

EDITORIAL COMMENT

HOLDING THE CENTER OF THE LAW OF ARMED CONFLICT

By *W. Michael Reisman**

Things fall apart; the center cannot hold;
Mere anarchy is loosed upon the world,
The blood-dimmed tide is loosed, and everywhere
The ceremony of innocence is drowned.

—*William Butler Yeats*

At any moment, the *jus in bello* is composed of two parts: what we may call “Part A” consists of principles to be applied in determining the proper use and quantum of force in specific cases. “Part B” contains a set of absolute prohibitions.

Part A is quite indulgent to the specialist in violence in international conflict. As a general matter, it permits the specialist to apply violence to adversaries as long as the violence is occasioned and justified by military necessity; is proportional to that necessity; and is as discriminating with respect to combatants and noncombatants as the context allows. In the application of these “MNPDP principles,” the warrior is allowed a significant margin of appreciation, for this part of the law recognizes and takes account of the complexity and variability of battle situations. As long as the warrior’s applications remain within the margin of appreciation delimited by the MNPDP principles, unintended deaths and injuries caused to noncombatants are characterized as “collateral damage” rather than war crimes and incur neither criminal nor civil liability.¹

In Part B, in contrast, the crafters of international law impose absolute limits on the use of certain instruments and modes of violence, limits that the warrior may not suspend on the ground that those instruments or modes might be demonstrated to prove militarily necessary and proportional to that necessity in a particularly urgent situation. These limitations, it should be emphasized, are militarily significant; in some circumstances, practices as diverse as perfidy, poisoning of wells, the use of poison gas or dumdum bullets, the initiation of aggressive war, even the intentional killing of noncombatants could plausibly promise significant usefulness to the tactician or strategist. Resort to Part B’s prohibited modes and instruments is impermissible, notwithstanding their potential military advantages, and remains so even if the adversary resorts to them.

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¹ *But see* W. Michael Reisman & Robert D. Sloane, *The Incident at Cavalese and Strategic Compensation*, 94 AJIL 505 (2000).

Some Part B limitations, for example those which are designed to ensure protection of the environment, may recommend themselves because they promise to benefit both victor and vanquished in a temporal-extensive sense; a victory achieved at the expense of a livable habitat would be pyrrhic. Other limitations are humanitarian and entirely altruistic; though they deprive a party of military advantage, they may not be suspended even in the absence of reciprocation.

Torture has been planted in Part B.²

I.

There is no evidence that the tolerance, if not encouragement or actual authorization of, the torture and indignity practiced by U.S. personnel at Abu Ghraib prison was part of a general “fire-at-will” type of order to torture anyone who fell under U.S. control. But interrogation techniques that did not conform to U.S. law, and were supposedly yielding evidence that would have been inadmissible in a U.S. court, were—and possibly still are—selectively authorized and the evidence secured can be admitted in military commissions.

The Military Commissions Act of 2006³ provides in section 6(c)(1) that “[n]o individual in the custody or under the physical control of the United States government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.” Subsection (2) explains that

the term “cruel, inhuman, or degrading treatment or punishment” means cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments . . . as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment.⁴

² Geneva Convention Relative to the Treatment of Prisoners of War, Art. 13, Aug. 12, 1949, 6 UST 3316, 75 UNTS 135; *id.*, Art. 3; International Covenant on Civil and Political Rights, Art. 7, Dec. 16, 1966, S. EXEC. DOC. NO. E, 95th Cong., 2d Sess. (1978), 999 UNTS 171; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 UNTS 85.

³ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

⁴ The reservations, declarations, and understandings are narrower than the Convention. They state in relevant part:

I. The Senate’s advice and consent is subject to the following reservations:

(1) That the United States considers itself bound by the obligation under Article 16 to prevent “cruel, inhuman or degrading treatment or punishment,” only insofar as the term “cruel, inhuman or degrading treatment or punishment” means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

...

II. The Senate’s advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Convention:

(1)(a) That with reference to Article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or

But section 7(a) provides that

no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

Thus, the Act eliminates existing means of challenge while not providing for alternative means of enforcing whatever prohibitions against torture it incorporates.

Nor does the Act absolutely preclude the admissibility of evidence secured by torture. While section 948r states in subsection (b) that “[a] statement obtained by use of torture shall not be admissible in a military commission,” subsection (c) allows the admission of evidence gained before December 30, 2005, when “the degree of coercion is disputed” if the military judge finds it reliable and of probative value and its admission would serve the interests of justice. As for a statement obtained after December 30, 2005, subsection (d) allows its admission when “the degree of coercion is disputed” if the military judge finds it reliable and of probative value, its admission would serve the interests of justice, and, under subsection (d)(3), “the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment prohibited by section 1003 of the Detainee Treatment Act of 2005.” Considering that the congressional battle in 2006 concerned alleged insufficiencies in the 2005 legislation, readers might be excused for feeling that they had been led through a dense forest of legislative verbiage back to the starting point. And led on a fool’s errand to boot, for if the prohibition of torture was moved from Part B to Part A, its legal definition ceases to be important. The lawfulness of torture in given instances is then to be governed by the MNPD principles rather than by whether that treatment conforms to a particular national or international legal definition.

The presumed justification for the selective use of torture was and continues to be that Al Qaeda and the groups that operate in its penumbra, who routinely and intentionally flout the most basic restraints in the law of armed conflict, threaten great and unlawful destruction. Because these adversaries cannot be deterred, defense against them requires information. In some “real-time” circumstances, the argument goes, only interrogations employing torture can secure it.

From an international legal standpoint, what is involved here amounts to more—and is more serious—than episodic violations of the law. It constitutes a claim to move an absolutely

application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

...

(2) That the United States understands the phrase, “where there are substantial grounds for believing that he would be in danger of being subjected to torture,” as used in Article 3 of the Convention, to mean “if it is more likely than not that he would be tortured.”

...

III. The Senate’s advice and consent is subject to the following declarations:

(1) That the United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing.

136 CONG. REC. S17,486, S17,486 (1990); *see also* Marian Nash Leich, *Contemporary Practice of the United States*, 85 AJIL 335, 336–37 (1991).

prohibited practice from Part B to Part A, that is, to apply the MNPD principles, on a case-by-case basis, to an activity that, until that time, had been made subject to an absolute prohibition.⁵ Whether the claim is made in an open and even bold fashion, as in some of President George W. Bush's public presentations,⁶ or in a more indirect, even cunning way, for example by artful definitions, as in the Military Commissions Act of 2006,⁷ the law-amending consequence being sought is the same.

Elements within the American executive branch and Congress have not been the sole proponents of this shift. The House of Lords has called for a case-by-case approach to determining the admissibility of evidence gained by torture.⁸ Other apologists for torture have invoked various "ticking bomb" scenarios. In more elegant fashion, philosophical arguments have sought in situations of extreme crisis—Churchill's "supreme emergency"—to justify the opportunistic application of utilitarian analyses to erstwhile deontological prohibitions.⁹

All of these voices are engaged in the same sort of attempted retro-shift of an absolutely prohibited activity from Part B to Part A, whereupon demonstration of the operation of some urgent contextual factors, theretofore inadmissible, could render it lawful. The new claim, whether explicit or implicit, signifies that henceforth torture *may* be used if it is plausibly militarily necessary, proportional, and discriminating.

Wholly aside from the individual human rights violation in each instance of torture, the promiscuous use of torture at Abu Ghraib, the black sites, and some of the destinations of extraordinary rendition suggests that the practice sits precariously on a slippery—and nasty—slope: torture, by its nature, once sanctioned and however contingent and restrictive in intent the authorization for its application may be, metastasizes quickly, infecting the whole process of

⁵ Incidentally, the national debate as to whether the president, as commander in chief in wartime, has an inherent "constitutional" power to order subordinates to torture in self-defense is irrelevant to an international inquiry. International law applies to all agencies and organs of a state and violations of international law by any organ or agency of a state will engage that state's responsibility; insofar as international law provides for individual responsibility, that responsibility now tracks up and down the chain of command that has ordered a violation of international law. Contrary national legal commands do not provide a defense. National law may *purport* to authorize some agencies or instrumentalities of the state to engage in torture or other acts prohibited by international law, but even the most absolute of rulers cannot discharge himself or his agents from the application of international law.

⁶ See President George W. Bush, The President's News Conference (Oct. 11, 2006), 42 WEEKLY COMP. PRES. DOC. 1782 (Oct. 16, 2006), *available at* <<http://www.whitehouse.gov/news/releases/2006/10/20061011-5.html>>; President George W. Bush, Remarks on the Signing of the Military Commissions Act of 2006 (Oct. 17, 2006), *id.* at 1831 (Oct. 23, 2006), *available at* <<http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html>>.

⁷ See *supra* note 3.

⁸ A v. Sec'y of State for the Home Dep't (No. 2), [2005] UKHL 71, [2006] 2 A.C. 221, *available in* LEXIS, United Kingdom Library, Case Law File, *available at* <<http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd051208/aand.pdf>>. The House of Lords unanimously held evidence obtained from torture to be inadmissible in the courts of the United Kingdom. Yet the Lords were divided four to three on the relevant test. The minority view, articulated by Lord Bingham, argued that courts must exclude evidence if there exists a "real risk" that the evidence may have been obtained by torture. *Id.*, para. 56. But the majority agreed with Lord Roger's standard:

When everything possible has been done, it may turn out that the matter is left in doubt and that, using their expertise, SIAC cannot be satisfied on the balance of probabilities that the statement in question has been obtained by torture. If so, in my view, SIAC can look at the statement but should bear its doubtful origins in mind when evaluating it.

Id., para. 145. See, in this regard, Cherie Booth, *Commentary*, FIN. TIMES, Mar. 2, 2006.

⁹ MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 245, 251–68 (4th ed. 2006). But see his reconsideration in MICHAEL WALZER, ARGUING ABOUT WAR 33–50 (2004).

interrogation. In other words, if torture is moved back to Part A, even an intended case-by-case method is likely to decay rapidly. Then torture bodes to become routinized, applied more and more widely, and ultimately by all.

II.

In the period after World War II, Part B enjoyed a dramatic expansion, signaled by the installation in the legal lexicon of the rather Orwellian term “international humanitarian law” in place of the erstwhile grim designations “law of war” and “law of armed conflict.” To track the expansion, one need only compare the limited codex of crimes the London Charter¹⁰ set out for the Nuremberg Tribunal with the far more elaborate itemization of crimes in Articles 7 and 8 of the Statute of the International Criminal Court¹¹ or the recent jurisprudence of the International Court of Justice applying human rights law to various parts of the *jus in bello*.¹²

Coincident, however, with the widely celebrated new prohibitions in Part B, the retreat of some of the most fundamental prohibitions from Part B to Part A has been virtually ignored, despite the fact that this retro-shifting, like any toleration of the practice of torture, goes far in undermining the law of armed conflict. Curiously, while the recrudescence of torture has aroused great alarm, other prohibitions that have fallen back to Part A have not. Consider two examples.

III.

At the very heart of the law of armed conflict is the effort to protect noncombatants by insisting on maintaining the distinction between them and combatants. The venerable requirement imposed on combatants that, to be lawful, they must wear uniforms and bear arms openly is an indispensable and easily implemented and policed means for protecting noncombatants. Without these distinctive insignia, belligerents cannot distinguish adversaries from civilians, with predictable results. Fulfilling the requirement does not come without cost to belligerents, for in many situations feigning to be a civilian provides a degree of protection and offers an element of surprise unavailable to the man or woman in uniform. The traditional mechanism for enforcing this prescription was the denial of the protections of the law of war to those violating it. Michael Bothe, Karl Josef Partsch, and Waldemar Solf put it without embellishment: “[T]he customary punishment for unprivileged participation in hostilities has been death”¹³

Certain explicit changes in the law of armed conflict under the auspices of the International Committee of the Red Cross have seriously eroded this historic rule. Article 37(1) of Additional

¹⁰ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 UNTS 280.

¹¹ Rome Statute of the International Criminal Court, Arts. 7, 8, July 17, 1998, 2187 UNTS 3, available at <http://www.un.org/law/icc/statute/99_corr/2.htm>.

¹² See, e.g., *Armed Activities on the Territory of the Congo (New Application: 2002) (Dem Rep. Congo v. Rwanda)*, Jurisdiction and Admissibility (Int'l Ct. Justice Feb. 3, 2006); *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)* (Int'l Ct. Justice Dec. 19, 2005); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 ICJ REP. 136 (July 9).

¹³ MICHAEL BOTHE, KARL JOSEF PARTSCH, & WALDEMAR A. SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 244 (1982).

Protocol I to the Geneva Conventions of 1949,¹⁴ which is entitled “Prohibition of perfidy,” provides:

1. It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:

...

(c) The feigning of civilian, non-combatant status.

Article 44 of Protocol I, entitled “Combatants and prisoners of war,” provides:

1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.

2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

- (a) During each military engagement, and
- (b) During such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c).

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.

5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.

6. This Article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention.

¹⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Art. 37(1), June 8, 1977, 1125 UNTS 3, 13 ILM 1391 (entered into force Dec. 7, 1979).

7. This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.

Article 44 constitutes a considerable relaxation, for at least one side to a conflict, of the historic requirement, as well as of the sanction that functioned as an enforcement mechanism.

This change was not accomplished inadvertently. Some of those pressing for it in the law-making process simply wished to favor the so-called national liberation combatants—to help them win—without regard to the consequences for noncombatants. Others rationalized the change in the hope that, in return for the relaxation of the uniform and open-arms requirement, irregular forces would have an incentive to comply with other parts of the law of war. The rationalization was of doubtful logic and morality.¹⁵ It was illogical because even if irregulars did henceforth comply, the fact that they and any future adversary could now—lawfully—fight without uniforms and without bearing arms openly meant that their adversaries would be unable to distinguish them as foes and as a result could not help but kill or injure more noncombatants. It was of doubtful morality because even if the rationalization proved to be correct and other parts of the law of war would henceforth be respected by belligerents who theretofore had no incentive to respect it, that gain would be purchased with the lives of noncombatants.

It has been widely observed that at the end of the nineteenth century, the great majority of those killed or wounded in war were military personnel. Toward the end of the twentieth century, the great majority were civilian noncombatants. In the social sciences, proof of causality and the identification of the *causa causans* are elusive, but there appears to be a disturbing correlation between the increasing failure to comply with this venerable Part B prohibition, the installation in its stead of new rules allowing its converse, and the appalling increase in death and injury to noncombatants relative to those of combatants.

IV.

When it comes to kinetic weapons, the essential equation is that the bigger the bang, the less the discrimination between combatant and noncombatant and between licit military target and other parts of the environment. By their nature, the biggest bangs will cause the most extensive violations of the MNPD principles. It is sobering to recall that the single uranium bomb dropped on Hiroshima killed seventy-eight thousand human beings instantly or soon after. Another thirty-seven thousand inhabitants of the city simply disappeared. By current standards, that bomb was a relatively primitive device.

In 1996 the International Court of Justice was presented with the opportunity to advise the General Assembly of the United Nations and the World Health Organization (WHO) on the legality of nuclear weapons.¹⁶ Without regard to the issue of the political prudence of the initiative, the question itself is certainly not frivolous. If nuclear weapons were now to be used,

¹⁵ For arguments against the compromises reached in Protocol I, see Abraham D. Sofaer, *The Rationale for the United States Decision*, 82 AJIL 784 (1988); for responses (in particular concerning Article 44), see George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AJIL 1, 7–10, 18 (1991); Theodor Meron, *The Time Has Come for the United States to Ratify Geneva Protocol I*, 88 AJIL 678, 682–84 (1994); George H. Aldrich, *The Laws of War on Land*, 94 AJIL 42, 46–48 (2000).

¹⁶ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ REP. 226 (July 8).

they would clearly make a shambles of the law's effort to secure effective discrimination between combatants and noncombatants, not to speak of the effort to preserve a livable habitat for the lucky (or unlucky) survivors.

For all their contingent horror, nuclear weapons did perform a useful, albeit hazardous function during the Cold War. With the end of the Cold War, however, the strategic deterrent system—the contraposed, roughly equal nuclear arsenals that guaranteed mutually assured destruction should resort to the weapons ever be had—became redundant to the point where insistence on its retention was essentially reflexive. In the meanwhile, nonproliferation, nuclear reduction, and ultimate nuclear disarmament, long-popular aspirations, had become urgent and no longer unrealistic international policies. Perhaps that was why the requests for the advisory opinions were submitted just as people had begun to absorb the implications of the end of the Cold War.

Because the International Court need not respond to petitions for advisory opinions, it could have demurred to the requests of the WHO and the General Assembly on the ground that the question each posed was political or, perhaps, properly located in the Court's contentious rather than its advisory jurisdiction. A selective judicial abstention could have allowed the political forces converging toward denuclearization to continue to advance their programs. Alternatively, the Court could have seized the moment and recorded the spectacularly obvious fact that nuclear weapons, in addition to their other externalities, simply cannot discriminate between combatants and noncombatants.

The Court declined to entertain the WHO's application but took the Assembly's and held that

in view of the present state of international law viewed as a whole, as examined above by the Court, and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.¹⁷

This holding bears far-reaching implications for the law of armed conflict. Under modern international law, all unilateral uses of force must be in self-defense. The predicate of self-defense is survival. What responsible government does not try to prepare for its self-defense, a fortiori for every imaginable "extreme circumstance"? By waffling as it did, the Court invited states not simply to reverse the drift of nuclear weapons into Part B but to move them firmly into Part A. The Court even minimized the potential restraint of the MNPD principles by sanctioning the use of nuclear weapons in advance on the basis of the user's own assessment that it was facing "an extreme circumstance of self-defence"!

Advisory opinions are *erga omnes*. North Korea and Iran, as well as the elites of other states who are pondering joining or are already trying to slip into the nuclear weapons queue, are as entitled to self-defense in "extreme circumstances" as any other state. The more states acquire nuclear weapons, the greater the likelihood of still further proliferation and nuclear wars—and nuclear terrorist actions—with weapons incapable of discriminating between combatants and noncombatants.

¹⁷ *Id.*, para. 97.

V.

Those who believe in natural law are inclined to assume that once a human right has been legislated, it will, *ipso facto*, persist forever: the vital center of the law, ever expanding and infused with new prohibitions, will always hold. But no law made by human beings endures simply by virtue of its own authority. All law requires political support. Principles of international law, like any prescription, are abrogated when their consumers and custodians decide, for better or worse, to change them, whether by explicit abrogation purportedly based on rational self-interest, or by persistent tolerated and unremedied violations, the latter often committed obliviously to rational self-interest.

Part B prohibitions of the law of armed conflict are no exception. The danger of the routinization of torture—and it is not the only extant example of decay in critical parts of the law of war—demonstrates how quickly a Part B prohibition, indeed, the entire category of Part B prohibitions, can degrade and how easily the hysteria of crisis, adroitly abetted by philosophical tools excepting “supreme emergencies” and legal justifications for “extreme circumstances of self-defense,” can befog the collective conscience as it hurtles down the ultimate slippery slope. The retreat from Part B to Part A of the most fundamental principles of the law of armed conflict threatens the termination of Part B. And that bodes ill to loose the blood-dimmed tide. Things will fall apart.