that state was its capacity to use or to threaten force. Sovereignty was the capacity to call upon citizens to kill and to be killed – to sacrifice – in defense of the national interest. The state might form strategic alliances, but they were always subject to

the state's own judgment concerning political necessity. There was no independent transnational, institutional power that could control state violence.

The second principle of the counter-religion is the proposition that all individuals have human rights that they can assert as a matter of law against all governments, including their own. Those rights express the normative priority of the individual over the state, which exists for the sake of individual well-being. Again, reality had been the inverse: the state was a structure of collective meaning quite independent of the interests of any particular individual. That meaning was inaccessible to the view of the outsider. To assess and regulate the meaning maintained between citizen and state from the outside would be rather like a Jew telling a Christian what the truth of his religion must be. What could be said, however, was that the state's meaning had proved sufficient to create and maintain the sovereign's claim of an ultimate power of life and death over citizens.

The religion and the counter-religion fought each other throughout the second half of the twentieth century. Many thought the counter-religion was winning this battle after the collapse of the Soviet Union in 1989. They thought that politics could now cease to exist as a practice of sacrifice. Killing and being killed for the state seemed an antiquated vision in a global order of law defined by human rights and trade. Post September 11, there has been a strong resurgence of the religion over the counter-religion – at least in the United States. Some were shocked by the reappearance of sovereign violence and, with it, the sacrificial imagination. The behavior of the United States after 9/11 was the reappearance of the classic expression of sovereignty as sacred violence: a demand to kill and be killed. In truth, in the United States, the religion has always dominated the counter-religion – at least outside of the academy. How long this conflict between the

religion and counter-religion of sovereignty will continue, and which will win – if either – are completely unpredictable, but surely it is a mistake to read history as if it could move in only one direction.

### Human Rights

Of the two targets of contemporary international law, war and torture, the latter appears to have been more difficult to reach and more important to prohibit. The prohibition on torture was not clearly stated as a formal matter of human rights law for another twenty years after the Charter's birth. Nevertheless, when the prohibition does appear, it appears as an absolute. This is just the opposite of the earlier prohibition on the use of force: while an integral part of the Charter itself, that prohibition was linked to an exception for self-defense.<sup>30</sup> There is no equivalent regime of the exception for torture. None of the conventions specifying the prohibition on torture allow for derogation under any circumstances. The Convention Against Torture puts this plainly: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as justification for torture."<sup>31</sup> Here, then, we have a human rights convention placed above all sovereign authority. It purports to regulate the practice of warfare, the scope of emergency powers, and the ordinary forms of legality. How is it that the torture prohibition became the point at which the ends of politics and the expression of sovereign power break down before the claimed majesty of the law?

The torture prohibition appears for the first time in the Universal Declaration of Human Rights, approved by the General Assembly in 1948. Article 5 of the Declaration states, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment

or punishment.” While the UN Charter comes into being as a treaty with the status of law, the Declaration has no such legal status. Retrospectively, we can see that it becomes a rich source for claims of customary international law. Nevertheless, such an evolution could not be known in advance. Indeed, the legal meaning of General Assembly Resolutions had to await the development of a practice. The very concept of “soft law” would not appear for some time.<sup>32</sup>

Formally, the Declaration gains legal significance – although hardly legal status – through Article 1 of the Charter, which speaks of “promoting and encouraging respect for human rights.” The Declaration provides a first content to the category of human rights, to which the new institution is formally committed. The Charter’s Preamble, too, lists among the new organization’s sources and ambitions “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women.” Faith and encouragement, however, are hardly a rule of law. Practically, we are still in the realm of aspiration. Theoretically, there was not yet any real understanding of how international law could directly regulate the relationship between government and citizens within a sovereign state.

Alongside of human rights promotion, the Charter declares a commitment to respecting state sovereignty. Indeed, its fundamental strategy is not to prevent war by enforcing a regime of human rights, but rather to prevent armed conflict by securing the borders within which a sovereign state is free to govern itself without outside interference. The idea of an international law of human rights stood in significant tension with this understanding. The primacy of sovereignty is seen clearly in Article 51’s reservation of a right to use force in self-defense. Nothing suggests that this right to

defend against armed attack is conditioned on the human rights record of a government. It is not so much that the drafters perceived the tension between self-government and human rights and then chose the former. Rather, there was an assumption that human rights abuses had their origin in illegitimate power structures. Newly decolonized nations would have no reason to abuse their citizens. On this, the theory of socialism and the theory of liberalism agreed.<sup>33</sup>

A similar uncertainty over the capacity of international law to exercise authority over the relationship of a government to its own citizens was simultaneously displayed at the Nuremberg trials. Something more than prosecution for traditional war crimes seemed required with respect to the leaders of the Nazi regime. The Nuremberg defendants were, accordingly, indicted both for the pursuit of an aggressive war and for violations of the human rights of their own citizens. Together, these represented the primary goals of the new UN system: an end to the “scourge of war” and a respect for human rights. But what was institutional aspiration for the UN was presented as an existing legal order at Nuremberg. That claim seemed so incongruous that leading Western scholars accused the prosecution of pursuing “victors’ justice.”<sup>34</sup>

In the end, the Nuremberg judges were moved by only one half of the legal innovations offered to them. They were willing to hold that aggressive war had been made illegal by the Kellog-Briand Pact of 1928 – an argument that required turning a blind eye to the realities of inter-war politics. With respect to the second innovation of the indictment, however, the judges balked. They could find no human-rights equivalent of the Kellog-Briand Pact. Avoiding the question of whether a free-floating human rights

law was consistent with state sovereignty, they linked the alleged human rights violations to the act of launching an illegal war.

At Nuremberg, then, human rights played a supporting role to a new legal regime founded on protecting state sovereignty through the prohibition on the use of force. This is just the position reflected in the Universal Declaration, which is linked through the Preamble and Article I to the legal prohibition on the use of force in the Charter. This paradigm endures in the jurisprudence of Chapter VII of the Charter, which allows the Security Council to adopt coercive measures in response to threats to, and breaches of, the peace: human rights violations become a subject of sufficient international concern to merit intervention when the effects of those violations “spill over” into third countries, raising a threat to the peace.<sup>35</sup>

This ambiguous, post-War regime of human rights reflects less Cold War frustrations and more the difficulties of decolonization. The Second World War had been a war of liberation, but the business of liberation was not yet complete in much of the world. The European Allies record of colonial invasion, occupation, and subordination was one that looked disturbingly similar to the recent German war effort. The differences were geographical and temporal – their colonial empires were located elsewhere and had developed over centuries. A colonial regime is not compatible with claims for human rights, for such a regime is fundamentally based on inequality.<sup>36</sup> Thus, the end of the wars of decolonization was a necessary condition for the moral aspirations of the Declaration to be framed as a set of legal requirements. This new era is announced with the opening for signature of the two human rights Covenants in the mid 1960s.<sup>37</sup>

Just as we can read the end of the era of colonization out of the transition from the Declaration to the Covenants, we can read the politics of the Cold War out of the odd combination of the success and failure of the Covenants – formal success and practical failure. Despite the success of decolonization, the geopolitical division fundamentally undermined the political and the legal aspirations of the United Nations, which had included protection of state sovereignty, international control over the authority to use force, and the progressive development of a legal order based on human rights. The latter part of the twentieth century was among the most violent in history. If one considers the stakes in the nuclear confrontation, the entire period lay at the edge of world destroying violence. Despite decolonization, this period of international relations looked surprisingly like a continuation of the 100 years of Great Power politics that had preceded it. Formally independent states became client states of the powerful through consent, force, or corruption. Spheres of influence were maintained, mass armies were created, wars were threatened, and proxy wars broke out.

Not only was the war prevention function of the Security Council a dead letter, but there was no follow up to the Nuremberg trials.<sup>38</sup> The latter part of the century was characterized by repeated abuses of human rights, including torture and genocide. There was no legal accountability. Ironically, in this situation of institutional failure, national conflict, moral atrocity and individual impunity, the articulation of the law of human rights achieved a kind of formal autonomy. Human rights now appeared in the form of law, not just moral aspiration.<sup>39</sup> This was not law as distinct from politics, let alone law as a limit on political practice. It was law that, apart from its formal announcement, could find no space to operate free of the politics that it was intended to regulate. The clearest

expression of this subordination was the UN's Commission on Human Rights, upon which sat regimes that were themselves gross violators of the fundamental human rights conventions.<sup>40</sup>

That the legal prohibition on state use of force – Article 2(4) – died at birth did not serve as a warning against moving further down the path of formal, but ineffective, legalization. Instead, just the opposite happened. Human rights law now advanced quite independently of any relationship to enforcement or even compliance by states that formally signed the various conventions. Entrepreneurs of the law emerged – academics, international lawyers, and NGO's. Because law had little practical effect, states had little interest in opposing the rhetoric of rights and some interest in supporting an ineffective legal rhetoric.<sup>41</sup> What, after all, was human rights law when torture was freely practiced, genocide was possible, democratic politics was repressed by force, and entire nations were kept subordinated through military occupation? Politically, human rights law became a field of inauthentic expression; morally, it was an embarrassing expression of hypocrisy.

As long as human rights law had little practical effect, it was free to develop as a formally autonomous legal order. Indeed, there was not even a need to compromise among conflicting visions of the content of rights, let alone resolve conflicts between a legal regime of rights and a political practice of state sovereignty. Without practical effect, any interest could become a right; any need could be met by a legal rule. Thus, there was a proliferation of the formal law of rights, much of it ratified by regimes that were actively violating the most basic of human rights. The no-torture rule appears as Article 7 of the International Covenant on Civil and Political Rights, which was opened

for signature in 1966 and entered into force in 1976, just as regimes of torture became typical throughout large areas of the world. In 1985, a separate Convention against Torture was opened for signature. Pinochet was still in office, Mandella was still in prison, the United States was still supporting the Contras, the Chinese reforms had yet to begin, and Gorbachev had just become General Secretary of the Communist Party.

International human rights law had so little force in this period that it was possible to take the appearance of a legal rule as an indication that the international community was not serious about the underlying issue. One surely could not look to the law to understand the shape of state practice. Human rights law failed to represent the self-ordering of any community. Thus, this period of the rapid development of human rights law ends with the accomplishment of a modern genocide in Rwanda. And why not? Surely nothing in international practice suggested to the Rwandans that the expression of law offered an institutionalized practice to which they were bound. The same can be said of the practice of torture. The Convention on Torture was an implicit acknowledgment of the regularity of the practice; it was not a serious effort to change the practice.

In this political context, international human rights law turned away from the language of “progressive realization” and toward the language of principle. The original post-war strategy of first eliminating war and then working on the human rights practices of secure regimes flipped around. Instead of non-intervention leading to rights, rights would lead to peaceful relations among states. Kant had argued something similar in his essay “On Perpetual Peace”: republican states will not generally go to war. This 200 year old essay was recovered by and for modern theorists.<sup>42</sup>

The best evidence that principle had been set free of a respect for practice is found in the definition of torture set forth in the Torture Convention itself:

[T]he term “torture” means any act by which severe pain or suffering ... 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 ... 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.<sup>43</sup>

Strikingly, this definition was written without regard to the practice of warfare. It assumes a world wholly outside the traditional political imagination of sovereignty. The use of force for political ends has simply disappeared from view. If the definition is read literally, combat qualifies as torture, for combat surely is the intentional infliction of severe pain and suffering in order to intimidate or coerce.<sup>44</sup> The sovereign power to demand sacrifice of its citizens and to kill the enemy simply makes no appearance.

No doubt the drafters of the prohibition did not mean to outlaw combat in their definition of torture, but that is just the point. They no longer imagined state violence outside of the practice of law enforcement. Not even violence in the pursuit of self-defense entered their minds. Article 51’s recognition of self-defense had given way to a broader and deeper rejection of violence. In short, the formal autonomy of law, which was both a sign and effect of the Cold War, literally freed the legal imagination from the

politics of sovereignty. Torture became the paradigm of political violence, and all violence – except for “lawful sanctions” – is the antithesis of law. This is the imagination that could place the prohibition of torture at the pinnacle of the legal order. We are as far as can be from the violence of the Schmittian Exception: “no torture, with no exceptions” translates into “no war; no Exception.”

The autonomy of law, including the privileging of the torture prohibition, was purchased at the cost of recognition of political reality. Instead of an international community under law, this period of dramatic formal expansion of law actually privileged the practice of state sovereignty. There was a proliferation of new states, each of which claimed the Charter’s legal guarantee of secure borders and objected to any intervention in its internal affairs – even in the name of law. Despite their formal assent to the new conventions, the successor states to the colonial regimes were generally no more respecting of human rights than their predecessors. By seeking to secure the conditions of pluralism, the United Nations helped secure the conditions of the continuation of a political practice of sovereignty. That practice remained one of imagining enemies – either external or internal. A state has a meaning that informs and makes a claim on the lives of its citizens. Because these meanings are distinct, pluralism will tend to create the conditions of threat. A contest over meaning need not turn violent, but it can. In an international regime in which violence is a traditional form of interaction, difference can easily become threat. Against enemies one prepares to use violence. War and torture flourished right alongside the discourse of rights. It was an era of parallel universes.

After 1989, the premises of the international legal system changed again. What had been a kind of fantasy of subordinating sovereignty to law now looked like a program. It was as if the lawyers had been building models just waiting for this moment to arise. In the immediate post-Cold War period, this often appeared as the only available program that could serve as an alternative to geopolitical dominance by the sole remaining superpower. Indeed, for many, international law meant opposition to the United States.

States that had formally agreed to human rights conventions that they had wholly ignored in practice were now told that law was not an abstraction, but rather a code of conduct. In place of sovereign states, a single legal order of trade, human rights, and international institutions was emphasized. NGO's were no longer minor players of uncertain legal status, but together with the international lawyers had brought us to a new world order.<sup>45</sup> The substantive law-making aspect of this project had already been largely accomplished. Post-1989, the legal issues were thought to be primarily institutional: to create enforcement mechanisms commensurate with the single global order of law. Torturers were now to be held judicially accountable – whether before domestic or international courts made little difference.<sup>46</sup> Universal jurisdiction was invoked against Pinochet, Sharon, and then a flood of others. *Ad hoc* international criminal courts began to appear: first with respect to the former Yugoslavia, then Rwanda. Finally, the Rome Statute brought forth a permanent international court, despite the vociferous objection of the world's most powerful state – the one most committed to the traditional idea of sovereignty.

The 1990s were seen as the moment for the recovery and completion of the post-War project of international law, which had been suspended practically, but not formally, during the Cold War. The narrative of the second half of the twentieth century was rewritten to fit within the most conventional paradigm of the development of law: first a new legal order is imagined in principle (the Declaration); then it is drafted in detail (the human rights Covenants); and finally, enforcement institutions are put in place (the International Criminal Court). The no-torture rule moves from the soft law of the Declaration, to the hard law of the Covenant and the Convention, to a norm enforced by a global regime of courts. International human rights law matures from a set of ideals to be adopted by sovereign states to an expression of self-regulation by a single global community. There is no room for torture in a world of democracy, trade, and rights. It has gone the way of war.

Then came 9/11, and suddenly this narrative of the triumph of a global order of law looked as if it might be no more than the successor myth to the earlier fantasy of human rights as an autonomous order of law. Terror is not gone and we have seen once again that the response to terror is torture. Political sovereignty is not an anachronism; war remains a force that gives us meaning. At least, these are claims that are in strong contention with the legal triumphalism so prevalent at the turn of the century. We are not yet done with the politics of sovereignty; we do not yet live within a global order of human rights law. The counter-religion announced its triumph too soon. We suffer terror and, so it seems, we respond with torture.

### International Humanitarian Law

Humanitarian law purports to regulate the forms of violence used in international conflict.<sup>47</sup> Generally, this body of law has two aims: first, to reduce the extent of suffering by limiting the targets and means of combat, and second, to prevent injury and abuse to those who fall within the control of an enemy power. These aims are embodied in the twin principles of discrimination and proportionality that constitute the core of humanitarian law. Under these principles, force should be directed only at combatants and should be roughly proportional to the importance of the military objective at stake.

Humanitarian law is a deeply paradoxical enterprise for, it brings a structure of reciprocity to an essentially asymmetrical activity. As a set of legal rules, humanitarian law demands that each side to a conflict recognize the same rights and duties. But combat, as an activity of killing and being killed, moves according to a logic of asymmetry: each side seeks the advantage. Given this tension between the symmetry of legal reciprocity and the asymmetry of warfare, humanitarian law could proceed only by building an ideal of the “warrior’s honor,” which understands the battlefield as an autonomous domain with its own practices and norms. Those practices can have only culturally specific valences.<sup>48</sup> There is no abstract measure of the forms of violent destruction. The prohibition on torture of combatants is one of these culturally specific practices. That combatants can injure and kill, but not torture, each other is a remnant of the code of chivalry maintained by the ethos of an aristocratic class – the class that later became officers. This ethos was based upon a transnational identity that could support a practice of honor, i.e., of reciprocal recognition, which might at times run counter to an

ethos of patriotic identity. Modern humanitarian law – and indeed the practice of modern combat – sits uneasily in the tension between norms of class and of nationalism.

Aristocrats recognized each other – indeed, they were often related – and in that mutual recognition supported a practical etiquette of consent even in their recourse to violence. This is, paradigmatically, the duel, which is an early modern practice of violence that stands alongside of torture. These two practices of violence divided the world into horizontal and vertical relationships: one tortured subordinates and dueled with equals. Thus, anyone could be tortured by the sovereign, slaves were tortured by masters, and children (and wives) by patriarchs. In these relationships, violence was used affirmatively to express – or to deny – recognition. To be tortured was to be treated as a slave. The duel, on the other hand, operated in a field of reciprocal recognition. The duel was the remedial response to a failure of recognition in an affront to honor. Where there could be no honor, there could be no recourse to such a remedy. For this reason, a duel between master and slave was unimaginable. For the same reason, however, the violent revolt of the subordinated – whether slave, colonist, or indigenous – was always understood as the rejection of an attempt to enslave and the demand for recognition of equality.

If recognition is the condition of politics, then the duel is an intensely political act. At the moment that each threatens the other, there is a pure symmetry of recognition. Each must fully and completely acknowledge the other for each displays to the other a power to kill. Each is “deadly serious.” In this sense, the symbolic function of the duel is over before the act is complete. The mutual and reciprocal threat, not injury or death, is

the end. Nations that exist in a balance of power demonstrate this same principle on a grand scale.

Even after the power to demand sacrifice moves from a sacral monarch to the popular sovereign, the duel remains a vibrant form of political expression. Americans need only to remember the devastating duel between Hamilton and Burr, or to recall that Andrew Jackson, when not killing Indians, fought several duels, including one in which he killed his opponent and suffered a dangerous wound himself. Jackson's life shows us the double character of political violence: dueling between equals existed alongside practices of slavery and genocide against those considered unequal. Where equality is unimaginable, political violence becomes torture and terror.

Denied the remedial power of the duel, the slave/subaltern will turn to terror – nonreciprocal warfare. The master or the master class always experiences the threat of violence as terror, for terror includes an element of revolt. Moreover, absent the conditions of public acknowledgment, the terrorist's goal is not likely to be equal recognition. It will instead be to reverse the hierarchy of power. It is war between enemies, not dueling among equals. Its character is asymmetry not reciprocity. The master does not worry about democracy; he fears he will be subordinated to the freed slave. He cannot imagine the reciprocal recognition that is a condition of democratic equality. That very inequality supports a practice of torture. If terror and torture are both founded on a rejection of symmetry of recognition, then there is little reason to believe that either side in these conflicts will look to international humanitarian law.

Humanitarian law's ambition has been to model combat on the duel, rather than on torture. The condition for that, however, is public acknowledgment of equality. Not to

see the enemy as a “subordinate,” i.e., as an inferior, is immensely difficult. To maintain a mutual and reciprocal respect for equality between combatants is the warrior’s honor. This is a peculiar sort of honor, for ordinarily we excuse the combatant’s violence by breaking the link between his action and responsibility for the decision to use force. Accordingly, we face the puzzle of finding dignity at the same time that we deny agency. The resolution is to recover agency by placing it within the rules themselves: the honorable combatant chooses to remain within the rules. He chooses not to be a war criminal in a situation in which he is likely to have multiple opportunities.

When we turn to the Hague and Geneva Conventions, beyond the prohibition on torture, we find a product of modern aristocrats dealing less with issues of honor than with issues of class. Those who made the law imagined combat within the ethos that shaped their conception of themselves.<sup>49</sup> The law affirms the equality of an aristocratic class across borders: officers share more with each other than with their troops.<sup>50</sup> The elite provide a set of rules appropriate for the masses who now fight the nation’s wars. Combatants are treated as a kind of international proletariat. They are to be cared for, but they are also a source of labor. War is work – dangerous work, but then so is most labor in the industrial age. Strict conditions are put upon the conditions under which the working class can engage in legitimate violence: they must be properly uniformed, subject to the commands of an officer class, and present themselves openly as targets when they threaten violence.<sup>51</sup>

That the worker might have a political identity never appears. They are to do as they are told under the direction of their officers who are engaged in a transnational project of managing the working class. Thus, the rules are concerned with specifying the

kind of work the laborers can be given, the conditions for carrying out that work, and the appropriate compensation for that labor. In a democratic age, the elite manage the lower classes by a mix of claims: expertise, representation, and traditional deference. Torture has gone the way of slavery.<sup>52</sup> To torture is to treat one's subordinates as if they were slaves.

The development of twentieth century humanitarian law was, in large part, the struggle to apply an ethos of class to control the democratic violence of the popular sovereign. The difficulty of the project was to militarize a population without politicizing it or, at least, without creating a space for a violent popular politics. That effort did not, and could not, succeed for the massive war effort of the twentieth century required a deep popular politicalization. Citizens who believe that they embody the popular sovereign will pursue a politics of violent sacrifice quite independent of the rules of humanitarian law. This was seen in the violent popular struggles of decolonization and in the horrendous civil wars of the twentieth century. It was seen as well in the turn to weapons of mass destruction.

If citizens believe they are linked together by political bonds of solidarity, if all are committed to a sacrificial struggle against the enemy, there is risk in every direction – including from those who seem to have fallen outside of combat and from those who never took on the formal markings of combatants. There is no release from the sacrificial demand of the popular sovereign: anyone can be asked to die – and to kill – for the state. Mao writes of the guerilla fighter swimming in the sea of peasants. This is just a low tech version of the capacity of the modern nation-state to pursue total war by drawing on its

entire population and all of its productive resources. With that, the category of “*hors d’combat*” collapses: everyone is politicized, and everyone is a potential threat.

The ethos of the Geneva Conventions, if not always anachronistic, certainly became so with the demise of the aristocratic values of honor and class upon which they had been built.<sup>53</sup> The warrior’s honor, with its implicit ideals of recognition, reciprocity and equality, cannot stand up to the asymmetrical logic of warfare between mobilized national communities committed to a politics of ultimate meanings. Only the sacrificial claims of a popular sovereign could move the great mass of the population to support and to suffer this violence. In retrospect, we can see that the popular, mass violence of modernity responded less to the ethos of class and more to that of race. A race is kept subordinate by a practice of degradation. The Western colonial practice of racial humiliation seeped back into the European metropole by mid-century. The object of that humiliation, in the first instance, was the Jew: the embodiment of racial difference in the Old World. Much of the Second World War, particularly on the Eastern front where the Jew and the Bolshevick were molded into a single image of the enemy, was pursued in complete disregard of the ethos of class embodied in humanitarian law.

The Geneva Conventions were greatly expanded and elaborated after the War in an effort to recover the earlier ethos of class for humanitarian law. But by that time, the forms of warfare had rendered anachronistic European class sentiments. Within Europe – as well as North America – the confrontation of organized mass armies on the field of battle was ending, despite continued preparation for such a war. Instead, there was the threat of nuclear Armageddon, which would eliminate all distinctions and practices of humanitarian restraint. This is the endpoint of the ethos of democratic warfare: total and

complete sacrifice for the sovereign. Torture drops from sight when combat is imagined as universal destruction.

Outside of Europe, the shape of warfare was now defined by the struggle for liberation against colonial powers. These wars were fought, as one might have predicted, within the ethos of race and religion – not class. They demonstrated no concern for the laboring class, but reciprocal efforts to invert and to maintain the governing group hierarchy. They were, accordingly, wars in which torture was not at the margins – appearing, for example, when there was a failure of command authority. Rather, torture and terror were paradigmatic of the nature of warfare on both sides. These are the instruments of degradation. We see exactly what that means in contemporary Iraq, where the political and the theological completely overlap.

Too often, the European contribution to Third World politics was not a lesson in democratic power, but rather a lesson in humiliation as the practice of power. Not the dignity of the autonomous agent, but the subordination of race and the ideology of hierarchy were the messages of colonial power. That power was perceived by its victims as a form of slavery, and it provoked a comparable rebellion.<sup>54</sup> This is the polar opposite of the ethos of the duel, which begins from an ideal of honor and equal recognition.

War today is still fought within the imaginative patterns established in the wars of decolonization. Torture and terror, not the duel, govern the imagination. This is true in Israel and throughout the Middle East. It is true in Africa as well, where race and ethnicity have fueled civil wars since the withdrawal of the Europeans. Even in the former Yugoslavia, war was fought under the ethos of ethnos.<sup>55</sup> Neither the values of the aristocracy nor even those of the middle class could control the violence. Today's warfare

tends toward a competition in reciprocal degradation. What we saw in the former Yugoslavia, we see now in Iraq. Perhaps this is not altogether bad. For the alternative to the ethos of ethnos may no longer be the ethos of the warrior's honor, and it is certainly not the Victorian class morality of the Geneva Conventions. Rather, the alternative is the ethos of nuclear annihilation.

The discourse of terror and torture today is also the discourse of nuclear weapons. This is just the point at which the twentieth century left us. Then, it was nuclear Armageddon in the First World and torture in the Third World. Globalization has brought together these distinct spaces with the result that the Third World now threatens nuclear destruction of the First. Terror threatens to go nuclear and the response has been a "rediscovery" of torture. Hence the ticking-time bomb hypothetical, for we all know that the bomb at issue is nuclear.

### Conclusion

The standard account portrays the movement from soft to hard law, from sovereignty constrained only by the conscience of the king to a law of international human rights, as moral progress. That claim for progress, however, has certainly not been based on a new willingness actually to intervene to prevent the abuse of human rights. Humanitarian interventions were nonexistent throughout the Cold War; they remain rare today. After Afghanistan and Iraq, they are likely to be rarer still. Nor was the triumphalism of twentieth century human rights discourse based upon a new moralization of international relations. Throughout the Cold War, the practice of international relations remained committed to a brutal realism, whether we look at the Soviets in Eastern Europe or the United States in Latin America and Southeast Asia.

Such realism is again on the agenda of American politics, as well as on that of the emerging powers: China, India, and Russia.

The real source of the claim for progress was a change in the imagination of a cosmopolitan elite. They sought to place “the global” within the modernist project, which was committed to the idea that political and social relations were malleable and could be shaped through the application of reason. Law was both the sign and the instrumentality of this process. More law meant more reform; more reform meant more reason. The way forward is always the way of reason.

The positive value of the equation of law and reason was matched by the negative value of an opposite equation of irrationality and bodily pain. The successive campaigns to subject first war and then torture to law are united in their understanding that the common enemy of reason is pain. This theme connects the “progress” of international law to the progress of modern medicine, as well to as the other sciences of human welfare. Medical analogies proliferate, beginning with war as a pathology of the body politic. Torture, too, is no longer seen as a political practice, but as a behavior that expresses individual pathology. This turn away from pain also connects international law to the fundamental texts of modern political theory, which understand the state of nature as a place of pain and death. These “ideals” of modernity are so strong that, even after the disasters of the twentieth century, we continue to be shocked when we discover the ordinariness – indeed, the banality – of the torturer and the willingness of ordinary individuals to take up the burden of killing and being killed for political ideas.<sup>56</sup>

Post-war international institutions were to create the possibility that reason could be effective globally. Expert, functionally-defined institutions were to manage not just

the global commons, but the needs of states in a global order: finance, commerce, communication, health, environment. As these functional elements gained their own institutional forms, they began to drift free of the sovereign state. They developed their own ideals, norms, practices, and frames of reference. Consider not just human rights law, but the Washington Consensus or the WTO. Modern international law's home has been within these multiple functional approaches to the global.

By the end of the century, international legal theorists were wondering whether there would long remain any place for state sovereignty. Experts have more in common with each other than with fellow citizens.<sup>57</sup> After 9/11, we can no longer have confidence that this vision of reason and law is a shared vision or that it extends very deeply into mobilized political communities. We can no longer be confident that we have left behind that world of colonialism and the civil wars that had been the locus of terror and torture for much of the twentieth century. If we are still fighting wars over sovereignty, we have not yet arrived at that Enlightenment idea of expert management of the global that was so attractive to international lawyers, political theorists, and NGO's at the end of the century.

The torture prohibition was a statement about the relationship of sovereignty to democracy, and of violence to law. It was a founding principle of the counter-religion, representing the triumph of law both domestically and internationally.<sup>58</sup> But we should also remember that terror and torture are deeply embedded in democratic forms of violence. The democratic aspiration of popular sovereignty fueled the turn to these forms of violence in the twentieth century, just as it fueled the politics of nuclear confrontation.

Even today, we see a resurgent Iranian nationalism taking up the cause of its own access to nuclear technology. In this, they are following the path of China, Pakistan, and India.

Many thought that the end of the Cold War represented the globalization of the rule of law. The premise of that position was that there is no longer to be a space of sovereignty outside of law. Terror, however, emerges from just such a political space. To respond to terror with torture is to reject the universal reach of law. The lawyer's insistence that torture is absolutely prohibited is only the rear-guard action of an order of law that is in retreat before popular, democratic violence. The character of the enemy has changed, the tactics have changed, but the imaginative construction of meaning through sovereign violence has not.

Notes: Chapter 2

<sup>1</sup> Treason, *Columbia Encyclopedia* (6th ed. 2006). As long as laws are seen as an expression of the sovereign will, there is a tendency to see a violation of law as an act of betrayal – i.e., as treason. See P. Kahn, *Out of Eden* 76 (2007).

<sup>2</sup> Again, we hear in this word, a resonance of the religious – to surrender oneself to faith. See S. Weil, *Waiting for God* (E. Craufurd, trans. 1951); R. Wagner-Pacifici, *The Art of Surrender: Decomposing Sovereignty at Conflict's End* 36-37 (2005).

<sup>3</sup> One should not overemphasize the claim that torture has been displaced by democratic combat. Torture fell out of place on the European battlefield, but Europeans – and Americans – have been quick to deploy torture when confronting the tactics of terror. This was true of the German response to resistance movements in occupied Europe; true as well of the French in Algiers, the British in the Middle East and Asia, and the Americans in Vietnam – and now, apparently, in Iraq.

<sup>4</sup> See E. Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (1957). See also works cited in note \_\_\_ above. Even today, the remaining ceremonial kings of Europe labor under an expectation of military service in their youth.

<sup>5</sup> See C. Hedges, *War is a Force that Gives Us Meaning* (2002).

<sup>6</sup> See L. Hunt, *The Invention of Human Rights* (2007).

<sup>7</sup> For this reason, the reform rhetoric of the 20th century sounds surprisingly like that of 200 years earlier, beginning, of course, with Tom Paine's *The Rights of Man*.

<sup>8</sup> I explore degradation in chap. 5 below.

<sup>9</sup> See, e.g., H. Shue, "Torture," in *Torture: A Collection* 47, 51 (S. Levinson, ed. 2004). Consider also A. Dorfman, *Death and the Maiden* (1992).

<sup>10</sup> The point here is similar to Arendt's analysis of the concentration camps where the denial of recognition was so great that torture seems the wrong word to describe the destruction: it is administrative death. To care enough to torture is more recognition than given in the camp or on the battlefield. See H. Arendt, *The Origins of Totalitarianism*, chap. 9 (1951).

<sup>11</sup> Compare D. Sussman, "What's Wrong with Torture?" 33 *Phil. & Pub. Aff.* 1, 3 (2005), with D. Sussman, "Defining Torture," 37 *Case W. Res. J. Int'l L.* 225 (2006).

<sup>12</sup> See C. von Clausewitz, *On War*, chap. 1, sec. 4. (M.. Howard & P. Paret, eds. and trans. 1976).

<sup>13</sup> During the Cold War, for example, whether the United States would actually use nuclear weapons – as it threatened – in defense of its European allies was often debated. See R. Dawson & R. Rosecrance, "Theory and Reality in the Anglo-American Alliance," 19 *World Pol.* 21 (1966) (on Britain and France, and America's "credibility problem"). See also *id.* at 24-25 (on De Gaulle's doubts about America and the French nuclear ambitions); G. Warner, "Review Article: The United States and the Western Alliance, 1958-63," 71 *Int'l. Aff.* 801, 806 (1995). ("[Many European leaders] were beginning to have doubts, in the era of ICBM's, as to the dependability from their point of view of a purely U.S. controlled deterrent . . .").

<sup>14</sup> Common Article 3 of the Geneva Conventions refers to "members of the armed forces who have laid down their arms. . . ." Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 287.

<sup>15</sup> See Uniform Code of Military Justice art. 99, which permits capital punishment against a member of the military “who casts away his arms or ammunition.” 10 U.S.C. § 899 (2006).

<sup>16</sup> See also Anonymous, *A Woman in Berlin, Eight Weeks in the Conquered City: A Diary* (P. Boehm, trans. 2005) (describing a situation in which defeat encompasses torture – particularly rape – and martyrdom.)

<sup>17</sup> See *Mavrommatis Palestine Concessions*, 1924 P.C.I.J. (ser. A.) No. 2, at 12.

<sup>18</sup> Accordingly, customary international law had to be understood as the “implied side [implicit consent] to the contractual theory that explains why treaties are international law.” M. Janis, *An Introduction to International Law* 43 (2003).

<sup>19</sup> See P. Weil, “Towards Relative Normativity in International Law?” 77 *Am. J. Int’l L.* 413 (1983).

<sup>20</sup> Grotius exemplifies this idea in his work, “On the Law of War and Peace.”

<sup>21</sup> This idea at the center of traditional international law becomes the foundation of Carl Schmitt’s definition of the sovereign as he who decides upon the exception. See C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* 5 (G. Schwab, trans. 1985) [1922].

<sup>22</sup> See UN Charter art. 2(4) (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . . .”); *id.* art. 51 (“Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council . . . to take at any time such action as it deems necessary in order to maintain or restore international peace and

security.”). The Kellogg Briand Pact of 1928 represented a wholly ineffectual attempt to use law to control international violence. See P. Kahn, “From Nuremberg to the Hague: The United States Position in *Nicaragua v. United States* and the Development of International Law,” 12 *Yale J. Int’l L.* 1 (1987).

<sup>23</sup> See, e.g., A. Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (2004).

<sup>24</sup> Typical of the new point of view is the following: “The State that claims sovereignty deserves respect only as long as it protects the basic rights of its subjects. It is from their rights that it derives its own.” S. Hoffmann, “The Politics and Ethics of Military Intervention,” 37 *Survival* 29, 35 (1995).

<sup>25</sup> Of course, it is only a small step further to deny the power altogether and thus abolish capital punishment.

<sup>26</sup> See A. Slaughter, *A New World Order* (2004); R. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (1984).

<sup>27</sup> See Jack Straw, Secretary of State Statement in the House of Commons (Mar. 2, 2000), in *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain* 481, 482 (R. Brody & M. Ratner, eds. 2000) (explaining refusal to extradite Pinochet to Spain for trial due to health reasons); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, (July 8).

<sup>28</sup> Reducing the role and range of this veto power – the requirement of unanimity – was a central goal of the proposed EU Constitution, which failed in French and Dutch referenda. See D. Chaibi, “The Foreign Policy Thread in the European Labyrinth,” 19 *Conn. J. Int’l L.* 359, 387-89 (2004) (describing provisions in draft constitution limiting

the need for unanimity); E. Sciolino, “European Leaders Give Up on Ratifying Charter by 2006,” *N.Y. Times*, June 17, 2005.

<sup>29</sup> J. Assmann, *Moses the Egyptian: The Memory of Egypt in Western Monotheism* (1997).

<sup>30</sup> See UN Charter art. 51 (protecting “inherent right of individual or collective self-defense if an armed attack occurs”).

<sup>31</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2(2), Dec. 10, 1984, 1465 U.N.T.S. 85.

<sup>32</sup> For a review of the development of the concept, see C. Chinkin, “The Challenge of Soft Law: Development and Change in International Law,” 38 *Int’l. & Comp. L.Q.* 850 (1989).

<sup>33</sup> See M. Howard, *War and the Liberal Conscience* 100-101 (1978).

<sup>34</sup> See, e.g., H. Kelsen, “Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law,” 1 *Int’l L.Q.* 153 (1947).

<sup>35</sup> This is the ordinary form of argument justifying Security Council action under Chapter VII. See, e.g., S.C. Res. 940, preamble, U.N. Doc. S/RES/940 (July 31, 1994) (justifying international military mission to Haiti under Chapter VII powers in part because “the situation in Haiti continues to constitute a threat to peace and security in the region. . . .”); A. Dowty & G. Loescher, “Refugee Flows as Grounds for International Action,” 21 *Int’l Security* 43 (1996) (on the use of refugee flows into neighboring countries as a justification for force under Chapter VII of the UN Charter).

<sup>36</sup> The US had a parallel fear of the effect of international human rights on its regime of racial subordination, leading to the controversy over the proposed Bricker Amendment.

The British had similar worries about the maintenance of their colonies. See M.

Mazower, “The Strange Triumph of Human Rights, 1933-1950,” 47 *Hist. J.* 379 (2004).

<sup>37</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

<sup>38</sup> The Eichmann trial in Israel in 1961 was before a domestic, not an international court. When the Nicaraguans took the United States to the ICJ, the United States simply walked away. See *Nicaragua v. United States*, 1984 I.C.J. Rep. 169.

<sup>39</sup> See UN Charter art. 13(1)(a) (directing the General Assembly to encourage “the progressive development of international law.”)

<sup>40</sup> For example, China, Cuba, Zimbabwe, Russia, Pakistan, Saudi Arabia, Algeria, and Syria.

<sup>41</sup> See O. Hathaway, “Do Human Rights Treaties Make a Difference?” 111 *Yale L.J.* 1935 (2002).

<sup>42</sup> M. Doyle, “Kant, Liberal Legacies and Foreign Affairs,” 12 *Phil. & Pub. Aff.* 205 (1983); B. Russett, *Grasping the Democratic Peace: Principles for a Post-Cold War World* (1993).

<sup>43</sup> Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1(1). The Convention does recognize the possibility of a “state of war” in Art. 2(2), but only to affirm that it may not be invoked as a justification for torture. The only way, formally, to reconcile the definition and the recognition of war is through the concept of “lawful sanctions” at the conclusion of the definition. I suspect there was a

vague idea that any legitimate use of force had to be a “lawful sanction” – including the use of force against a nation.

<sup>44</sup> Compare this with the ICCPR, which at least acknowledges forced military service as an exception to the prohibition on “forced or compulsory labor.” International Covenant on Civil and Political Rights art. 8(3)(c)(ii).

<sup>45</sup> Again, the model here is the EU. See, e.g., J. Weiler, “The Transformation of Europe,” 100 *Yale L.J.* 2403 (1991).

<sup>46</sup> The ICC has a kind of supplemental jurisdiction: cases within its jurisdiction become admissible only when the relevant state “is unwilling or unable genuinely to carry out the investigation or prosecution.” Rome Statute of the International Criminal Court art. 17(1)(a), July 17, 1998, 2187 U.N.T.S. 90.

<sup>47</sup> Since the Geneva Conventions of 1949, its most basic norms, expressed in Common Article 3, have also extended to conflicts “not of an international character.”

<sup>48</sup> See M. Ignatieff, “The Warrior’s Honor” in *The Warrior’s Honor: Ethnic War and the Modern Conscience* 109 (1998).

<sup>49</sup> See M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2002).

<sup>50</sup> The Third Geneva Convention stipulates that the norms of treatment of prisoners of war shall be in large part governed by rank. See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War art. 39 (“Prisoners of war, with the exception of officers, must salute and show to all officers of the Detaining Power the external marks of respect provided for by the regulations applying in their own forces. Officer prisoners of war are bound to salute only officers of a higher rank of the Detaining Power; they must,

however, salute the camp commander regardless of his rank.”); *id.* art. 43 (“Upon the outbreak of hostilities, the Parties to the conflict shall communicate to one another the titles and ranks of all the persons mentioned in Article 4 of the present Convention [prisoners of war], in order to ensure equality of treatment between prisoners of equivalent rank.”).

<sup>51</sup> The Third Geneva Convention affords “prisoner of war” status to those captured who are not members of a “regular army” so long as they “fulfil the following conditions: (a) That of being commanded by a person responsible for his subordinates; (b) That of having a fixed distinctive sign recognizable at a distance; (c) That of carrying arms openly; (d) That of conducting their operations in accordance with the laws and customs of war.” Geneva Convention Relative to the Treatment of Prisoners of War art. 4(2)(a)-(d).

<sup>52</sup> Of course, the transition is hardly complete: slavery reappeared in the German war effort, just as it reappeared in Stalin’s Soviet Union. A world of slavery will always include torture.

<sup>53</sup> See R. Brooks, “The Politics of the Geneva Conventions: Avoiding Formalist Traps,” 46 *Va. J. Int’l L.* 197, 197 (2005) (“[T]he Geneva Conventions were ‘out of date’ from the moment they entered into force; they laid out rules for a world more orderly than the world they had inherited, and hoped that by doing so, they would encourage life to imitate art.”)

<sup>54</sup> See, e.g., F. Fanon, *The Wretched of the Earth* (C. Farrington, trans. 1963); Kahn, *supra* note 1, chap. 4.

<sup>55</sup> I owe this phrasing to Robert Post.

<sup>56</sup> See J. Conroy, *Unspeakable Acts, Ordinary People: The Dynamics of Torture* (2000); C. Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (1992).

<sup>57</sup> See A. Slaughter, *A Liberal Theory of International Law*, 94 *Am. Soc'y Int'l L. Proc.* 240 (2000).

<sup>58</sup> See J. Waldron, "Torture and Positive Law: Jurisprudence for the White House," 105 *Colum. L. Rev.* 1681 (2005).