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INTRODUCTION TO THE SYMPOSIUM ON REEXAMINING THE LAW OF WAR

Marshall J. Breger⁺ and Marc D. Stern⁺⁺

The law of war, alternatively known as the law of armed conflict (LOAC), or international humanitarian law (IHL), as it is called by those more focused on minimizing casualties to civilians than on regulating effective warfare, is often described in the public press as an unchanging and unquestioned body of law, adequately addressing shifting battlefields and the latest changes in military technology and tactics.

Humanitarian advocacy groups are interested in fostering the impression of a settled and universally acknowledged body of law because it facilitates their ability to criticize those who harm civilians to argue that international law is clear and unquestioned in banning those actions.¹ It is our impression that the public has accepted that view; of course, as a result, part of the public rejects the salience of rules they find objectionable (to the detriment of international law).² Here, as elsewhere with regard to the law, those widespread public perceptions of legal stability are wrong.

International law, like many other bodies of public and private law, leaves many questions open. Equally, it is not a static area. International law regulating warfare that protects civilians is itself a relatively late development in the law of war, as the law earlier regulated mostly relations between the combatants themselves. Indeed, the law of war evolved substantially after each change in the nature of warfare: the development of effective ammunition and artillery and enhanced naval warfare capabili-

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1. See Marc Stern, Op-Ed., *The Media Was Misled by Amnesty's Legal Advocacy*, FORWARD, Mar. 30, 2007, available at <http://www.forward.com/articles/the-media-was-misled-by-amnesty-s-legal-advocacy/> (detailing admission by Amnesty International that some of its criticism of Israel was based on a contested view of international law).

2. Perhaps that is one of the reasons that explains the recent spate of commentators who reject the very notion of international law as law. See, e.g., John Bolton, *U.S. Isn't Legally Obligated to Pay the U.N.*, WALL ST. J., Nov. 17, 1999, at A27. Whatever the analytic power of that criticism, we believe it unhelpful in dealing with the practical reality of the fabric of international law today. Cf. Louis Henkin, HOW NATIONS BEHAVE 14-23 (1968). See generally Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265 (2006) (reviewing JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005)).

ties in the nineteenth century; air warfare and chemical (gas) warfare in World War I; and genocide and other mass attacks on civilians after World War II, attacks that led to the adoption of the four canonical Geneva Conventions in 1949.³

The most recent, and in many ways most controversial, global revisions of the law of war are the two 1977 Additional Protocols to the Geneva Conventions.⁴ These Protocols were written to address and regularize a growing wave of guerilla warfare directed at “colonial” and “occupying” powers (read, for the latter, Israel). They were never ratified by the United States or Israel, and were accepted by some other Western nations only with reservations precisely because they conferred distinct tactical and strategic advantages on non-state forces compared to their official opponents. Other narrower changes are not particularly controversial, such as the 1998 Landmine Treaty,⁵ to which the United States is not a signatory, or the 2000 Optional Protocol to the Convention on the Rights of the Child,⁶ to which the United States is a signatory but with reservations.

Some of the material in the Protocols, even if not ratified, is widely believed to represent “binding” customary international law, binding even on nonratifying states. The International Committee of the Red Cross (ICRC) has extensively surveyed state practices and military manuals relative to the Additional Protocols (including states that, in modern times, rarely engage in combat) to determine which parts of the Additional Protocols reflect customary international law.⁷ Not surprisingly, the ICRC concluded that most of the Additional Protocols’ provisions had been accepted as customary international law. As we put finishing touches on this Article, a letter from the Departments of State and De-

3. See, e.g., Christopher Greenwood, *Historical Development and Legal Basis in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* 1, 12-22 (Dieter Fleck ed., 1995).

4. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609.

5. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211 [hereinafter *Convention Against Land Mines*].

6. G.A. Res. 54/263, U.N. Doc. A/RES/54/263 (May 25, 2000).

7. See generally JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* (2005).

fense took sharp issue with the methodology used to reach that conclusion.⁸

The ICRC is not alone in concluding that much in the Protocols now constitutes binding customary international law. The Israeli Supreme Court, for example, while upholding much of Israel's "targeted killings" programs, recently held that although Israel had not agreed to be bound by Additional Protocol I, the Protocol in relevant part represented binding customary international law—binding on Israel despite its refusal to ratify the Protocol.⁹

As noted, since 1977 there has been relatively little revision¹⁰ of the law of war, even in the face of an explosion of asymmetric warfare, and the greater sophistication and armed power of irregular forces. After 9/11, the United Nations Security Council settled the question of whether terrorism violated international law,¹¹ but that overdue resolution of the issue did little to change LOAC or IHL with regard to combating terrorism. Indeed, one still hears the refrain that terrorism is not a military problem, but one for criminal law.¹² This may be true of the unaffiliated freelance terrorist; it is not evidently true of heavily armed, well organized, and tactically sophisticated groups like Hezbollah or the Tamil Ti-

8. Letter from John Bellinger, III, Legal Adviser, U.S. Dep't of State, and William Haynes, II, General Counsel, Dep't of Defense, to Jakob Kellenberger, President, Int'l Comm. of the Red Cross (Nov. 3, 2006) (on file with author).

9. HCJ 769/02 Pub. Comm. Against Torture in *Isr. v. Israel* (Dec. 14, 2006), available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf.

10. The major exception—and it does not directly address asymmetric warfare—is the broadly adopted Convention Against Land Mines. See generally *Convention Against Land Mines*, *supra* note 5.

11. See S.C. Res. 1368, U.N. Doc. S/Res/1368 (Sept. 12, 2001); see also S.C. Res. 1735, U.N. Doc. S/Res/1735 (Dec. 22, 2006).

12. Indeed, Professor Jordan Paust takes that position in his article in this Symposium. See Jordan J. Paust, *Responding Lawfully to Al Qaeda*, 56 CATH. U. L. REV. 759 (2007). And we must recognize that in many ways, Israel has adopted a "cycle of law" approach in its fight against terrorism that suggests a wider purview for the "criminal law" model. See generally Aharon Barak, *The Role of a Supreme Court in a Democracy, and the Fight Against Terrorism*, 58 U. MIAMI L. REV. 125 (2003); Dorit Beinisch, *The Role of the Supreme Court in the Fight Against Terrorism*, 37 ISR. L. REV. 281 (2003-2004). In the well-known torture case, the Israeli Supreme Court noted:

This decision opens with a description of the difficult reality in which Israel finds herself security wise. We shall conclude this judgment by re-addressing that harsh reality. We are aware that this decision does not ease dealing with that reality. This is the destiny of a democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties.

HCJ 5100/94 Pub. Comm. Against Torture in *Isr. v. Israel* [1999] *IsrSC* 53(4) 817, reprinted in 38 I.L.M. 1471, 1488 (1999).

gers. These groups, and their counterparts elsewhere around the world, are increasingly difficult to distinguish from ordinary armed forces.

States are no longer the only actors in reshaping LOAC or IHL. The International Court of Justice (ICJ) and the various criminal courts involving the former Yugoslavia¹³ and Rwanda¹⁴ play an active role in shaping the international law of war and related rules (including those against genocide) not, of course, by legislating, but by applying and in some cases creatively reinterpreting the international law of war—increasingly in the context of criminal prosecutions. Some national courts have joined in this effort, invoking the doctrine of universal jurisdiction.¹⁵ Some of these efforts seem politically motivated, others sympathetic.¹⁶ It is hard to generalize just yet because the cases litigated to some sort of conclusion are so few. The political impact of these efforts is, so far, probably greater than their legal impact.

The ICJ's efforts have been particularly noteworthy in limiting invocation of the right of self-defense guaranteed by Article 51 of the United Nations Charter by states seeking to respond to asymmetrical warfare by non-state armed groups. In the *Nicaragua v. United States*,¹⁷ *Oil Platforms*,¹⁸ *Legal Consequences of Construction of Wall in Occupied Palestinian Territory*,¹⁹ and *Democratic Republic of Congo v. Uganda*²⁰ cases, the court all but denied such a right, at least absent some overwhelming number of incidents. These interpretations of Article 51 of the United Nations Charter are (as Robert J. Delahunty explains below)²¹ quite debatable in their own right. Doubtless, they are not reflected in state prac-

13. See generally James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT'L L. 639 (1993).

14. See Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT'L L. 501, 501-504 (1996).

15. See, e.g., *Regina v. Bartle (Ex parte Pinochet)*, [2000] 1 A.C. 147 (H.L. 1999), reprinted in 38 I.L.M. 581.

16. See, e.g., Lisa Abend & Geoff Pingree, *Spanish Court Looks at Tibetan Genocide Claims*, CHRISTIAN SCIENCE MONITOR, Mar. 2, 2006, at 4; Paul Chevigny, *The Limitations of Universal Jurisdiction* (Mar. 2006), <http://www.globalpolicy.org/opinion/2006/03universal.htm>; HUMAN RIGHTS WATCH, *UNIVERSAL JURISDICTION IN EUROPE: THE STATE OF THE ART* (2006), <http://hrw.org/reports/2006/ij0606/ij0606web.pdf>. The classic debate is between Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction*, FOREIGN AFF., July/Aug. 2001, at 86, and Kenneth Roth, *The Case for Universal Jurisdiction*, FOREIGN AFF., Sept./Oct. 2001, at 150.

17. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

18. *Oil Platforms (Iran v. U.S.)* (Nov. 6, 2003), 42 I.L.M. 1334.

19. *Legal Consequences of Construction of Wall in Occupied Palestinian Territory*, Advisory Opinion (July 9, 2004), 43 I.L.M. 1009. See generally Geoffrey R. Watson, *The "Wall" Decisions in Legal and Political Context*, 99 AM. J. INT'L L. 6, 19-21 (2005).

20. *Armed Activities on Territory of The Congo (Dem. Rep. Congo v. Uganda)* (Dec. 19, 2005), 45 I.L.M. 271.

21. Robert J. Delahunty, *Paper Charter: Self-Defense and the Failure of the United Nations Collective Security System*, 56 CATH. U. L. REV. 871 (2007).

tice, and not surprisingly are consistently rejected by states actually confronting asymmetrical warfare.

The ICJ's advisory opinion in the *Wall Case* is also noteworthy for its interpolation of international human rights law into matters formerly considered the exclusive province of the law of war, LOAC or IHL. For example, the main opinion in the *Wall Case* turns on the broad ideals of human rights law such as the Universal Declaration on Human Rights²² and its implementing Covenants,²³ not on the law of war. This reverses the usual rule that when both a general statute and a specific one cover a particular situation, the specific one governs.

The ICJ evidently prefers the majestic generalities of the Declaration of Human Rights and its implementing Covenants to the hard-fought specifics of the law of war, on the theory that those generalities will better protect civilians and that the protection of civilians is the highest priority of this body of law. But what of the right of states to protect themselves (and their citizens) from asymmetric warfare, much of which indiscriminately targets civilians? Those interests are dealt with by the law of war, not human rights law. Given its civilian-protecting orientation, it is no surprise that the ICJ gave absolutely no weight to the wall's evident and demonstrated effectiveness in preventing suicide attacks.²⁴

The thrust of both of these developments is to privilege protection of civilians at the expense of nations' ability to defend themselves against practitioners of asymmetric warfare. Does the change also reflect an underlying sympathy with the counter-establishment groups? Perhaps. That change has the moral advantage of enhancing the protection of civilians, but it comes at the high—some would say too high—moral cost of protecting armed groups who show little or no regard for the laws of war and state sovereignty. And one can question whether, in the long run, civilians (including those living in states targeted by asymmetric warfare) are better off for the court's apparent tolerance for asymmetric warfare.

So far as the law of war has ceased to focus primarily on the ability of nations to defend themselves, it is not surprising that the very phrases "law of war," or Professor Yoram Dinstein's substitute phrase "the law of armed conflict"²⁵ have fallen into disuse and disfavor, and have been replaced with the more aspirational, and differently focused, term "interna-

22. Universal Declaration of Human Rights, G.A. Res 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/801 (Dec. 12, 1948).

23. See International Covenant on Civil and Political Rights, Dec. 19, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

24. See Ruth Wedgwood, *The ICJ Opinion on the Israeli Security Fence and the Limits of Self-Defense*, 99 AM. J. INT'L L. 52 (2005).

25. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 12-14 (2004).

tional humanitarian law,” a phrase that emphasizes protection of civilians as the primary goal of international law, and one that seems to deny war as such any legitimacy.

So great is the focus on protecting civilians that in July 2006, as Israel’s army and Palestinian irregular forces fought in Gaza, then United Nations Secretary General Kofi Annan issued a statement addressed to the parties: “I remind both Israelis and Palestinians of their responsibilities under international humanitarian law, which calls on them to take constant care to spare civilian populations and to refrain *from any attack which may cause loss of civilian life and property.*”²⁶

There is, of course, no such absolute duty even under the most expansive reading of the Additional Protocols to the Geneva Conventions, let alone under the Geneva Conventions or the antecedent Hague Convention. The Secretary General’s misstatements of international law—denying state parties to armed conflicts the ability to effectively engage in legitimate acts of self-defense (for that is the price of avoiding all civilian casualties)—is a good indication of how the thinking about international law and what interests it protects has changed.

At the risk of sounding callous, we wonder whether these changes are sound, especially with the growth of asymmetrical warfare—warfare no longer conducted with outdated rifles but with the most modern rocketry and artillery and sophisticated explosive devices. Linger on the horizon are the possibilities of weapons of mass destruction (such as a dirty nuclear device or anthrax) in the hands of irregular forces.

We are not alone in our view that new forms of warfare suggest the need for reexamining the laws of war. Kim Howells, a minister in the current British government, recently suggested as much in testimony to Parliament. After criticizing Israel’s actions in Lebanon on the ground for wreaking too much harm on civilians, he made the following observation about Hezbollah’s tactic of deliberately locating its military assets amongst Lebanese citizens:

If an organisation like Hezbollah is ruthless enough to exploit those tactics then one wonders how it can ever be possible in the future to, if you like, win with justice on your side against such an enemy. It seems to me we have to do a huge amount of reassessment about this in the future, about how we define this kind of warfare. I think the military now call it “an asymmetrical response”—very, very difficult to do. I think we are facing these problems in Iraq and in Afghanistan, and many countries face them; the Pakistani Government is certainly facing it. These

26. Press Release, Secretary-General, Statement of the Secretary-General on the Situation in the Middle East (July 7, 2006), available at <http://www.un.org/apps/sg/sgstats.asp?nid=2125>.

definitions that have held good since the Second World War, I think, are probably going to have to be reviewed very extensively from now on out.²⁷

Some asymmetrical forces present completely unsympathetic profiles; others, indeed, present sympathetic ones. To require asymmetrical forces who project no discreet military targets (an army base, for example) to fight with all the rules binding on armies backed by the resources of the state is to inevitably condemn them to defeat. One wishes that on, say, the Janjaweed, the Lord's Resistance Army, and Hezbollah, but not the French Resistance during World War II. How then to cast the balance?

These and other difficulties persuaded the Catholic University of America, Columbus School of Law, West Point Military Academy, and the American Jewish Congress to convene a conference at West Point in November 2005 to explore these and other issues. We take here the opportunity to thank Professor Michael Noone, Research Ordinary Professor, Catholic University of America, Columbus School of Law, for shepherding the conference to its fruition. There was, of course, no unanimity of opinion. Some of the presenters (including, somewhat to the present writers' surprise, ranking American military officers) were fierce defenders of the existing law of war, albeit in some cases claiming that the law was more permissive than widely believed. Defenders of existing law emphasized the importance of imposing humanitarian norms to preserve the morale of one's own forces and to ensure protection of one's own forces in time of war. Others at the conference called for innovative interpretations of existing law, and still others called for wholesale revisions.

In this special issue of the *Catholic University Law Review*, we publish those of the papers presented at the West Point conference presently ready for publication, and some additional papers commissioned to address issues for which there was no room at the conference. They reflect, as the readers will see, no single orthodoxy. Collectively, though, they show that the law of war—LOAC or IHL—is in some important ways unsettled, and that a healthy debate over its parameters is ongoing.

Robert J. Delahunty argues that Article 51 of the United Nations Charter (restricting the right of self-defense) should be seen only as one element of its interlocking provisions that create a system of international collective security. With the hard-to-deny total collapse of that unitary system of collective security, it is, Delahunty argues, perverse to read the provision authorizing self-defense narrowly. Indeed, he argues that Arti-

27. *Hearing Before the Select Comm. on Foreign Affairs* (Sept. 13, 2006) (U.K.) (statement of Kim Howells, Minister of State, Foreign and Commonwealth Office), available at <http://www.publications.parliament.uk/pa/cm/cm200506/cmselect/cmcaff/1583/6091304.htm>.

cle 51's limits should no longer be regarded as binding at all because the other provisions of the Charter, which were intended to substitute for a robust and unfettered right of self-defense, are inoperative. His view will no doubt be quite controversial, as many scholars regard the Charter's limitations on the use of force, even a self-defensive response to force (and certainly to threats of force), as among the most important achievements of the United Nations.²⁸

Professor Daphné Richemond addresses two questions about the Geneva Conventions raised by the increased number of instances in which the armed forces of states confront terrorist or other irregular non-state forces, and how these instances are to fit into the framework of the Conventions. With the limited exception of some provisions of Additional Protocol II, these Conventions address states and were written with conventional interstate warfare in view.

She argues that the transition from a state-centered law of war to one focused on states pitted against transnational non-state actors does not require wholesale revision of international law texts, but merely a reinterpretation. Richemond applies the twin analytic tools of "the purposes and the moral underpinnings of the Convention" to tackle key issues, including the important and vexing question of whether to categorize members of non-state armed groups as civilians or as combatants.²⁹ Her views contrast sharply with the passionate defense of a bipolar reading of combatant states that pervades Jordan Paust's article.

Amos Guiora and Jordan Paust separately tackle the often-asked question of where and how to try accused terrorists.³⁰ This is, of course, the Guantanamo issue, which is on an ultimate track to the United States Supreme Court. Paust (who has updated his paper to include many of the recent legal developments) is a firm believer in the traditional due process/prisoner of war approach, one which is quite alluring because it is tested by practice and because it appeals to settled and universally accepted principles of fairness.

Surely, at a minimum, it ought to be the default model, which should be overridden—if at all—only in cases of compelling necessity. What makes the entire area so difficult to assess is that judgments for or against Paust's position (and concomitantly against and for the Bush administra-

28. See, e.g., HELEN DUFFY, *THE 'WAR ON TERROR' AND THE FRAMEWORK OF INTERNATIONAL LAW* 144-68 (2005).

29. See Daphné Richemond, *Transnational Terrorist Organizations and the Use of Force*, 56 CATH. U. L. REV. 1001 (2007); see also HCJ 769/02 Pub. Comm. Against Torture in *Isr. v. Israel* (Dec. 14, 2006), available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf.

30. See Amos Guiora, *Where Are Terrorists To Be Tried: A Comparative Analysis of Rights Granted to Suspected Terrorists*, 56 CATH. U. L. REV. 805 (2007); Paust, *supra* note 11.

tion's contrary position) depend on judgments well beyond the average informed citizen's ken—how great is the harm to national security by disclosure of information from informants? What is the gain in international public opinion from open trials? Are there compromises available that are more protective of national security than slavish compliance with the criminal model, but that still retain the values of the adversary system and a healthy skepticism of a not-fully-proven-in-open-court basis for detaining persons?

Professor Paust's position is in one important respect diametrically opposed to that of Professor Delahunty. Paust denies that the laws of war apply to American challenges to al-Qaeda (whose attacks were, for Paust, crimes, not acts of war) under existing law. The United States could, however, according to Professor Paust, invoke the right of self-defense, which Professor Paust obviously considers still binding, against al-Qaeda in Afghanistan, but not against their Taliban hosts. Action against al-Qaeda would be justified on evidence of its "direct involvement" in the September 11th attacks, but not the Taliban, who were guilty of merely "harboring, endorsing, or financing" al-Qaeda. No doubt Professor Delahunty does not share these views on the limits of self-defense. Neither, it should be noted, did the United Nations or NATO.

It bears emphasizing that what concerns our authors is a question of law, not a question of prudence. One might reject Professor Paust's claim that the law of war is inapplicable to the "war" on terrorism, and conclude that as a political or prudential matter, the battle against terrorism ought (as a rule) not to involve military force, at least not as the first response. The same point could be made with regard to almost all of the issues raised in this Symposium. Even if the law of war allows, or should allow, for a particular course of action, it does not mean that it is prudent or moral to follow that course. Only the most hardened cynic would deny that governments are inevitably incapable of restraining themselves from using every conceivably means legally available to them.

Professor Amos Guiora's approach to the problem is less prescriptive than it is comparative, contrasting American, Russian, Indian, Spanish, and Israeli approaches to the question of the status of captured irregular fighters, i.e., terrorists. The central issue Guiora confronts is whether terrorists ought always to be tried with the full panoply of rights available to the ordinary criminal defendant or whether some modified procedure is acceptable in at least some cases to justify (at least) the disabling detention of such persons.

The heart of the problem, as Guiora sees it, is the asserted (sometimes real) need to protect the confidentiality of intelligence information (informants, for example) and sources from disclosure, and yet maintain public confidence in the fairness and justice of the proceedings.

The problems Guiora and Paust discuss have, in the public presses, generated mirror-image extreme responses—either terrorists have no

rights on the ground that they are illegal combatants³¹ or that they should be treated in every respect like criminal defendants. Guiora is critical of the American inability to come up with a balanced approach and suggests a look at either Israel's two-track approach or the modified criminal law approach of Russia, India, and Spain.

Israel allows the government to choose between full criminal prosecution, with full disclosure of evidence in open court, or administrative detention, in which there are administrative proceedings with greater restrictions on disclosure of evidence, but with direct substantive review by the courts.³² More or less ordinary criminal models are used in Spain, India, and Russia, with (in the case of India) some modifications in interrogation rules or (in Spain) of pretrial detention rules.

Although Guiora does not mention it, one factor in that decision probably ought to be the degree of terror a nation faces—is it occasional or continuing? Does it involve mass casualties or smaller, isolated attacks? And the presence of Russia in Guiora's discussion raises the question of how much attention to pay mere paper responses to terror. Russia may adhere to traditional due process models on paper, but on the ground it conducted a scorched earth war against Chechnian separatists.³³ It is regrettable to report that those tactics appear to have succeeded in suppressing terrorism to a far greater degree than India's much softer approach.

However, it is possible to devise other solutions to Guiora's dilemma. The European Court of Human Rights has upheld a procedure in which an independent attorney with clearance to access classified information is appointed in terrorism cases in which secret evidence is to be relied upon by the government.³⁴ That attorney probes the secret evidence that cannot be revealed to the defendant, and tests its veracity, but does not disclose it to the defendant or his advocate. The special attorney owes no ethical obligations to the "client." This solution is far from perfect, but there may be no better one available. (It is telling that when one of us mentioned this model to a high-ranking Bush administration official, it

31. As should be obvious by now, the question of the status of irregular fighters runs through several of the papers, has generated substantial discussion—dare we say confusion—at the West Point Conference, and begs for an agreed upon legal solution since so much else turns upon it. Whether such a solution is possible is a matter of substantial doubt.

32. See EMANUEL GROSS, *THE STRUGGLE OF DEMOCRACY AGAINST TERRORISM* 120-29 (2006) (providing a skeptical evaluation of how Israel's law works in practice).

33. See, e.g., AMNESTY INT'L, *RUSSIAN FEDERATION: VIOLATIONS CONTINUE, NO JUSTICE IN SIGHT* (2005), [http://web.amnesty.org/library/pdf/EUR460292005english/\\$file/eur4602905.pdf](http://web.amnesty.org/library/pdf/EUR460292005english/$file/eur4602905.pdf).

34. See, e.g., *Chahal v. United Kingdom*, App. No. 70/1995/576/662, para. 144 (Eur. Ct. H. R. Oct. 25, 1996), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search "Case Title" for "Chahal").

was brushed aside with a curt dismissal of purportedly naïve European models.)

No aspect of the Bush administration's handling of the war on terror has generated more criticism than its approval of (near?) torture in interrogating illegal combatants.³⁵ At the West Point Conference, some, including persons with actual experience in the trenches, denied that torture ever produces reliable evidence. This seems plainly wrong. Surely, a verbal confession obtained by torture cannot be considered reliable enough by itself to sustain a criminal conviction. But what if a confession achieved through torture leads to the discovery of tangible evidence that would only have been known to the guilty?³⁶

Anti-torture groups argue for an absolute ban on torture, or cruel and degrading treatment falling just short of torture, no matter what the justification, arguing—too facilely—that nothing useful ever comes of torture. (Their real argument may be that torture by its own terms violates our notions of human dignity.)³⁷ At the same time, there is no doubt that the exigent circumstances often put forward to justify extreme treatment—the so-called “ticking bomb” situation—is rarely found in the real world. When we involve such language, we too often slide into what Ron Suskind has called “the one percent solution”—in which even a smidgeon of possibility of a terror attack justifies any and all measures.³⁸ Interestingly, Professor Alan Dershowitz famously has argued for torture warrants in ticking bomb cases,³⁹ but it is our impression that his proposal has found little support amongst international lawyers.

Professor Yuval Shany argues for what strikes us as a middle ground approach.⁴⁰ Professor Shany argues that the rule against torture and other cruel treatment ought to remain absolute as a norm binding on states: “[B]ecause of the risk of chronic norm abuse, absolute . . . norms

35. See *In Re Guantanamo Detainee Cases*, 355 F. Supp .2d 443 (D.D.C. 2005), vacated *sub nom.* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir.), cert. denied, 127 S. Ct. 1478 (2007).

36. Cf. *Brewer v. Williams*, 430 U.S. 387, 392-94, 400-06 (1977) (involving an illegally coerced (but not by torture) confession that led directly to discovery of murder victim's body in the snow-covered woods).

37. For but one example of this theologically-based view, see generally RABBIS FOR HUMAN RIGHTS—NORTH AMERICA, A RABBINIC RESOURCE ON JEWISH VALUES AND THE ISSUE OF TORTURE (2005).

38. RON SUSKIND, THE ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA'S PURSUIT OF ITS ENEMIES SINCE 9/11 (2006).

39. ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 156-63 (2002).

40. Yuval Shany, *The Prohibition Against Torture and Cruel, Inhuman, and Degrading Treatment and Punishment: Can the Absolute Be Relativized Under Existing International Law?*, 56 CATH. U. L. REV. 837 (2007).

promote better enforcement of humanitarian norms at the price of suboptimal compatibility in extreme cases.”⁴¹

Shany would retain an absolute bar on state sanctioning of torture no matter how urgent the need. He would, however, allow individual defendants in prosecutions for torture to raise a narrowly circumscribed necessity defense, that the torture was necessary to forestall an imminent terrorist attack. Although an individual could not be subject to criminal punishment if he succeeded in establishing the necessity defense, the state on whose behalf he or she acted would still remain liable to the victim of torture or degrading treatment even so. Of course, an individual contemplating torture would have to bear the risk that her defense would be rejected.

Given universal jurisdiction over serious breaches of international law, Shany’s solution will work if it is universally accepted. Otherwise, an official might be entitled to a defense in one county, but be prosecuted with no defense available in another. If that is the case, Professor Shany’s proposal to (de facto) tolerate torture in cases where its use is morally justified would accomplish nothing.

A. John Radsan, formerly an assistant general counsel for the CIA, describes in detail the reaction of the CIA and its employees as the legal fight over debated interrogation techniques bounced between the Supreme Court and Congress.⁴² He notes, too, that given the rule that war crimes offenders may not claim refuge in statutes of limitations, the most serious of which are subject to universal jurisdiction, these fears may hover over the agency and its workers well into the future.

Radsan’s article demonstrates, too, that criminal penalties can be highly effective in preventing government officials (in, at least, states that are governed by law) from engaging in behavior that violates international and internal legal norms. At the same time, and for the very same reasons, one questions whether government officials, doing their best to defend their countries at the fuzzy borders of international law, ought to be exposed to criminal persecution anywhere in the world for doing their jobs. Should, for example, rank-and-file CIA officers be subject to criminal prosecution under a subsequent administration when they acted upon the legal advice of high-ranking Justice Department lawyers in a prior administration?

The contributions in this Symposium do not cover all of the important issues that need to be reexamined. Among those issues which we think

41. *Id.* at 132.

42. A. John Radsan, *The Collision Between Common Article Three and the Central Intelligence Agency*, 56 CATH. U. L. REV. 959 (2007).

would bear rethinking include “targeted assassinations,”⁴³ the complex problem of state practice of customary IHL as evidenced, for example, in the recent ICRC compendium on that topic,⁴⁴ the problem of reciprocity (current law makes no allowance for the cases in which one party to a complaint wholly ignores its international legal obligations), and the relationship between the law of war and international human rights law.⁴⁵ There are no doubt others.

We urge consideration of these and other issues fully cognizant that such reconsideration comes at a price. The struggle to moderate war has been a long and difficult one. The constraints of law push hard against the imperative to achieve victory at costs under which those charged with waging war must labor. Suggesting that the rules are less than perfect, that they may favor the wrong parties, and that they do not reflect current realities, might well undermine whatever restraining effect the law has managed to achieve in over a century.

However, we think the risk of reexamination is worth running. In the past, the law of war has adapted for the better as the nature of warfare has changed. Adherence to the status quo is not morally or politically neutral. There are winners and losers—and not necessarily the correct winners and losers.

The papers in this Symposium are an important start to the process of reexamining international law. If, taken together, they do nothing more than explode the myth that all is well, then they will have served their purpose.

43. See generally Kenneth Watkin, *Humans In The Cross-Hairs: Targeting and Assassinations In Contemporary Armed Conflict*, in *NEW WARS, NEW LAWS?* 137 (David Wippman & Matthew Evangelista eds., 2005).

44. 2 HENCKAERTS & DOSWALD-BECK, *supra* note 7.

45. See generally Anthony Dworkin, *Military Necessity and Due Process: The Place of Human Rights in the War on Terror*, in *NEW WARS, NEW LAWS?*, *supra* note 41, at 53, 65-69.

