

# The danger of “new norms” and the continuing relevance of IHL in the post-9/11 era

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## Abstract

*In the post-9/11 era, the label “asymmetric wars” has often been used to question the relevance of certain aspects of international humanitarian law (IHL); to push for redefining the combatant/civilian distinction; and to try to reverse accepted norms such as the bans on torture and assassination. In this piece, we focused on legal and policy discussions in the United States and Israel because they better illustrate the dynamics of State-led “norm entrepreneurship”, or the attempt to propose opposing or modified norms as a revision of IHL. We argue that although these developments are to be taken seriously, they have not weakened the normative power of IHL or made it passé. On the contrary, they have made it more relevant than ever. IHL is not just a complex (and increasingly sophisticated) branch of law detached from reality. Rather, it is the embodiment of widely shared principles of morality and ethics, and stands as a normative “guardian” against processes of moral disengagement that make torture and the acceptance of civilian deaths more palatable.*

**Keywords:** IHL, asymmetric war, norm entrepreneurs, targeted killing, torture, terrorism, moral disengagement.



## Introduction

There is broad agreement in military, political and academic circles that after 9/11 and the launch of the “global war on terror”, the way we think about war has changed, as perhaps has the way many wars are fought. The label “asymmetric war” has often been used to capture a variety of armed conflicts.<sup>1</sup> Asymmetric wars are clearly not a new reality; small, low-intensity civil wars, and non-State armed groups battling much more powerful enemies, have a long history. Yet, after 9/11 the label of “asymmetric war” has come to represent an influential perspective and has impacted on how we think about wars, potentially even testing international humanitarian law (IHL).

Traditionally, the concept of “asymmetric war” refers to the attempt of a much weaker party to offset an overwhelmingly more powerful enemy by using non-conventional tactics. The use of certain tactics that have been commonly linked to the concept of “asymmetric war”, such as deliberately targeting non-combatants or hiding behind them, has been said to violate the moral and legal principles of distinction between civilians and combatants and to put the weaker party at a moral disadvantage.<sup>2</sup> These tactics, however, are chosen because they make it difficult for the stronger party to fight effectively while adhering strictly to the rules of IHL. They strategically create a certain balance in conflicts that would otherwise be grossly unequal, allowing for no clear sign of success on either side.<sup>3</sup>

These features of “asymmetric war”, thus understood, have been particularly discussed in relation to post-9/11 US-led interventions in the context of the “global war on terror,” as well as the Israeli–Palestinian conflict. They have had important consequences. Over the past two decades, a significant part of the law and policy debate in both Israel and the United States has focused on the need for better protection from weaker but “existentially threatening” enemies, who are seemingly unfettered by legal and moral constraints. This debate has been marked by questions regarding the relevance of IHL in contemporary warfare – in some cases, by a push towards redefining the combatant/civilian distinction, and in others, by an attempt to reverse accepted norms such as the prohibitions against torture and assassination.

In this piece, we argue that although these developments are to be taken seriously, they have not weakened the normative power of IHL, or made it passé. On the contrary, they have made it more relevant than ever. In the past two decades, the acceptance of IHL, as well as the acceptance of human rights, has been making significant progress both internationally and domestically.<sup>4</sup> When States attempt to adapt or circumvent international law (as in the case of the

1 For a quick survey, see Michael L. Gross, *Moral Dilemmas of Modern War: Torture, Assassinations, and Blackmail in an Age of Asymmetric Conflict*, Cambridge University Press, Cambridge, 2010.

2 *Ibid.*, p. 14; For a discussion of the ethics of asymmetric tactics from a consequentialist and deontological point of view, see David Rodin, “Ethics of Asymmetric War”, in Richard Sorabji and David Rodin (eds), *The Ethics of War: Shared Problems in Different Traditions*, Ashgate, Aldershot, 2006.

3 M. L. Gross, above note 1, p. 19; D. Rodin, above note 2, pp. 155–156.

4 Thomas Risse, Stephen C. Ropp and Kathryn Sikkink (eds), *The Persistent Power of Human Rights: From Commitment to Compliance*, Cambridge Studies in International Relations, No. 126, Cambridge University Press, Cambridge, 2013.

“unlawful enemy combatant” theory), or justify violations thereof (as in the case of torture), they act as “norm entrepreneurs”.<sup>5</sup> It is in this analytical context that we focus on the United States and Israel, as they offer the opportunity to illustrate the dynamics of norm entrepreneurship in the current historical period. Not only do they discount legal and normative stances, but they also propose opposing or modified norms. Yet, in both the case of torture and the unlawful enemy combatant theory, a new “norm internalization” failed to take place. Instead, what took place was an enormous effort to conceal violations and to reframe or justify them when they were exposed, coupled with expressions of remorse. This has in fact served to reaffirm the status of IHL and other international norms. The following sections examine the examples of torture and targeted killings in turn to demonstrate this point.

## Torture

In the aftermath of 9/11, the Bush administration attempted to legitimize the practice of torture during interrogation, as well as detention without trial, by using the counter-norm of anti-terrorism.<sup>6</sup> A shocked and grieving American public accepted the state of emergency, which was presented as a necessary counterterrorism measure. Even some prominent human rights advocates contemplated chipping away at the norm and law against torture, for torture was a “lesser evil”. This was presented as a pragmatic balancing act: “A clear prohibition [against torture] in the name of human dignity comes up against a utilitarian case also grounded in the dignity claim, namely the protection of innocent lives.”<sup>7</sup>

The initial consensus on counterterrorism, shared by US allies, at first lowered the risk of internal and international contestation. The Bush administration showed a remarkable lack of vulnerability to potential moral and political pressure against its violation of both IHL and domestic law. It created its own legal category of “unlawful enemy combatants”, applicable to Al Qaeda members and the Taliban, giving the illusion that they were completely outside the law.<sup>8</sup> It also crafted its own vocabulary. In the discourse of US defence and

5 We borrow this term from constructivism, to identify actors that propose normative changes. See Kathryn Sikkink and Martha Finnemore, “International Norm Dynamics and Political Change”, *International Organization*, Vol. 52, No.4, 1998.

6 Kathryn Sikkink, “The United States and Torture: Does the Spiral Model Work?”, in T. Risse, S. C. Ropp and K. Sikkink (eds), above note 4.

7 Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror*, Princeton University Press, Princeton, NJ, 2005, pp. 140 ff.

8 The administration correctly argued that these combatants are not entitled to receive POW status and the full protections of the Third Geneva Convention; see William J. Haynes II, “Enemy Combatants”, *Council on Foreign Relations*, 12 December 2002, available at: [www.cfr.org/international-law/enemy-combatants/p5312](http://www.cfr.org/international-law/enemy-combatants/p5312) (all internet references were accessed in December 2015). However, it failed to add that they are protected by the Fourth Convention and the relevant provisions of Additional Protocol I. For a detailed legal analysis on this point, see Knut Dörmann, “The Legal Situation of ‘Unlawful/Unprivileged Combatants’”, *International Review of the Red Cross*, Vol. 85, No. 849, 2003.

political circles, practices such as slamming a detainee's head against the wall or choking him with water until he was nearly drowning – all clear violations of both the Convention against Torture<sup>9</sup> and the US criminal code<sup>10</sup> – were dubbed “enhanced interrogation techniques”<sup>11</sup> and thus reinterpreted as permissible.

On torture, the Bush administration did not just turn a deaf ear to criticism; it built a legal defence of it. As Kathryn Sikkink argues, this “*actively undermined* the prescriptive status of the norm, ... a fact that profoundly influenced US behavior as well as behavior in other countries”.<sup>12</sup> A series of legal memos, many of them written by Deputy Assistant Attorney General John Yoo, created the “golden shield” requested by the CIA to protect the administration from potential prosecution for war crimes. These memos rejected the application of the Geneva Conventions to detainees from the war in Afghanistan by re-labelling them as enemy combatants,<sup>13</sup> provided a new definition of torture to help US interrogators avoid prosecution,<sup>14</sup> and explicitly justified the very aggressive techniques approved by Secretary of Defence Donald Rumsfeld.<sup>15</sup>

- 9 See Convention against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984 (entered into force 26 June 1987), Part 1, Art. 1, available at: <http://hrweb.org/legal/cat.html>.
- 10 See United States Code Title 18, para. 2340(1) and (2), available at: <http://uscode.house.gov/>.
- 11 A definition of “enhanced interrogation techniques” was given by then CIA director George Tenet in “Guidelines on Interrogations Conducted Pursuant to the [redacted]”, which he issued on 28 January 2003, available at: [www.acu.org/files/torturefoia/released/082409/olcremand/2004olc12.pdf](http://www.acu.org/files/torturefoia/released/082409/olcremand/2004olc12.pdf). In this document, these are techniques that “*do* [emphasis added] incorporate significant physical or psychological pressure beyond standard techniques”. These guidelines followed the 2 December 2002 Department of Defense memo summarizing approved forms of interrogation, available at: <http://nsarchive.gwu.edu/NSAEBB/NSAEBB127/02.12.02.pdf>. This memo talked instead of “counter-resistance techniques”. However, it is the term “enhanced interrogation techniques” that has become more popular in public discourse as an alternative, euphemistic way of talking about torture: this is discussed in more detail later in the article.
- 12 K. Sikkink, above note 6, p. 156. While there has not been any official disclosure of the number and identity of foreign countries involved in the US government's secret detention and extraordinary rendition programs, an Open Society Justice Initiative report mentions the participation of fifty-four governments in such operations. See Open Society Justice Initiative, “Foreign Government Participation in CIA Secret Detention and Extraordinary Rendition”, in *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*, Open Society Foundations, New York, 2013, available at: [www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf](http://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf). High-profile court cases have exposed individual countries. See European Court of Human Rights (ECtHR), “Secret Detention Sites”, Factsheet, July 2014, available at: [www.echr.coe.int/documents/fs\\_secret\\_detention\\_eng.pdf](http://www.echr.coe.int/documents/fs_secret_detention_eng.pdf); and ECtHR, *Nashiri v. Poland*, Case No. 28761/11, Judgment, 24 July 2014. Among the many serious consequences for US society is the role played by psychologists and the conduct of their professional association, the American Psychological Association, in the CIA's torture programme. A comprehensive discussion of this issue can be found in Steven Reiser, “CIA on the Couch: Why There Would Have Been No Torture without Psychologists”, *Slate*, 12 December 2014.
- 13 John Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, “Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees”, Memorandum for William J. Haynes II, General Counsel, Department of Defense, Washington, DC, 9 January 2002, available at: [www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf](http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf).
- 14 Jay S. Bybee, Assistant Attorney General, “Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A”, Memorandum for Alberto R. Gonzales, Counsel to the President, Washington, DC, 1 August 2002, available at: [news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf](http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf).
- 15 Donald Rumsfeld, Secretary of Defence, “Subject: Counter-Resistance Techniques in the War on Terrorism (S)”, Memorandum for The Commander, US Southern Command, Washington, DC, 16 April 2003, available at: [www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.16.pdf](http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.16.pdf).

Yet, a powerful criticism was mounted by scholars,<sup>16</sup> international organizations<sup>17</sup> and domestic human rights groups,<sup>18</sup> the media,<sup>19</sup> local legislatures,<sup>20</sup> members of the Supreme Court, and individuals within the very institutions that formulated and often secretly implemented the Bush administration’s illegal policies. Some of these individuals and groups managed to bring these policies to light and if not end them, at least curb their excesses.<sup>21</sup> The Supreme Court ruled that the Geneva Conventions applied to Al Qaeda, and

- 16 Apart from a variety of public statement made by legal scholars, we mention two important criticisms of torture: Georgetown professor of philosophy and law David Luban made his arguments against torture in “Liberalism, Torture and the Ticking Bomb”, *Virginia Law Review*, Vol. 91, No. 6, 2005; and Philippe Sands, professor of international law at University College London, discussed the issue in *Torture Team: Rumsfeld’s Memo and the Betrayal of American Values*, Palgrave Macmillan, New York, 2008.
- 17 Two confidential reports by the International Committee of the Red Cross (ICRC), *The Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation* (published in February 2004) and *The Treatment of Fourteen “High Value Detainees” in CIA Custody* (published on February 2007), have been published without the consent of the organization. See “Report by the ICRC on the Coalition Forces’ Treatment of Persons held in Iraq”, News Release 04/35, 7 May 2004, available at: [www.icrc.org/eng/resources/documents/misc/5yrl67.htm](http://www.icrc.org/eng/resources/documents/misc/5yrl67.htm).
- 18 To mention a few: the Center for Constitutional Rights has been consistently engaged in representing victims of torture at Guantanamo and various rendition sites as well as prosecuting US officials in the Bush administration in foreign courts (see: <https://ccrjustice.org/home/what-we-do/issues/torture-war-crimes-militarism>); Human Rights Watch sought to investigate detention facilities in Afghanistan as early as 2002 and continues to monitor, report, denounce abuses and lobby for accountability (for the most recent position, see Laura Pitter, Senior National Security Counsel, “Delusion of Justice on CIA Torture”, *The Hill*, 14 December 2015); and the American Civil Liberties Union (ACLU) has been particularly effective in its use of the Freedom of Information Act (FOIA) to gain access to documents and in its efforts to build coalitions with other human rights groups in order to ask for accountability.
- 19 Scathing reports by media that used the term “torture” to describe how prisoners were interrogated in detention facilities at several sites – from Afghanistan to Iraq and Cuba, to name the largest – began to appear as early as December 2002. Dana Priest, Barton Gellman and Rajiv Chandrasekaran at the *Washington Post*, and Tim Golden and Carlotta Gall at the *New York Times*, investigated the issue. An international “scandal” on the abusive treatment of detainees in the Iraqi prison of Abu Ghraib exploded when CBS’s *60 Minutes* aired graphic photos on 28 April 2004, and a few days later the *New Yorker* published Seymour Hersh’s report on the same story. Jane Mayer at the *New Yorker* and Mark Danner at the *New York Review of Books* have contributed important investigations. At least two documentaries have investigated detention abuses: the 2007 Academy Award winner *Taxi to the Dark Side*, by Alex Gibney, and the 2008 film *Standard Operating Procedures*, by Errol Morris, a recipient of the Silver Bear at the Berlin International Film Festival.
- 20 In her excoriating indictment of the Bush administration’s policies after 9/11, Elaine Scarry also provides an interesting overview of the perhaps little-known resistance of towns and cities against the Patriot Act. See Elaine Scarry, *Rule of Law, Misrule of Men*, Boston Review Books, MIT Press, Cambridge, MA, 2010.
- 21 This is not the place to list all the internal dissent, and we will only give a few examples. It is understood that even among CIA interrogators there were critics of “enhanced interrogation techniques”, for example John Kiriakou, the officer who first publicly revealed the practice of waterboarding and was later sentenced for leaking classified information. At the Defense Department, General Counsel of the Navy Alberto Mora led a campaign opposing the use of coercive interrogation techniques at Guantanamo Bay. For these efforts, he was honoured in 2006 with the John F. Kennedy Profile in Courage Award. Now at Harvard, Mora is leading a three-year research programme investigating the foreign policy and military consequences of the United States’ use of torture following 9/11. To mention one of the high-ranking US Army officers who refused to abide by the Bush administration policies on interrogation, General Martin Dempsey, current joint chief of staff, prohibited maltreatment of prisoners while commanding the 1st Armored Division in Iraq from 2003 to 2004. See Douglas A. Pryer, *The Fight for the High Ground: The U.S. Army and Interrogation during Operation Iraqi Freedom I, May 2003–April 2004*, CGSC Foundation Press, Fort Leavenworth, KS, 2009, p. 68.

that *habeas corpus* applied to Guantanamo's detainees.<sup>22</sup> The 2014 report on the CIA's interrogation and detention programme, authored by the US Senate Select Committee on Intelligence,<sup>23</sup> further exposed the extent of the use of torture, causing domestic and international outrage. The report discovered that the torture programme was "amateurish";<sup>24</sup> that the CIA probably knew it was practicing torture,<sup>25</sup> despite denial; and that it misrepresented the extent to which torture practices had been effective<sup>26</sup> in providing useful information, with the consequence that even the justification based on the "lesser evil" argument began to crumble.<sup>27</sup> That torture still remains an issue of contention is confirmed by the strong challenge to the conclusion of the Senate study expressed both in the Republican minority opinion and the comment drafted by the CIA.<sup>28</sup>

Torture and rendition have been publicly discussed and criticized, and effectively abandoned since 2008.<sup>29</sup> From fairly different perspectives and reaching different conclusions, Jack Goldsmith and Kathryn Sikkink largely agree that the reverse in the original practice started under the Bush administration was at least in part due to pressure from elements within the administration (both Bush's and, later, Obama's). These elements had internalized the norm against torture and considered it an unacceptable practice.<sup>30</sup> At the time

22 See US Supreme Court, *Hamdi v. Rumsfeld*, 542 US 507 (2004); and *Boumediene v. Bush*, 553 US 723 (2008). The Court held that the US Constitution also guaranteed the right of *habeas corpus* in Guantanamo. In *Hamdan v. Rumsfeld*, 548 US 557 (2006), the Court ruled that the military commissions set up in Guantanamo violated both the US Uniform Code of Military Justice and the four Geneva Conventions of 1949, and mentioned in this regard Article 3 common to the four Geneva Conventions.

23 The complete study, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, 3 December 2014, is available at: [www.gpo.gov/fdsys/pkg/CRPT-113srpt288/pdf/CRPT-113srpt288.pdf](http://www.gpo.gov/fdsys/pkg/CRPT-113srpt288/pdf/CRPT-113srpt288.pdf).

24 *Ibid.* Limiting the following references below to the "Findings" section of an otherwise monumental document, see Finding 11, on the unpreparedness of the CIA to operate its detention and interrogation programme six months before being granted the authority; Finding 12, on the deep flaws of the programme, including the lack of training and experience among interrogators; and Finding 15, on the lack of a comprehensive and accurate account of the number of detainees.

25 *Ibid.* In Findings 3 and 4, the Senate Committee concluded that interrogation techniques and detention conditions had been much harsher than was represented by the CIA. Knowing it was overstepping the legal boundaries set up by the administration memos, the Agency asked for a "necessity defense" to be included in the memos in order to "avoid prosecution of U.S. officials who *tortured* to obtain information that saved many lives" (Finding 5, emphasis added).

26 *Ibid.* According to its own review of the programme, the CIA knew it had not been effective (Finding 1) but still claimed that it had been (Finding 2).

27 For a short assessment of the US Senate Select Committee on Intelligence's study, the executive summary of which alone is 500 pages long, see Mark Danner and Hugh Eakin, "The CIA: The Devastating Indictment", *New York Review of Books*, 5 February 2015.

28 Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program: Minority Views*, 20 June 2014, available at: <https://repositories.lib.utexas.edu/handle/2152/28132>; CIA, *Comments on the Senate Select Committee on Intelligence's Study of the Central Intelligence Agency's Former Detention and Interrogation Program*, 27 June 2013, available at: [www.cia.gov/library/reports/CIAs\\_June2013\\_Response\\_to\\_the\\_SSCI\\_Study\\_on\\_the\\_Former\\_Detention\\_and\\_Interrogation\\_Program.pdf](http://www.cia.gov/library/reports/CIAs_June2013_Response_to_the_SSCI_Study_on_the_Former_Detention_and_Interrogation_Program.pdf).

29 Executive Order 13941, "Ensuring Lawful Interrogations", 22 January 2009, available at: [www.whitehouse.gov/the\\_press\\_office/EnsuringLawfulInterrogations/](http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/).

30 Goldsmith, who served in the Office of Legal Counsel in the Bush administration, argues that while President Obama was initially critical of Bush counterterrorism policies, he embraced them later because the pushback from the courts, the media and human rights groups had already altered and legitimated them by the time

of writing, the official position of the Obama administration with regard to torture is very clear:

[A]ll U.S. personnel are legally prohibited under international and domestic law from engaging in torture or cruel, inhuman, or degrading treatment or punishment at all times, and in all places. There are no gaps, either in the legal prohibitions against these acts by U.S. personnel, or in the United States’ commitment to the values enshrined in the Convention, and the United States pledges to continue working with our partners in the international community toward the achievement of the Convention’s ultimate objective: a world without torture.<sup>31</sup>

Yet, the Obama administration has thus far decided not to prosecute anyone who either approved or practiced torture back in 2008, and has given no signs of changing this attitude in light of the 2014 Senate Study on the CIA’s detention and interrogation programmes. President Obama is facing direct criticism for this choice, which fails to satisfy the obligations that the United States has under Article 7 of the Convention against Torture. The United Nations (UN) High Commissioner for Human Rights, as well as the Special Rapporteur on counterterrorism and human rights, have demanded accountability for such egregious violations.<sup>32</sup>

These democratic dynamics of domestic questioning by a divided public and international pressure by human rights advocates and other principled actors have provided strong counter-forces to the United States in its effort to claim a “state of exception”, or in its desire to position its actions “at the limit between politics and the law”.<sup>33</sup>

## Targeted killings

Since 2000, in the aftermath of the Second Intifada, Israel has fully acknowledged the routine use of targeted killings of suspected terrorists<sup>34</sup> – a practice that has been

he took office. Jack Goldsmith, *Power and Constraint: The Accountable Presidency after 9/11*, W. W. Norton, New York, 2012. According to Sikkink, it was the Obama administration, more sensitive to domestic and international pressure, that took steps to reverse Bush’s policy on torture and other policies early on, but it decided not to “pursue accountability for past violations, and some of its initial efforts, for example, to close the detention center at Guantánamo, have failed”. K. Sikkink, above note 6, p. 162.

- 31 See “Statement by NSC Spokesperson Bernadette Meehan on the U.S. Presentation to the Committee Against Torture”, November 2014, available at: [www.whitehouse.gov/the-press-office/2014/11/12/statement-nsc-spokesperson-bernadette-meehan-us-presentation-committee-a](http://www.whitehouse.gov/the-press-office/2014/11/12/statement-nsc-spokesperson-bernadette-meehan-us-presentation-committee-a).
- 32 Office of the High Commissioner for Human Rights, “Zeid: Landmark U.S. and Brazil Reports Highlight Need to Eradicate Torture on 30th Anniversary of Convention”, 10 December 2014, available at: [www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15405&LangID=E-sthsh.LjaLVZeE](http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15405&LangID=E-sthsh.LjaLVZeE); and United Nations Human Rights Office of the High Commissioner for Human Rights, *Feinstein Report: UN Expert Calls for Prosecution of CIA Officers and Other US Government Officials*, Geneva, 9 December 2014, available at: [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15397&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15397&LangID=E).
- 33 Mark Danner, “After September 11: Our State of Exception”, *New York Review of Books*, 13 October 2011, available at: [www.nybooks.com/articles/archives/2011/oct/13/after-september-11-our-state-exception/](http://www.nybooks.com/articles/archives/2011/oct/13/after-september-11-our-state-exception/).
- 34 Gabriella Blum and Philip Heymann, “Law and Policy of Targeted Killing”, *Harvard National Security Journal*, Vol. 1, 27 June 2010, p. 151.

facilitated by the availability of unmanned aerial vehicles (better known as drones), weapons that allow great accuracy and no risk for their operators. The United States has been using the same means in the post-9/11 period to hunt Al Qaeda and other suspected terrorists, although these missions are conducted by the CIA in a covert manner and have become public mostly through leaks to the media.<sup>35</sup> Initiated by President Bush, targeted killings have escalated during the Obama administration, according to a close observer of counterterrorism policies, perhaps in an effort to compensate for the abandonment of practices such as torture and rendition.<sup>36</sup>

Despite public approval<sup>37</sup> in both Israel and the United States for the use of drones, the practice of targeted killing is the object of considerable criticism, including questions about its precision and challenges to its legality, which we discuss below. It is important to notice here that despite its association to the norm-breaking practice of assassination,<sup>38</sup> targeted killing is, instead, often presented as a positive evolution from (indiscriminate) bombing; as if the technological precision in striking a legitimate target also included the normative and legal distinction that helps to protect non-combatants.<sup>39</sup>

Since World War II, be it because of concerns with reputation or legitimacy, or the aversion to the huge devastation caused by bombing both at home and internationally, the United States has focused on decreasing the number of civilian casualties during bombing (collateral damage) by paying more attention to proportionality and improving military technology.<sup>40</sup> The high point of this goal was the 1999 US-led NATO military intervention in Kosovo and Serbia. On that occasion, legal advisers played an unprecedented role in reviewing military targets and ensuring the protection of civilians, even though no particular

35 For the latest comprehensive treatment of this, see Mark Mazzetti, *The Way of the Knife: The CIA, a Secret Army and a War at the Ends of the Earth*, Penguin Books, New York, 2013.

36 *Ibid.*, pp. 218–219. For President Obama's legacy on rights and counterterrorism, see Kenneth Roth, Human Rights Watch, "Obama & Counterterror: The Ignored Record", *New York Review of Books*, 5 February 2015.

37 According to a March 2013 Gallup Poll, 65% of Americans approve of the use of drones: Gallup, "In U.S. 65% Support Drone Attacks on Terrorists Abroad", 25 March 2013, available at: [www.gallup.com/poll/161474/support-drone-attacks-terrorists-abroad.aspx](http://www.gallup.com/poll/161474/support-drone-attacks-terrorists-abroad.aspx). On activism, see Medea Benjamin, *Drone Warfare: Killing by Remote Control*, Verso Books, London, 2013, pp. 165–200. Among the recently published US books on drones, see Brian Glyn Williams, *Predators: The CIA's Drone War on al Qaeda*, Potomac Books, Washington, DC, 2013; Lloyd C. Gardner, *Killing Machine: The American Presidency in the Age of Drone Warfare*, The New Press, New York, 2013; Shahzad Bashir and Robert D. Crews (eds), *Under the Drones: Modern Lives in the Afghanistan-Pakistan Borderlands*, Harvard University Press, Cambridge, MA, 2012; M. Shane Riza, *Killing Without Heart: Limits on Robotic Warfare in an Age of Persistent Conflict*, Potomac Books, Washington, DC, 2013; P. W. Singer, *Wired for War: The Robotics Revolution and Conflict in the 21st Century*, Penguin Books, New York, 2009; Sarah Kreps and John Kaag, *Drone Warfare*, Polity Press, Cambridge, 2014.

38 Editor's note: the normative framework governing the legality of such practices can differ and the consideration as to whether or not the incident in question is norm-breaking, in addition to factual considerations, would heavily depend on whether it is judged from the standpoint of international law or from the perspective of relevant domestic law.

39 S. Kreps and J. Kaag, above note 37, pp. 133–135; Michael L. Gross, "Murder, Self-Defense, or Execution? The Dilemma of Assassination", in M. L. Gross, above note 1, pp. 100–121.

40 Ward Thomas, *The Ethics of Destruction: Norms and Force in International Relations*, Cornell University Press, Ithaca, NY, and London, 2001, pp. 147–179.



innovation in the law had required this level of reviewing.<sup>41</sup> It was the real-time media scrutiny of the war, or what was then known as the “CNN Factor”, that made “distant suffering”<sup>42</sup> observable and awakened a universal moral repugnance to killing of civilians not only by ethnic cleansers, but also by their NATO rescuers.<sup>43</sup>

Military lawyers, known as JAGs (members of the Judge Advocate General’s Corps), are an increasingly strong presence in all branches of the US Army. They advise on the fundamental IHL principles – proportionality, distinction and precautions in attack – in a time of great technological precision.<sup>44</sup> Yet, despite the strong focus on accuracy and legality that experts provide, progress in the technology of bombing creates new moral and political hazards. For example, conducting a safer, remote war in which the vaunted “surgical precision” is partly illusory might make assassinations more frequent and less concerned with the principles of distinction and proportionality. The key questions that absorb legal and ethical debates on targeted killing are how accurate the killing really is and who is targeted.

The first question, or the possibility that despite precision, civilian casualties might be much greater than expected and/or publicly known, is a concern of human rights groups as well as the military, who object on consequentialist grounds.<sup>45</sup> As the Obama administration has admitted to small or no collateral damage, but without divulging any figures,<sup>46</sup> reports by the New American Foundation and estimates from the London-based Bureau of Investigative Journalism indicate that the ratio of civilian to militant casualties oscillates from 12% to 26%.<sup>47</sup> Besides the moral outrage over the high number of civilian victims, there is a growing awareness among critics that civilian deaths have become a new recruitment tool for terrorist groups and generate hostility among the affected populations.<sup>48</sup>

41 For Wesley Clark’s comments on the force of moral constraint, see *ibid.*, p. 168.

42 On “distant suffering”, see Luc Boltanski, *Distant Suffering: Morality, Media and Politics*, Cambridge University Press, Cambridge, 1999.

43 W. Thomas, above note 40, pp. 171–172.

44 A good discussion of the role of “booted lawyers” can be found in Ariel Colonomos, *The Gamble of War: Is It Possible to Justify Preventive War?*, Palgrave Macmillan, London, 2013, pp. 112–116 (first published as *Le pari de la Guerre: Guerre Préventive, Guerre Juste?*, Denoël, Paris, 2009).

45 See Michael Doyle, “The Costs and Consequences of Drone Warfare”, *International Affairs*, Vol. 89, No. 1, 2013, pp. 1–29. Minimizing civilian casualties is stated as a priority in the 2006 US Army *Counterinsurgency Field Manual*, as success is gained by protecting the populace, not the military. See also statements by US generals such as that of Stanley McChrystal, following civilians death in Afghanistan due to an airstrike, available at: [www.mcclatchydc.com/2010/02/22/87352/us-concedes-air-strike-killed.html](http://www.mcclatchydc.com/2010/02/22/87352/us-concedes-air-strike-killed.html).

46 See the widely publicized June 2011 comment by John Brennan, currently CIA director but then Obama’s top adviser on counterterrorism, that there had been no collateral civilian deaths in the drone programme: Scott Shane, “CIA is Disputed on Civilian Toll in Drone Strike”, *New York Times*, 11 August 2011, available at: [www.nytimes.com/2011/08/12/world/asia/12drones.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/08/12/world/asia/12drones.html?pagewanted=all&_r=0).

47 International Human Rights and Conflict Resolution Clinic, Stanford Law School, and Global Justice Clinic, NYU School of Law, *Living under Drones: Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan*, September 2012, available at: <http://chrgi.org/wp-content/uploads/2012/10/Living-Under-Drones.pdf>.

48 Michael J. Boyle, “Is the US Drone War Effective?”, *Current History: A Journal of Contemporary World Affairs*, Vol. 113, No. 762, 2014.

The second question, or who is targeted, catalyzes the debate on extrajudicial killings, and this is related to a legal debate on whether the applicable law is IHL or human rights law.<sup>49</sup> In the context of war, killing a combatant is lawful, but if the law of war does not apply, killing a criminal is lawful only when there are no other means (e.g. arrest) to stop an imminent threat of death or serious injury. Further, as the distinction between civilians and combatants becomes increasingly blurred, the identification of a lawful target itself is subject to disagreement.

Some of these questions have also been debated in the courts; in fact, the term “lawfare” is nowhere more relevant than in the litigation on targeted killings.<sup>50</sup> In the United States, the American Civil Liberties Union (ACLU) has played a major role in challenging the administration’s policies. It has focused on the legality of targeting US citizens abroad and on a strategy of Freedom of Information Act (FOIA) requests, searching for more transparency.<sup>51</sup> While most of this litigation has been dismissed thanks to the US government’s insistence on secrecy for national security reasons, it has brought to light the administration’s legal rationale for targeted killings.<sup>52</sup>

The Israeli Supreme Court has engaged more directly with the legality of targeted killings. It has concluded that the practice is not unlawful, but needs justification and proportionality,<sup>53</sup> and has addressed the thorny question: if the

49 David Kretzmer, “Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?”, *European Journal of International Law*, Vol. 16, No. 2, 2005, available at: [www.ejil.org/pdfs/16/2/292.pdf](http://www.ejil.org/pdfs/16/2/292.pdf).

50 Major General Charles J. Dunlap Jr., US Air Force, “Lawfare Today: A Perspective”, *Yale Journal of International Affairs*, Winter 2008, available at: [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5892&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5892&context=faculty_scholarship).

51 In April 2014 a federal district court in Washington, DC dismissed the case of *Al-Aulaqi v. Panetta* (US District Court, District of Columbia, *Al-Aulaqi v. Panetta*, Civil Action No. 12-1192 (RMC), 2004), in which the ACLU and the Center for Constitutional Rights charged that the 2011 killing of three US citizens by drones in Yemen violated the Constitution’s fundamental guarantee of due process of law. In the same month, the US Court of Appeals for the Second Circuit reversed a January 2013 district court decision, and held that the government must disclose a memo relating the targeting killing of a US citizen. In March 2013, a federal appeals court reversed a previous ruling and held that the CIA could no longer deny its interest in the government’s targeted killing programme, given the numerous public statements made by CIA and administration officials. In the FOIA request on civilian deaths at Al-Majalah, the ACLU and the Center for Constitutional Rights requested information about a December 2009 US missile strike in Yemen that killed dozens of civilians, including at least 21 children. The US government has yet to release basic information about the strike. In 2010, a federal court dismissed the challenge to the government’s authority to carry out targeted killings of US citizens located far from any armed conflict zone (*Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 52–54 (DDC 2010)).

52 David J. Barron, Acting Assistant Attorney General, Office of the Assistant Attorney General, “Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi”, Memorandum for The Attorney General, Washington, DC, 16 July 2010, available at: [www.aclu.org/sites/default/files/assets/2014-06-23\\_barron-memorandum.pdf](http://www.aclu.org/sites/default/files/assets/2014-06-23_barron-memorandum.pdf). The release was preceded by a leak to the media of a white paper derived from the memo: NBC News, *Department of Justice White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or an Associated Force*, available at: [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf).

53 Supreme Court of Israel, *Public Committee Against Torture in Israel (PCATI) et al. v. The Government of Israel et al.*, HCJ 769/02, 11 December 2005, available at: [www.haguejusticeportal.net/Docs/NLP/Israel/Targetted\\_Killings\\_Supreme\\_Court\\_13-12-2006.pdf](http://www.haguejusticeportal.net/Docs/NLP/Israel/Targetted_Killings_Supreme_Court_13-12-2006.pdf).

target has a shifting identity as an occasional participant in terrorist activities, is he a combatant or a civilian? The Court has rejected the idea that there is a third category beside civilians and combatants, namely the individuals who can be lawfully killed as members of a terrorist group but who do not enjoy protection as combatants. It has concluded that “as far as existing law goes, the data before us are not sufficient to recognize this third category”,<sup>54</sup> and that “an unlawful combatant is not a combatant, rather a ‘civilian’”. However, he is a civilian who is not protected from attack “as long as he is taking a direct part in the hostilities”.<sup>55</sup>

Why is this important? “Booted normativists”, as Ariel Colonomos dubbed the ethicist who developed an ethics of war for the Israel Defense Forces,<sup>56</sup> have attempted to reinterpret the civilian/combatant distinction, which is the bedrock of IHL. Although they acknowledge working in the context of the conflict between Israel and various Palestinian organizations and individuals,<sup>57</sup> they suggest that their proposed new distinctions, conceptions and norms introduced “for the case of fighting terror, can and should be adapted for the case of ordinary international armed conflicts”<sup>58</sup> – that is, they “are intended to be universal”.<sup>59</sup> These individuals propose a detailed classification of participation in conflict, with nine categories of direct participation, from bearing weapons or explosives to making the general operational decisions, and five categories of indirect participation, including funding terrorism and praising suicide bombers.<sup>60</sup> Michael Walzer dismisses such categories as neither necessary nor useful.<sup>61</sup> More importantly, he objects to the claim that “when the state does not have effective control of the vicinity, it does not have to shoulder responsibility for the fact that the persons who are involved in terror operate in the vicinity of persons who are not”.<sup>62</sup>

The Israeli Supreme Court is clear about the status of a civilian who has directly participated in combat: if he previously took “a direct part in hostilities once, or sporadically, but [has since] detached himself from them (entirely, or for a long period), he is not to be harmed”.<sup>63</sup> The same individual loses his civilian protection, the Court continues, if engaged in the “revolving door” phenomenon, alternating periods of activities with periods of rest. Between these two

54 *Ibid.*, “D. A Third Category: Unlawful Combatants?”, para. 28.

55 *Ibid.*, “C. Civilians”, para. 26.

56 A. Colonomos, above note 44.

57 Asa Kasher and Amos Yadlin, “Military Ethics of Fighting Terror: An Israeli Perspective”, *Journal of Military Ethics*, Vol. 4, No. 1, 2005; Asa Kasher and Amos Yadlin, “Assassination and Preventive Killing”, *SAIS Review of International Affairs*, Vol. 25, No. 1, 2005.

58 A. Kasher and A. Yadlin, “Military Ethics of Fighting Terror”, above note 57, p. 28.

59 *Ibid.*, p. 4.

60 *Ibid.*, pp. 13–14.

61 Michael Walzer, “Response”, *Journal of Military Ethics*, Vol. 6, No. 2, 2007.

62 This formulation is in A. Kasher and A. Yadlin, “Military Ethics of Fighting Terror”, above note 57, p. 18. Writing with Avishai Margalit, Michael Walzer strongly criticizes the elevation of the lives of soldiers above those of enemy civilians in a non-occupied territory, for the ethical implications that it has. See Avishai Margalit and Michael Walzer, “Israel: Civilians and Combatants”, *New York Review of Books*, 14 May 2009.

63 From the Court opinion, see *PCATI*, above note 53, “F. The Third Part: ‘For Such Time’”, para. 40.

possibilities, there are the “gray” cases, which require careful examination of “each and every case”. The guidelines for such examination are precise: good and verified information on the identity of the target is needed; the burden of proof of this information rests on the army; a civilian taking direct part in hostility cannot be attacked if less harmful means can be employed; if an attack could not be avoided, it should be thoroughly and independently investigated afterwards; and any collateral damage “must withstand the proportionality test”.<sup>64</sup> This Court opinion also states that “customary international law has not yet crystallized”<sup>65</sup> on the definition of the direct participation of a civilian in combat. Yet, an interpretive guidance by the International Committee of the Red Cross (ICRC) provides a functional approach to what is permissible under the harsh conditions of war: “civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities”.<sup>66</sup>

The debate on distinction and proportionality on targeted killings confirms the existence of disagreement, but also the salience of IHL. A recent report by Ben Emmerson, the UN Special Rapporteur on counterterrorism and human rights, has concluded that both the United States and Israel must make a greater effort to comply with IHL and human rights law when using drones.<sup>67</sup> Specifically, he calls upon States to investigate any plausible indication of civilian casualties and to be more transparent and accountable in the use of such practices. More fundamentally, Emmerson’s report asks for better clarification of the thorny legal issues raised by the use of drones such as a definition of self-defence and prevention, as well as the “global war on terror” and the notion of direct participation in hostilities.<sup>68</sup> These and other points are made in the common letter sent to the UN Human Rights Council by an array of major human rights groups, which testifies to the increasing international pressure on the issue.<sup>69</sup>

64 *Ibid.*

65 *Ibid.*

66 See Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009, Part I, ICRC Recommendation VII, available at: [www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf](http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf).

67 See Ben Emmerson, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, Third Annual Report, UN Human Rights Council, 28 February 2014, available at: <http://justsecurity.org/wp-content/uploads/2014/02/Special-Rapporteur-Rapporteur-Emmerson-Drones-2014.pdf>.

68 *Ibid.*, “D. Achieving a Consensus on the Applicable Legal Principles”, para. 71.

69 Joint letter by eleven human rights and civil rights organizations: American Civil Liberties Union, Amnesty International, Center for Human Rights & Global Justice and Global Justice Clinic (NYU School of Law), Center for Civilians in Conflict, Center for Constitutional Rights, Human Rights Clinic (Columbia Law School), Human Rights First, Human Rights Watch, International Commission of Jurists and Open Society Foundations, *Joint Letter to the UN Human Rights Council on Targeted Killings and the Use of Armed Drones*, 18 September 2014, available at: [www.hrw.org/news/2014/09/18/joint-letter-un-human-rights-council-targeted-killings-and-use-armed-drones](http://www.hrw.org/news/2014/09/18/joint-letter-un-human-rights-council-targeted-killings-and-use-armed-drones).

## Moral disengagement and morality shifting

The brief review presented above on the issues of torture and targeted killings clearly suggests that in spite of attempts to do so by norm entrepreneurs, there is no need and little support for relaxing IHL to fit the “new” reality of wars. States, particularly those engaged in asymmetric conflicts as described above, will continue to try to push the boundaries of IHL. From our perspective, and to the extent that such attempts are made through the courts and legislative bodies, they are not inherently problematic. They foster debate on these complicated issues and contribute to reaffirming existing norms and the rule of law.

What we see as highly problematic and potentially very damaging is the political and social discourse about armed conflict, because of the consequences it has on the image of the enemy. In 2004, former CIA contractor David Passaro was charged, and later convicted, for the death of Abdul Wali, an Afghan who had been arrested on suspicion of involvement in an attack on a US base. Accounts by witnesses revealed that Passaro used torture and hit Wali repeatedly, causing his death. Passaro himself admits to some of the techniques he used during his interrogation of Wali. Importantly for our concerns here, this is how he justified his actions:

After 9/11, President Bush got on national television, and said, not only are we going to go after the terrorists, but we’re going to go after those that harbor the terrorists, and we will do so under any or with any means necessary. In other words, all the rules and regulations no longer applied.<sup>70</sup>

Needless to say, Passaro’s interpretation of President Bush’s words is at best anecdotal evidence of the influence that political discourse can have on the men and women who end up dealing with suspects and prisoners and making decisions on who to kill as well as the cost of targeted killings in terms of civilian deaths. A host of evidence from the social sciences, however, tells us that words matter when it comes to discussing a conflict and depicting an enemy. Those involved in torture do not call it torture.<sup>71</sup> They call it “enhanced interrogation techniques”, a euphemism that has its own acronym, “EITs”. The death of civilians in drone attacks becomes acceptable “collateral damage”. Psychologists call such renaming “euphemistic labelling” and consider it a moral disengagement strategy: a psychological process that helps people construe a version of reality in which their own actions are not reprehensible.<sup>72</sup>

70 PBS, “Convicted Former CIA Contractor Speaks Out about Prisoner Interrogation”, 20 April 2015, at: [www.pbs.org/newshour/bb/convicted-former-cia-contractor-speaks-prisoner-interrogation/](http://www.pbs.org/newshour/bb/convicted-former-cia-contractor-speaks-prisoner-interrogation/).

71 David Bromwich, “Euphemism and American Violence”, *New York Review of Books*, 3 April 2008, available at: [www.nybooks.com/articles/archives/2008/apr/03/euphemism-and-american-violence/?page=1](http://www.nybooks.com/articles/archives/2008/apr/03/euphemism-and-american-violence/?page=1).

72 Albert Bandura, “Selective Activation and Disengagement of Moral Control”, *Journal of Social Issues*, Vol. 46, No. 1, 1990; Emanuele Castano and Roger Giner-Sorolla, “Not Quite Human: Infrahumanization in Response to Collective Responsibility for Intergroup Killing”, *Journal of Personality and Social Psychology*, Vol. 90, No. 5, 2006, available at: [www.newschool.edu/uploadedFiles/Faculty/NSSR/Castano\\_GinerSorolla2006\\_1.pdf](http://www.newschool.edu/uploadedFiles/Faculty/NSSR/Castano_GinerSorolla2006_1.pdf).

Next to such explicit strategies, other psychological mechanisms exist that are more subtle. Dehumanization and demonization of the enemy are a case in point.<sup>73</sup> Primo Levi, a survivor of Nazi concentration camps, observes that the degradation imposed on the prisoners was not a matter of cruelty, but a *necessary* process: for those operating the gas chambers not to be overwhelmed by distress, victims had to be reduced to subhuman objects beforehand.<sup>74</sup> Dehumanization facilitates violence, and in turn, violence enhances the dehumanization of the victim. Research shows that when people are reminded of atrocities committed by their own fellow countrymen, either 200 years prior or in current times, they defend against the threat to their psychological equanimity by depicting the victim group as a whole in a dehumanized manner.<sup>75</sup> Americans who read about the torture and killing of detainees in an Iraqi prison will dehumanize Iraqis more, and will perceive the suffering inflicted on the family of those tortured and killed as lesser, when they read that the perpetrators were US soldiers as opposed to Iraqi or Australian soldiers. Research also shows that the use of these moral disengagement strategies results in lessened demands for both retributive and restorative justice.<sup>76</sup>

Evidence stemming from social psychological studies such as these goes even further. When we have to make a decision about, say, whether or not to torture or kill a person, or the acceptable degree of civilian deaths, we rely on the law, of course, but also on a sense of what is right and wrong, on our understanding of what is morally appropriate. Morality, however, is best understood in the plural. Theorizing and research in the social sciences reveals at least four different systems or foundations of morality, which applied to the same specific event would result in very different decisions, all allegedly defensible as moral. The best-developed model of morality in psychological theory is Haidt's social intuitionist model, in which four moral foundations are identified: harm, fairness, loyalty and authority.<sup>77</sup> Of direct relevance for our purposes here, experiments tested whether being confronted with scenarios of IHL violations carried out by one's in-group (e.g. US soldiers for American participants), as

73 Roger Giner-Sorolla, Bernhard Leidner and Emanuele Castano, "Dehumanization, Demonization, and Morality Shifting: Paths to Moral Certainty in Extremist Violence", in Michael A. Hogg and Danielle L. Blaylock (eds), *Extremism and the Psychology of Uncertainty*, Wiley-Blackwell, London, 2011.

74 Primo Levi, *Se questo è un uomo*, Einaudi, Torino, 1981.

75 E. Castano and R. Giner-Sorolla, above note 72.

76 Bernhard Leidner, Emanuele Castano, Erica Zaiser and Roger Giner-Sorolla, "Ingroup Glorification, Moral Disengagement, and Justice in the Context of Collective Violence", *Personality and Social Psychology Bulletin*, Vol. 36, No. 8, 2010.

77 Jonathan Haidt and Jesse Graham, "When Morality Opposes Justice: Conservatives Have Moral Intuitions that Liberals May Not Recognize", *Social Justice Research*, Vol. 20, No. 1, 2007, p. 98. Harm morals demand that people do not harm others, and fairness commands people to treat others fairly and justly. In-group/loyalty morals reflect a tendency to see something as moral to the extent that it benefits one's in-group. The moral foundation of authority consists of values related to subordination, such as duty, obedience and conformity to in-group norms, while that of purity, shaped by the psychology of disgust and contamination, concerns itself with defending purity from possible contaminants – e.g., maintaining the purity of the "Aryan race". Clearly, depending on which of these moral foundations is applied to decide upon the morality of a specific behaviour, the behaviour can appear as moral or immoral.

opposed to an out-group (e.g. Australian soldiers), leads to a shift in the accessibility of these morality principles.<sup>78</sup> When violations of IHL were carried out by in-group members, the principles of harm and fairness receded to the background of the participants’ minds, and were thus less likely to be used to judge the morality of the events. On the contrary, the principles of loyalty and authority became more accessible, and were thus more likely to guide participants’ interpretation of the events.<sup>79</sup> Practically, this means that when we ponder the morality of an action taking place either in the past or in the future, our decision depends upon the moral principle at work; individuals will use the principles that are more likely to lead to an outcome that allows them to maintain psychological equanimity.<sup>80</sup> As an example, when deciding whether or not to torture a prisoner, if the harm/fairness principle is very salient/accessible in the potential torturer’s mind, it is likely that the torture will not happen. If, on the contrary, the situation is all about in-group loyalty and/or authority, or purity (in cases where the prisoner belongs to a despised group that has been the target of denigration and is considered the “cancer” of the society), then torture will seem like the moral thing to do – especially if it is purported as a means to save one’s fellow in-group members.

Most soldiers in regular armed forces know that targeting non-combatants, raping women, and destroying churches, mosques or other safe havens are criminal acts. They learn this in training, but they also know it well before becoming soldiers. Those who violate these norms do so because they undergo a process of radicalization and essentialization of the enemy: “they” are all combatants, wild and subhuman creatures (“irreconcilables”, in the terms of the US manual of counter-insurgency);<sup>81</sup> women of the enemy population become a threat to individual and collective safety; religious sites/safe havens become shields of the enemy. The law still applies to non-combatants, women and religious and safe sites, but these are re-labelled and re-categorized in an attempt to exempt them from the protection of the law. The research discussed above shows how these mechanisms often operate automatically and unconsciously. In many cases, however, they are purposely utilized in order to prepare public opinion for, and to justify, violations of IHL.

78 “Accessibility” is a psychological term that refers to the extent to which a certain concept is available for use in a person’s mind, at the forefront of their perception and cognitive processes. The more accessible a concept is, the more likely it is that it will affect our interpretation of the word around us, and thus our decision-making and behaviour.

79 Bernhard Leidner and Emanuele Castano, “Morality Shifting in the Context of Intergroup Violence”, *European Journal of Social Psychology*, Vol. 42, No. 1, 2012, available at: <http://onlinelibrary.wiley.com/doi/10.1002/ejsp.846/abstract>.

80 This is particularly true among “high glorifiers” – that is, those individuals who tend to see their group, in this case the United States, in superior, aggrandizing terms.

81 *Multi-National Force – Iraq Commander’s Counterinsurgency Guidance*, 15 July 2008, p. 1, available at: [www.rs.nato.int/images/stories/File/COMISAF/15%20July%202008%20MNFI%20COIN%20Guidance.pdf](http://www.rs.nato.int/images/stories/File/COMISAF/15%20July%202008%20MNFI%20COIN%20Guidance.pdf).

## Conclusion

Scholars and practitioners widely acknowledge that over the last couple of decades, the nature of conflict has changed, and especially since 9/11 and the advent of “asymmetric wars”. There is, however, disagreement with regard to the implications that this evolution has or should have for IHL. Is IHL obsolete?

In this article, we focused on a series of specific practices by “norm entrepreneurs” that have attempted to challenge or redefine some of the pillars of IHL, such as the ban against torture and the distinction and protection of civilians. While it is certainly true that these States have attempted to make a case for the necessity and even the legality of torture programmes and targeted killings, it is our opinion that, by and large, they have failed. Various actors in the international community, from States to international organizations and NGOs, have condemned these practices as immoral and opened questions about their legality. A strong critique and demands for accountability have come from domestic actors including the media, legislative bodies and significant parts of the population.

IHL and other bodies of international law are not simply legal obligations that States have committed to, and that make those States accountable. First, their strength and reach are propelled by an emerging synthesis of the laws of war, human rights and international justice – what legal scholar Ruti Teitel calls “humanity law”.<sup>82</sup> Second, they have the power to influence behaviour by prompting public debates, providing mobilizing agendas for civil society actors and individuals, and suggesting monitoring activities.<sup>83</sup> This is why, when States in which the rule of law is prevalent violate IHL with apparent impunity, they never or rarely manage, for all their power, to remain unchallenged. They cannot insulate themselves from the aspiration and pressure of the many domestic and international actors, and, perhaps most importantly, of their own citizenry, because they want to maintain legitimacy in the broader international political and legal order. Whether they follow a “logic of appropriateness”, which presumes the influence of norms in suggesting patterns of appropriate behaviour, or are merely sensitive to concerns for their “reputation”, the outcome is the same.

IHL and other bodies of international law, which operate in a complex moral and political environment, stand as normative “guardians” against processes of moral disengagement that make torture and the acceptance of civilian deaths more palatable. Teitel writes:

What the waging of the “war on terror” has made abundantly clear is that humanity law need not run out – that, indeed, there is no category of persons on the globe that is not covered or protected. Indeed, by turning to the overlapping regimes, coverage can be ensured.<sup>84</sup>

82 Ruti Teitel, *Humanity's Law*, Oxford University Press, Oxford, 2011.

83 Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*, Cambridge University Press, Cambridge, 2009.

84 R. Teitel, above note 82, p. 133.



It is the law that provides crucial support in the struggle to define the humanity of the enemy, because when the enemy is not only dehumanized but also demonized,<sup>85</sup> and the conflict is framed in terms of loyalty, authority or purity, violations of IHL can become moral imperatives. Upholding IHL is not separable from monitoring types of political discourse and social climates that lead to processes of moral disengagement and demonization of the enemy.

All in all, we contend that IHL is as widely supported as it was a few decades ago, if not more so. And the reason is that while at times it may appear so, IHL is not just the complex creation of sophisticated jurists who have little knowledge of the reality of conflict. Rather, it is the embodiment of widely shared principles of morality and ethics, and as such it should and does keep its ground, irrespective of momentary lapses in judgement and opportunistic thinking.

85 R. Giner-Sorolla, B. Leidner and E. Castano, above note 73.