

# **ENDOWMENT FOR MIDDLE EAST TRUTH**

**ARE 20TH CENTURY RULES OF WARFARE GERMANE TO 21ST  
CENTURY CONFLICTS ?**

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**TUESDAY, JANUARY 26, 2010  
9:00 A.M.  
2200 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, D.C.**

*Transcript by  
Federal News Service  
Washington, D.C.*

SARAH STERN: Hi. Welcome. My name is Sarah Stern, and it's indeed my pleasure to welcome you here to yet another EMET Capitol Hill symposium. Today before I begin, I should certainly thank Chairman Howard Berman of the House Foreign Affairs Committee, and his staffer, Alan Makovsky, who helped us with this room and all the preparations for this event.

We're here today to discuss two very, very important issues. The Geneva Convention of 1949 was developed in the aftermath of World War II, and the wake of all the human atrocities. All of the humanitarian laws that came about then were brought about to defend the civilian populations against ruthless states and soldiers who used the Nuremberg Defense.

Today, however, we're faced with a new challenge: warfare that's fought in an entirely different fashion. Basically it's a phenomenon of non-uniformed, non-state actors who hide in densely populated urban centers and use civilians as human shields in which to launch attacks.

How is the state – any state – supposed to practice Article 51 of the United Nations Charter, which means defending a civilian population, under those conditions?

Western liberal democracies throughout the world are now under assault – not only by these non-state actors, but by an alliance and a congruency of forces between the non-state combatant and the institutions of international jurisdiction – such as the International Criminal Court, the International Court of Justice, the International Red Cross – who seem to be stuck in this old paradigm.

The 20<sup>th</sup>-century paradigm regards the state as the primary and only source of belligerency against the helpless civilian. But what about the case that we have to confront right now, in many – if not all – of 21<sup>st</sup>-century conflicts, when the person wearing civilian clothes is not necessarily innocent?

Are these institutions of international jurisdiction capable of rendering an objective and unbiased judgment? Or are they stymied by an outdated paradigm or by a certain zeitgeist that looks at the machinery of the state as all-powerful against a hapless civilian – even when the civilian might be involved in lethal terrorist activity and has an allegiance to a greater cause with hegemonic ambitions.

Have these institutions of international jurisdiction become political forums for assaulting Western liberal democracies such as the United States and Israel – and for assaulting the rule of law within liberal democracies, when they should be focusing again on human atrocities such as what is taking place right now in Darfur, or what has taken place in Rwanda and Bosnia and Cambodia?

Each one of our four speakers today has a magnificent but quite lengthy bio. I'll therefore be brief in introducing them. I hope I don't insult any of them when I talk about who they are because I'm sure you would rather hear them speak than me.

John Fonte is a resident scholar at the Hudson Institute and director of the Center for American Common Culture, which is a division of Hudson. He's been a business scholar at the American Enterprise Institute, where he directed the Committee to Review National Standards. His forthcoming book, "Sovereignty or Submission – Will Americans Rule Themselves or Be Ruled by Others," is due to be published by Encounter Books soon.

He has written countless articles for the National Interest, the Chronicle of Higher Education Commentary, National Review, Policy Review, American Enterprise and a host – a score – of other publications.

Nathan – Nate – Lewin – or Nathan Lewin – has engaged in trial and appellate litigation in federal and state courts over the last 40 years. He has argued before the Supreme Court over 15 times with a total of 27 arguments. His clients have ranged from Jews who have wanted to wear yarmulkes in the U.S. armed forces to Attorney Gen. Edward (sic) Meese. He has taught at Harvard law school, has been a visiting professor at Harvard law school, and an adjunct law professor at Georgetown law school, University of Chicago law school, George Washington University law school, and is now adjunct professor at Columbia University law school. He's been an author and contributing editor to the New Republic, and it goes on and on. We could be here all day. (Chuckles.)

Amichai Cohen is professor of international law at the Ono Academic College in Kiryat, Ono Israel. In academic year 2009/2010 now, he is a visiting professor at American University at the Washington College of Law. He holds an LLB summa cum laude from the Hebrew University in Jerusalem, and an LLN and JS degrees from the Yale law school.

His research interests include international humanitarian law, national security law, application of international humanitarian law with a special emphasis on the role of administrative agencies and courts, and the relationship between international tribunals and national courts.

Among Professor Cohen's recent publications are "A Development of Modest Proportions: The Application of the Principle of Proportionality in the Targeted Killing Case," in the Journal of International Criminal Justice. There is a great deal more. Again, for all of these distinguished people, I am honored to be in the presence of each one of them.

Jeremy Rabkin is a professor of law at George Mason University School of Law. Before joining the faculty in June 2007, he was a professor of government at Cornell University for 27 years. Professor Rabkin is a renowned scholar in international law, and was recently confirmed by the U.S. Senate as a member of the board of directors of the United States Institute of Peace.

He holds a Ph.D. from the department of government at Harvard University, and graduated summa cum laude with a BA from Cornell University. His full-length books include

“Law without Nations,” Princeton University Press; “The Case for Sovereignty,” AEI Press; and “Why Sovereignty Matters,” AEI Press. Again, there is a huge, wonderful list of other articles that he’s published.

Lt. Col. David Benjamin has been part of the IDF – the Israeli Defense Forces – and part of the Military Advocate Gen. Corps for 17 years. He’s recently retired. He’s a specialist in international law, with emphasis on the law of armed conflicts and counterterrorism.

Lt. Col. Benjamin served as one of the top legal advisors to the Israeli security establishment. From 2005 until his retirement, Lt. Col. Benjamin was director of the strategic and international affairs branch, in the IDF international law department. In that role, he advised senior IDF commanders on operational law issues and headed a team of military lawyers dealing with foreign relations, economic affairs, humanitarian affairs and the Israeli disengagement from Gaza in 2005.

Lt. Benjamin served as chief legal advisor for the Gaza Strip, heading the legal team responsible for advising military commanders and civil administration officials on all matters related to the Gaza Strip; as well as having responsibility for the prosecution service in the Gaza military court.

Prior to this, Lt. Col. Benjamin served in various posts – including deputy chief legal advisor for the Gaza Strip, and a brief stint as a military court judge on the West Bank. In addition, he worked in civil litigation in the Tel Aviv law firm, Amikam Harlap & Company.

During his service, Lt. Benjamin dealt first-hand with cutting-edge issues of international law being faced by democratic states fighting non-state actors. In many cases, this entailed the preparation of legal, numerous petitions to the state of Israel supreme court regarding IDF policy and practice.

He also played a ground-breaking role in the integration of legal advisors into the operational law. Among them, international humanitarian law – also known as the Law of Armed Conflicts, the Law of Belligerent Occupation and counterterrorism law, administrative law and criminal law and has been involved in numerous diplomatic initiatives, international agreements and negotiations.

I think we cannot think of a more qualified or better-qualified group of experts than those that have assembled today. I want to thank each and every one for giving us their time and we are in for a treat. I’d like first just to be able to pave the philosophical ground for this presentation to begin with: Professor John Fonte, thank you.

JOHN FONTE: The international community, what is it. We hear the international community opposes Guantanamo. The international community opposes Israel in Gaza, or the international community demands Iranian compliance on nuclear weapons. So what is the international community? Is there an international community?

Well, there are certainly international sub-communities. There's the Non-Aligned Movement. There's the Islamic bloc. There's something called the West but the West is divided really between two forces, those who believe in the primary legitimacy of a liberal democratic nation-state and those who would promote global governance and this division cuts across every nation within the West itself. At the core of what I'm calling the ideology of global governance is the belief in the establishment of supranational law, global legalism we could call it.

Let's just take a peek at just some of the language these folks use. One is, and I'm quoting here from a leading American professor of international law, he predicts the following: "When constitutional norms are changed to conform with international ones, the Supreme Court will emphasize that they are interpreting American law and claim the Constitution is authoritative. Nevertheless this window dressing will simply obscure the infiltration of international law. Below the surface U.S. constitutional decision-making will be increasingly constrained by internationally determined standards."

Then here's an important quote: "To tether constitutional law to some other source of law is to demote it so that it is no longer supreme." At the core the Global Governance Project is to demote the democratic state including – well I should say the nation-state and this includes the democratic state, no distinction is made.

The professor continues, "There will likely come a point of time which domestic constitutional law is effectively if not formally subordinated to international law."

Well, let's take a broad look at this which I'm calling the party of global governance. Let's do it this way. What are the forces that are currently opposing Israel's concept of self-defense? Those forces in the West, I'm not talking about forces of radical Islam but the forces in the West that are opposing Israel's concept of self-determination – self-defense I should say – and presenting what they consider legitimate self-defense.

For example Additional Protocol I of the Geneva Conventions of 1999 which essentially permits terrorists to hide among civilians, pop out, attack military, go back inside. Well, Protocol I is not recognized by the United States, Israel, India, China, the Philippines, a host of other nations. But it is incorporated into the International Criminal Court and it is constantly referred to as international law by Human Rights Watch, Amnesty International month after month.

Well, what are these forces in the West? I'm listing seven here. One, major Western philanthropists particularly the Ford Foundation, we remember them at the Durban Conference; two, leading human rights organizations, specifically Human Rights Watch, Amnesty International, Oxfam; three, units of the United Nations, at times the secretary-general's office, certainly the Office of the U.N. High Commissioner for Human Rights under Mary Robinson, Louise Arbour, Navi Pillay, and the U.N. Human Rights Council which is a strong Islamist bloc. So there's an overlap here in the consul between political Islamists and Western global governance.

Fourth, the International Criminal Court, particularly the Office of the Chief Prosecutor Moreno-Ocampo; five, sectors of the European Union; and six, European nations themselves. Now the European Union is an example of supranational governance. I would look here at an excellent book that's an ideology that's promoting the European Union by Robert Cooper who's a British diplomat. It's called "The Breaking of Nations". He says there's two types of nations in the 21<sup>st</sup> century, the modern nation-state which includes the United States as a democracy, China as not a democracy but it's a modern state, Israel as a modern state. These are states that attempt to exercise full sovereignty, also in respect to defense, and the post-modern – the post-modern nation. He views many European nations as post-modern or at least a good part of the time post-modern.

The difference is the post-modern state believes in sharing sovereignty, in pooling sovereignty to supranational authority above that of the nation-state. So the European Union itself is an example of transnational governance. It's not a state or regime or government but it's ceded certainly in the area of law and a good part of administration many of their laws created in Brussels and European nation-states, the post-modern states, effectively created the International Criminal Court and some of these international organizations. The post-modern state agrees to self-subordinate itself to transnational movement.

Seven, what I call ideologists of global governance, you could call them transnational progressives. They certainly include mainstream churches, the National Council of Churches and they may include peace elements within Israel itself including NGOs that are funded heavily by the European Commission in Israel. An example of a global ideologue, a perfect example is Judge Goldstone himself, the Goldstone Report suggesting possible Israeli war crimes.

In a way he's the epitome of a global governance ideologue. He was on the board, served on the board of Human Rights Watch and he played a crucial role in Rome in 1998 at the International Criminal Court conference. At one point in the conference the United States was making some headway in attempting to limit the scope of the International Criminal Court. At this point Judge Goldstone and others intervened and convinced the delegates to push as hard as possible for universal jurisdiction.

What I think all this means is that analytically we need to rethink how we're thinking about world politics. We need to re-conceptualize it. Essentially we need to put another chess piece on the global chess board, the chess piece of global governance which has substantial ideological and material resources, resources as we say such as foundations, post-modern nation-states, the European Union, the NGOs, good elements at the U.N. So this is a player in international politics. It's a factor in world politics in general and specifically it's a factor in what we're talking about today, the use of the laws of war in international law and it's a negative factor in the conflict against radical Islam.

Looking at world politics re-conceptualized I'm thinking instead of the international community, of sub-communities, blocs, and groups. We can think of four major competitors in world politics. One, radical Islam and all their allies and the organizations in Islamic states and so on; two, non-democratic authoritarians, Russia, China, in a sub-way maybe Chavez and so on but non-democratic authoritarians; three, liberal democratic sovereigntists, the United States,

Israel, to an extent India; four, what I would call the party of global governance which cuts across nations but is nevertheless a factor in world politics.

Now ideologically if we look at this philosophically on the question of principle, the four groups, these four forces differ in their ultimate ends of political society. Their ends are different. For radical Islam the end of course is Shariah, worldwide Shariah, Islamic law. For the Russian and Chinese authoritarians it's strengthening their own role and acting as regional powers. There's no longer communism or world domination but it's certainly strengthening their own role as much as possible.

For liberal democratic sovereigntists it's the perpetuation of liberal democracy, the liberal democratic nation-state and possibly the expansion of a community of liberal democratic nations. For the party of global governance the end goal is the establishment of some sort of global authority, not world government, not black helicopters, nothing like that but the pooling of sovereignty, the sharing of sovereignty, a new system where global governance has authority over nation-states. The International Criminal Court would be an example. There are many others.

So the supernational authority above the nation-state and that includes above the democratic nation-state. So in a sense they're post-democratic. The radical Islamists, Chinese, Russians are anti-democratic. The liberal democrats are democratic. Global governance forces are post-democratic. So this is a way of looking at new forces in world politics and it's not I think so much that the forces of global governance are looking at the 20<sup>th</sup> century. They're looking to the 21<sup>st</sup> century, 21<sup>st</sup> and 22<sup>nd</sup> and are seeing a new world, a world in which the nation-state is demoted. That's the ideological message if you read their works and if you want to read one that's clearly written and I think it's a good example, it's "The Breaking of Nations" by Robert Cooper.

Now obviously in conventional international relations thinking the forces of liberal democratic sovereignty and global governance of the United States and the European Union, of NATO and the NGOs, all make up the West, a good part of the developed world. At one level this is obviously true. However at a deeper level it's also true there exists a divided West in Jürgen Habermas' terms. That's his words. There's a divided West and I think he's right on that. I don't agree with what he favors in that divided West and that divided West of two distinct conflicting world views. There's two conflicting world views emerging.

That's Francis Fukuyama's concept of the end of history that occurs when all the ideological arguments are over and has essentially not work out because we're still arguing about what is the best regime. Is it the liberal democratic nation-state or is it some form of global governance.

Now liberal democratic sovereigntists (ph) – that's all of us probably on this panel – are internationalists. We believe in an effective international system of cooperating democratic nation-states. We support universal human rights but unlike the globalists we reject the idea that the substance of human rights is determined by supernational authorities and transnational groups. Western global governances on the other hand place ultimate legitimacy not in

democratic self-government but in concepts of universal human rights and global norms that they themselves determine. In other words what consists – the substance – what consists of universal human rights are decided by people like Mary Robinson, Louise Arbor, former U.N. human rights commissioners, Richard Goldstone, Kenneth Roth, the executive director of Human Rights Watch, none of whom have any democratic accountability whatsoever.

In the liberal democratic system, what determines what human rights and international law are is determined by people like Obama and Reagan and Pelosi and Gingrich and Boehner and Reed and McConnell. We agree or disagree with them but they're part of the American democratic system. Robinson, Arbor, Goldstone, and Roth are not. The conflict between liberal democracy and global governance is nonviolent of course but it is coercive in the legal coercive sense and judicial enforcement. It will be complicated by the fact that liberal democrats will be engaged in a two-front struggle.

On the one hand there's the violent conflict, the hard struggle with radical jihadists. Obviously in this conflict the forces of liberal democracy and global governance will sometimes cooperate. Manifestos will be issued about Western unity and the norms of the international community and civilized society against extremism. This is obviously to an extent true. However at the same time it's true that the West is divided on the fundamental issue of who should govern and this is going to continue with us for decades to come. I think this argument is just beginning. It's something that's going to be with us 20, 30 years into the future.

The forces promoting global governance, they say they'll cooperate with the liberal sovereigntist, with liberal democracy leaders at the most general level. At the same time, operationally, in the weeds, they will continue to advance their political and legal struggle against the liberal democratic nation-state. How? They'll do this by initiative lawfare suits in courts that harass military and security forces, putting our reports, any attempt to define self-defense will be challenged in court, national courts, transnational courts, and they'll be working for the supremacy of the International Criminal Court.

Now in some ways this situation is reminiscent of the Cold War during which serious Western anti-Communists were faced with really a two front ideological conflict against the Communists themselves and against the Western anti-anti-Communists who repeatedly undermined the core anti-Communist enterprise. The main obstacle to global governance today is American democratic sovereignty and all that entails by way of American exceptionalism in politics, religion, culture, economics, national identity, and jurisprudence. America's constitutional regime is the major roadblock to the achievement of a global legal system. In order to achieve the desired end of global governance, I'm talking about long-term here, 30, 40 years, it's necessary to integrate, incorporate, and harmonize the American political, legal, economic, and constitutional system with myriad European and foreign institutions and courts.

Therefore for global governance to support and succeed it first and foremost American sovereignty has to be curtailed, not eliminated but at least curtailed. America in this sense has to be brought to heel, to obey global norms is the language used. It must become a type of post-modern state. Still they would want to use its military in emergencies but essentially in most cases it would have to be a post-modern state.

Therefore the United States, America would have to be demoted. That's probably the best single-word concept. That is the goal, to demote the democratic nation-state.

Now across the globe today the democratic world is engaged in a violent struggle, a war with the forces of radical Islam. At the same time a subdued subtle yet more intense political conflict is being waged with the party of global governance against the sovereignty of the liberal democratic nation-state. In both of these struggles Israel is on the front lines. Democratic Israel is the first line of defense of the forces of liberal democracy against both the hard challenge of radical Islam and the soft challenge of global governance. The forces of global governance are not seeking Israel's destruction as are Hamas and radical Islamists. They are seeking its demotion, its demotion from a modern independent nation-state to some type of post-modern dependent entity, maybe some binational entity under supernational supervision and so on.

Israel is the most vulnerable of the world's independent democratic nation-states. It often serves as a surrogate target for the United States and independent democratic states generally. In other words the precedents regarding the laws of war, the International Criminal Court, international human rights law, universal jurisdiction, and the like are established first against Israel and later against the United States and against the principle of sovereign self-governments and against liberal democratic nation-states itself. Thank you.

MS. STERN: Thank you very much. Jeremy?

JEREMY RABKIN: Okay, well I guess I will follow that by talking not about international law in general but about the law of armed conflict and I just want to give you some general perspective on this which seems to me very much lacking in the kind of debates that people have when they get fired up about what happened at Guantanamo or what happened in Gaza, what happened in Iraq.

People talk about the law of armed conflict or international humanitarian law and it's invoked very confidently as if the law – we all know the law, this is against the law, it's clearly against the law. Almost always when people want to make a point they say it's clearly. Now we should just remind ourselves that even when we have a long history of a body of law in which we have a lot of adjudication, constitutional law, we have notoriously disagreements.

We just had this case last week. Citizens United against the Federal Election Commission, yes or no, does the First Amendment allow prohibitions on nonprofit groups like Citizens United putting out videos on the eve of an election and the Supreme Court split 5-4 and it didn't split on minor technical questions. The majority said, oh, come on, this is political speech and you can't prevent this and the four dissenters said no it's a corporation. Corporations don't have the same rights.

You'd think that'd be a real basic question which we would have settled long ago and no, we are still divided about that, a lot of anger on both sides, a lot of conflict on on both sides. We disagree. You should just keep in mind that we have almost no central authorities that can tell us

what the international humanitarian law requires. We have a number of treaties and I'm going to get to that in a minute.

But the first thing you should keep in mind is you have the United States Supreme Court acting continuously for more than 200 years to tell us what the Constitution means and we have nothing like that in international law. The International Court of Justice, which everyone has heard of, basically requires the consent of both states to be there and they hardly ever consent, both states, when it's something controversial like how are we fighting a war. So they have almost no decisions which are directly about how you fight wars.

People have heard of the International Criminal Court. It's had – it started four cases. It hasn't finished any of them. It's really in its infancy and of course it's very controversial. A lot of important countries, actually I think still you could say the majority of countries actually involved in conflict aren't parties to it. So the status of it is obscure. So this is really not quite law in the sense of important domestic law which is continuously adjudicated and has real authority behind it. If we don't have a central court to tell us authoritatively this is what it is, how is it that we have anything that we can call law.

I want to talk about just briefly about that to set up the rest of what I want to say. Through most – people have been talking about this for many centuries and even writing treatises about it for many centuries and for almost all of that time the understanding was these are rules which really operate with the consent of states and are contingent on the continuing honoring of these rules by states. So a time honored part of war was reprisal.

If one state violates the rules then the other state is authorized lawfully to do something which would otherwise be unlawful. To give one example which is an important example, I mean historically, going back many centuries, people had the idea that when somebody has surrendered you're obligated to accept his surrender and not kill him. But if your opponents deny quarter, quarter meaning you allow them to surrender, you are authorized to say, all right, fine, we are going to do this to you.

If you follow this even a little bit people usually say the first code that was actually written out and adopted by a government, it's pretty late, it's in the American Civil War, the so-called Lieber Code which the Union army adopted. It was prepared by this professor from Columbia, Francis Lieber. It says specifically you must accept surrender but if the other side denies quarter then you can deny quarter to them and just to emphasize the point he says if you make a mistake and they had denied quarter to your troops, that is they have slaughtered your troops who are trying to surrender, and you don't remember this or you get confused, so you allow them to surrender but then you realize this was a mistake, you can then turn around and kill them within three days.

So we used to think the way in which these laws, these norms, these rules will be enforced is if one side deviates then the other is entitled to hit back and this is not a repudiation of the rules. This is the way the rules would be enforced. Who else would enforce it?

So historically the understanding was these are basically rules better organized armies which are capable of upholding these rules. The first time when we have actually an international treaty which tries to set down what is it we think are the rules, it's really late. It's the Hague Conference, the so-called peace conference in 1899. That's the first time when you have a bunch of countries saying we've had all these customary practices. Let's really try and set this down. They insert this proviso. These are rules that will apply so long as all of the participants in the particular conflict honor them. If even one participant does not honor them then these rules will not apply.

So that was basically saying we're not totally committed to this. This is contingent on everybody following these rules. At the time, the leading treatise, and it's still one in a revised updated form, one of the leading treatises, "Oppenheim's International Law", had this question: could you use troops from your colonies, what he calls barbarous troops, in a European war and he says probably not, probably that would be unlawful because they wouldn't fight by the rules.

In fact during the First World War, the French and the British did bring in troops from their colonies and the Germans thought this was outrageous and they felt it was outrageous because they thought these people wouldn't fight in a way that conforms to the rules that they were accustomed to in European conflict.

Let me read you a quote from somebody in that era describing what colonial warfare was: "In civilized warfare, force is directed against the armed enemy and his defensible positions, not against his country and subjects." But this, he says, "colonial warfare is not civilized warfare. The enemy does not possess troops that stand to be attacked nor defensible posts to be taken or innocent subjects to be spared. He has only rough hills to be penetrated, high peaks to be scaled, dwellings containing people, all of them to a man concerned in hostilities. To spare these villages would be about as reasonable as to spare the commissariat supplies or the arsenals of a civilized enemy."

So what he's describing is in wars out on the colonial frontier when you have a raid from – in fact what he's describing is Afghanistan – when you have a raid by your enemies you just go up, you send in British troops and you blow up their village as a punishment to say don't do this again or we will retaliate against you by blowing up your village. The person who wrote that was Winston Churchill and he was describing an actual raid that he went on in 1897 on the frontier of India with Afghanistan and being young and puckish he says straight out. This is described in Parliament with euphemisms and circumlocutions but we should be honest what this really was. We punished them by blowing up their stuff and we did it because that was the only way to restrain them and this is what war has to be on the colonial frontier.

Now that's really a pretty mild thing and the interest of it is a rather famous person, sounds kind of famous, but actually we had a whole series of colonial wars between the first Hague Peace Conference in 1899 and the second in 1907. There's the really, really fierce war in South Africa in which the British put the Boers into camps which they called concentration camps to remove them from the possibility of helping Boer guerillas. These are white people.

In the Philippines the Americans do something similar. They confine civilians so they can't help the guerillas. We pioneer this interrogation technique which is actually water-boarding. There's a little bit of controversy but we do it because it's a colonial war. The Germans are particularly savage and horrible in southwest Africa which is now Namibia.

So there's a whole series of really, really nasty colonial wars in which there's really very little restraint by the European powers and in 1907 they review the rules which they have agreed to in 1899 and say do they need any changes. Remove a comma, let's change this word. They make hardly any changes because they don't think any of those rules are relevant to the law of war.

Why? Because the law of war is basically the law that applies between organized armies of what we would say Western, we might say civilized, states that are able to uphold these rules and maintain reciprocity. So I don't want to go on for a long time. Let me just briefly itemize three things of sort of how the world has changed.

The way it is now I think it's much more difficult to speak confidently about the rules. First, we are now talking as if the same rules apply to, let's say, Western states and Third World states. They would have said a hundred years ago civilized states and barbarous states. You don't like the word barbarous. Maybe we should all be somewhat cautious about saying civilized giving what civilized countries have done in the 20<sup>th</sup> century. But still there is a difference between countries which have organized armies with military discipline and some capacity to maintain rules and guerillas who don't even pretend that they are going to adhere to these rules. This is the first time we are now talking as if all the same rules apply to everyone and that is a very, very big change and it is very, very hard to do because there isn't reciprocity. If there isn't reciprocity it's really hard to understand what is that maintains these rules except the sort of general commitment to niceness which is nice except if you start to lose or lose people or protract the war. So there's a lot of uncertainty about what the rules are.

Second thing that's really new in the world, before they had codification, before they had these first treaties, people thought, yes, there still is – we have some general understanding what do we mean by the law of war. When we had the Lieber Code the reason why they turned to this professor, what he thought he was doing and what people thought he was delivering was a summary of what is the prevailing practice among Western armies, give us a summary. They thought that the law reflected the practice, the customary practice of actual armies in the field.

So the second thing that is different in today's world apart from this first thing that we're now generalizing and pretending the law can cover, civilized and barbarous or the First World and Third World, regular armies and guerillas. The second thing that is different in addition to that is we're now thinking that the development of this law can be as much the work of bystander states as participants. It's no longer fundamentally about the actual practice of actual fighting forces.

If you ever looked at treatises or even commentaries on the existing treaties, until very recently it was all about military episodes. The commentary would be we see this happened in this war. Here's what the Japanese did after Port Arthur. Here's what the British did in this

battle. They have you examples of actual armies in actual conflicts to make credible that this is actually what is done.

We've now shifted to a world in which we think the Belgian delegate to this conference said the following. That's very interesting. What exactly does that tell you?

It's shifted from a law which is grounded in practice to a law which is about talking. If you think that I am exaggerating or that it seems a bit abstract and academic, let me just pause for a minute and describe the International Red Cross has produced a gargantuan three volume work which they purport to explain what is the customary law, customary international humanitarian law and the reason they're doing this is there are some important treaties which have been signed by many countries but not by others, not by the United States. These are the additional protocols to the Geneva Conventions that were adopted in the mid-1970s. The United States is not a party. Israel is not a party. A few other important countries are not parties and they say that doesn't matter.

This is all international custom. How do we know what international custom is and they have literally it's like three telephone books worth of documentation and the documentation of what is now international humanitarian law is what people have said in speeches and they have such comical things as you must never harm civilian objects, that is property belonging to civilians. What's the proof that this is custom? This was said by Saddam Hussein during the war between Iraq and Iran. Did he live up to this? Did anyone live up to this?

They're not interested in that. He gave a speech. That established it. They literally cite a whole series of dictators saying things. My favorite one is it's wrong to bomb civilian objects." Proof that this is so, Neville Chamberlain said it in the House of Commons in 1939. Did anything interesting happen after that? That's not important. He said it. We got him signed. That's not international humanitarian law.

So this is a big change to be taking the law based not on practice, not on what fighting countries actually do in actual wars but on what somebody said in a speech and I will finish just with referring to what John Fonte said and I think the third thing that's different is the understanding of what the law was about the interactions of actual states and now the law is told to us by the international Red Cross, by Amnesty International, by Human Rights Watch.

These organizations didn't exist a few decades ago. The International Red Cross did. It was very, very reticent about telling the world its opinions because it wanted to be a go-between, an intermediary. To have private organizations paid for with private money, if it is private money, Human Rights Watch now it turns out is getting money from Saudi Arabia.

I wonder why that is. To have these organizations set themselves up as an authority on what the rules are is a very, very big change to the world and I think probably not helpful because they have no responsibility for what happens. If you follow Human Rights Watch rules and you sustain a lot of casualties, a lot of people get killed, you lose your war, Human Rights Watch gives you a little prize, not a very good prize. It's like a little plastic thing and they say you were humanitarian. I mean, what does that count for? What does that even mean? They are

not responsible for actually saving lives. They are not responsible for protecting people. They are not a government. It's a big change to say people sitting on the sidelines with no responsibility should be able to tell us what the rules are.

So finally I agree with what John says. It's important to go back to the earlier version of this in which individual states responsible for actual armies dealing with opponents who either do or do not go along with these rules are the center of gravity in the system and we've entered a very, very different world and not a safe world if we allow third parties to say something was immoral and in fact our view of the law is that it's not allowed and by the way it's absolutely clear. Very few things in the law are clear, even domestically, certainly not in the law of war. Thank you.

MS. STERN: Wonderful. Nate?

NATHAN LEWIN: Well, on this panel I am I guess the most civilian of the group. A lot of the talk about international humanitarian law and international law in these situations has to deal with compassion to civilians. I'm surrounded by experts in the laws of war, in international law, and I am just coming to this discussion really as a domestic civilian lawyer, as one that has been involved in a legal system that fortunately has a supreme court that makes decisions, even though by a 5-4 vote, but that can lay down the law in ways that the people who are subject to it A, can understand; and B, can apply.

The interesting thing is that the lawyers have really made a mess of this whole area. I mean, war is bad enough but put the lawyers into the middle of the question of how to wage war and how countries are supposed to wage war or how they're supposed to deal with self-defense and you can be sure that it will not improve the situation.

I mean, I'm reminded of the story of the architect and the doctor and the lawyer, all of whom were arguing about which profession came first and the architect said, well, you must have come first because you know the Bible tells you about Noah building an ark. He could not have built it for all those animals and for that period of time without the help of an architect.

And the physician said, no, we came first because clearly when God took Adam's rib and created a woman from Adam's rib there had to be someone who would take care of the postoperative stage. That was the physician. The lawyer said, no, that's ridiculous. We came first. Just look at the very second verse in the Bible right after the fact that God creates the heavens and the Earth. It says Veha'arets hayetah tohu. The land was in total confusion. There's nobody who can create total confusion like the lawyers.

I think that's what's happened really with regard to these matters of the laws of war. Jeremy has talked about some of the history. I mean, I'm sort of going back to the early history of the conventions which dealt with laws of war. In 1899 when the Hague Convention set up the laws of war there was one provision in it for example that was adopted in 1900 by the United States, ratified by the president April 7, 1900. It prohibited the launching of projectiles and explosives from balloons. That was international law. You could not launch a projectile or an explosive from a balloon.

Now times have changed. There are projectiles and explosives launched from the air. It's taken for granted. It's permitted. The fact is that the laws of war as they are talked about by all the theorists that you've heard about from the speakers who have really in very many ways very appropriately derided the fact that they are theorists who are talking about this and not the people who are actually engaged in practice are just not applicable to today's warfare.

Again, as a domestic lawyer, as one who deals with constitutional and legal issues that apply within a legal system that's enforceable, it's well-established under our system that – there's a nice Latin phrase *cessante ratione legis cessat ipsa lex*; once the reason, the reasoning, the justification changes, is over, then the law is over.

It's applied in domestic law just as Benjamin Cardozo when he was on the New York Court of Appeals, the highest court in the State of New York had to deal with the question of whether a manufacturer of automobiles, the Buick company could be liable for defective automobiles that a seller, that a purchaser bought and used, to his harm.

He said in language that has come down through the ages as many Cardozo statements have, "Precedents drawn from the days of travel by stagecoach do not fit the conditions of travel today." Now that's a well-established principle in American law. A New Jersey Supreme Court that dealt with similar problems involving the building of homes said "the law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping its common-law principles abreast of the times. Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected."

Now why is it that in dealing with war and dealing with self-defense and dealing with the needs that a country has to protect its own inhabitants, all that is thrown to the winds? The only thing that the theorists can think about and that the international courts and the Goldstones of this world can consider is whether taking standards that apply to totally different situations, whether a country like Israel could be held culpable because there are civilians who are injured in what is a necessary measure of self-defense.

The law, I mean the classic of the law that does not apply – I mean there's a Supreme Court case called *McBoyle v. United States* in which Justice Oliver Wendell Holmes dealt with the question of whether somebody who deals an airplane, flies an airplane, a stolen airplane, can be prosecuted under a federal law that was obviously enacted when there were no airplanes but when there were railroads and cars and that made it a federal crime to use a, quote, "self-propelled vehicle not designed for running on rails".

Is an airplane a self-propelled vehicle not designed for running on rails? Sure it is but the Supreme Court said unanimously and Justice Holmes said it, they're not talking about airplanes and the defendant in the case, his conviction was reversed because that's not what the law referred to. It's not what the law could possibly have meant.

The same thing it seems to me applies to these applications of the Geneva Convention of 1949 which was adopted after a war in which civilians were talking about victims of the

Holocaust. We're talking about victims who were moved into concentration camps, who were murdered, and world society said we have to set up rules that protect civilians, not only the civilians like those whom Hitler and his horde subjected to the Holocaust but also civilians like citizens in Leningrad who were starved during the siege of Leningrad and maybe even, true, citizens if you like in Dresden who were subjected to substantial bombing. But that's a different kind of civilian and citizen that the citizens and civilians that we're talking about in today's warfare.

In today's warfare, as Sarah mentioned, we're not talking about armed troops on the one hand and people who were just living in their homes quietly on the other. We're talking about non-uniformed, non-state actors. We're talking about people in areas, be it Gaza, be it Hezbollah in Lebanon, who are working not within the confines of a country that's at war but who are engaged in acts which threaten civilian populations, which are acts of war in what the United States, even if not all the rest of the world recognizes as a war on terrorism, a war by terrorists against Western civilized society. That's what we're talking about when we deal with civilians. Civilians takes in a huge scope of possible individuals who could be subjected to harm that is caused as a result of the war.

The statistics are very interesting. When the Hague Convention was adopted in 1900 and when battles were fought on battlefields between combatants in uniform there were 10 percent or less civilians who were injured or killed in the course of warfare. In World War II the number, the percentage of civilians according to those who have studied it, increased to about 50 percent.

Now there are very few combatants who are killed in war. It's mainly civilians. Some of the figures range between 80 and 90 percent because that's where wars are fought now. Wars are fought from the air. They're not fought on battlefields. The old medieval notion of people racing at each other with swords and spears, that has long gone. But even the World War I and World War II pictures of the soldiers fighting each other or the Civil War pictures of soldiers fighting each other with rifles and cannons and tanks, those are obsolete notions and it's time, if in fact that's the reality is such, that the obsolete legal provisions, that statements that have been made and that were adopted, whether in 1949 or in 1977 when there was a protocol that additionally protected civilians, no longer apply.

There are so many ambiguities. Article 51 of the U.N. Charter speaks of self-defense in the case of an armed attack. What is an armed attack? Is an armed attack an attack by a government or is an armed attack the lobbing of shells over into Sderot? Are rockets that are fired by unknown private groups in a territory which is not even a country of its own, is that an armed attack? Can't you defend your own civilian population against those kinds of attacks and how do you do that?

The protection that's given by these articulated standards are for civilian population or, as Jeremy mentioned, civilian objects. What are civilian objects and how do you distinguish between civilian objects and what you may attack which are, quote, "military objectives". How do you determine what's a military objective? How do you determine whether an attack is what would be prohibited, an indiscriminate attack? It's indiscriminate under this doctrine under, quote, "proportionality" that the legal theorists have worked out.

A military commander is now supposed to weight the proportionality of an attack on what may be very well the source of shells that are being lobbed over into civilian – into communities in Israel and he’s supposed to decide whether the harm that’s going to be done to civilians is going to outweigh the military objective.

Well, let me read to you about a description of a case in the 1991 Gulf War, the al-Firdos bunker case. The bunker was identified by U.S. forces as a legitimate military objective during the 1991 Gulf War. The United States claimed that the bunker was camouflaged. Its perimeters were protected by barbed wiring and access points were guarded by armed sentries. On the basis of information collected by planners the military commander made an assessment that the bunker was a legitimate military objective and application of the rule of proportionality determined that the incidental damage to civilians would not be excessive in relation to the military advantage gained.

The objective was bombed. It was subsequently and tragically discovered that along with its military function the bunker was also being used by civilian as sleeping quarters at nighttime and 300 civilians were killed as a result of the attack. U.S. authorities determined that there had been no violation of international humanitarian law because the information available at the time had allowed the military commander to make a reasonable assessment that the target was a legitimate military objective and that he expected loss of civilian life and/or damage to civilian property was not disproportionate to the expected military advantage.

That’s the kind of judgment that you’re expecting military commanders to make in terms of protecting human life within Israel for example? They’re supposed to be making judgments about proportionality or convey in terms of protecting their own national interests, say, or this appears to be a source of military harm or whether it’s military or not, a source of injury to our population and consequently we will take care of it. That’s what war is today. War today is not lining up on a battlefield and facing the enemy with rifles and swords and spears.

The fact is that these various conventions, these various articulated standards which as Jeremy noted very well and John Fonte noted very well are being articulated by people who have no practical experience, are not themselves involved in protecting their own citizens’ lives, are today irrelevant. They’re wrong.

What has to happen is the entire convention, quote, “for the protection of civilians” has to be scrapped from beginning to end and people have to sit down and say in terms of the reality of today’s world and the reality of protecting one’s own citizens in today’s world, are there articulated standards in which we can set up some humanitarian procedure?

The Israeli forces, after all, it was acknowledged even in the Goldstone Report made efforts in terms of dropping leaflets to civilian areas that they were going to have to attack, to areas that included civilians, that were military objectives but included civilians that they were going to attack, to advise the civilians to leave. To me that’s an extraordinary measure, not to my knowledge at least specifically provided for, but nonetheless one that the Israeli authorities thought was appropriate.

Other than recognizing that there are extreme situations certainly where one has to protect civilians, I don't see that this entire body of international humanitarian law really serves any purpose. There's a very fine Hebrew phrase that is in "Pirkei Avot", in "The Ethics of the Fathers". It says – (in Hebrew) – the gain is offset by its loss. This entire book documents on the laws of war today, in today's society, as to that it seems to me – (in Hebrew), the entire set of volumes, the entire articulated rules of war simply make no sense today. Thank you.

MS. STERN: Thank you, Nate. As you see we're going from the more abstract to the more particular with those who have actually been in the weeds. Now, Amichai would you like to present?

AMICHAH COHEN: So the reason – an advantage or a disadvantage to being relatively late in the speakers, the advantage is that some things I want to say have already been said and the disadvantage is that some of the things I wanted to say were already countered by previous speakers.

So let's see. So as Jeremy Rabkin and Nathan Lewin have already stated, modern conflicts are asymmetrical, asymmetrical in the sense that there is a state against a non-state actor and they're also asymmetrical in the sense that there is one side and this is the state who wants or is willing to abide by the law of the war, whatever they are, and another side who does not protect them and who does not want to respect them. States naturally which are confronted by this situation are at a problem. They have a dilemma, what to do with this situation, when they are confronted.

Now one suggestion, as I think Nate Lewin has most eloquently stated, is that we need to change. The whole laws of armed conflict have to change. We have to scrap everything and start from the beginning. The norms that may have been suitable in previous situations in the past are not suited to more than armed conflict. Now perhaps changes to the laws of armed conflict may be required although I must say it will prove very difficult to convince states to adopt such changes.

However it seems to me that before tabling dramatic changes it might be useful to evaluate the current state of the laws of armed conflict and ask ourselves whether some of the problems to which reference has been made before cannot be solved within the existing framework without a need for reconstruction. This might also prove an efficient exercise because if something can be reinterpreted and applied then we don't have to start from zero. We might be able to start from 20 percent, 50 percent.

In my talk today I should present the attempts of the Israeli Supreme Court to provide contemporary interpretation to the laws of armed conflict which fulfill two functions. First, they try to describe the laws of armed conflict and to interpret them in a workable and sensible way from the viewpoint of a state engaged in asymmetrical conflict. Second, these interpretations would also be loyal to the principles and norms embedded in the laws of armed conflict because this is a court and a court which attempts to apply a set of what it views as norms.

The Israeli Supreme Court's application of international laws of armed conflict has a long history dating back to the Six Days War in 1967. After the war when Israel came to control the territories, the Israeli Supreme Court was the explicit agreement of the organs of Israel applied to the territories a set of international norms which form a body of law called the International Law of Belligerent Occupation.

I don't want to get into the discussion and the supreme court has always evaded the discussion whether the territories are actually occupied or not occupied. The agreement was we will treat them as if they are occupied and apply the specific set of rules of International Law of Belligerent Occupation.

Now, since Israel was almost the only state applying this body of law, the Israeli supreme court was certainly the only court applying it. There were very few precedents for the court to rely on. Over the years, the Israeli supreme court has created a detailed and wide-ranging jurisprudence of this body of law dealing with issues such as the rights of private property in occupied territory, the right of detainees, the scope of judicial review and the legality of all kind of security measures.

The procedure which was most frequently used to develop this legal regime was when the Israeli supreme court was set as the high court of justice – basically an administrative procedure allowing the court to review the actions of other branches of government and issue temporary restraining orders and writs to those branches which forbid them to take specific action or command them to take an action.

Now, in September of 2000, after the failure of the Camp David process, the second intifada broke out. The Israeli supreme court was quick to recognize that this intifada involved much more than sporadic security breaches in occupied territories. The situation on the ground with wide-ranging terrorism, suicide bombing and, above all, organized Palestinian action from areas at least partially controlled by Palestinians fulfilled the requirements of the international definition of an armed conflict. The legal consequence was that the international law of armed conflict was recognized to be the relevant legal regime controlling the events.

While deciding which legal regime controlled the situation was relatively simple, what is unique in the Israeli situation is that a national court was willing to entertain petitions and decide cases based on the international law of armed conflict. Prior to 2001, almost no national court had ever applied the laws of armed conflict in administrative proceedings. Even today the number of decisions in these matters in courts around the world is very limited. The fact that the Israeli supreme court was willing to deal with the issues is perhaps best attributed to its long history of jurisprudence regarding the international law of occupation which I have just described earlier.

Now, what was this jurisprudence? How did the Israeli supreme court apply the international law of armed conflict to the situation? What were the principles? Now, Professor David Kretzmer, a very notable Israeli scholar on these issues, suggested that the intifada jurisprudence of the Israeli supreme court can be divided into two parts.

The earlier cases posited the Israeli supreme court as the mediator, facilitator, accepted by both sides: the IDF on the one hand and the Palestinians and international organizations on the other. The second part of the cases, mostly the later ones, the Israeli supreme court used international law and interpreted it in ways which posited it as the main barrier between Israel and international criticism.

Now, what I'll do is, I'll take one case of each of these roles that the supreme court played and try to talk about it a little. Now, the first case I want to take is what's called the Rafah decision – it's Physicians for Human Rights v. the commander of IDF forces in Gaza – and this perhaps is the clearest case where the Israeli supreme court served as a facilitator, a mediator between the party.

The background is a military operation in the Gaza strip before the disengagement; a petition to the Israeli supreme court was submitted during a military operation. The petitioners were a group of NGOs that raised many questions relating to the conduct of operations, most of them concerning with the transfer of medical supplies and food and water to civilian use for civilians that were caught up between the parties in the operation.

Now, the claims were based on the duties of Israel according to the international law of armed conflict and the duties of Israel according to the law of belligerent occupation. Basically, the basic claim was that even in the midst of battle, Israel has a duty to transfer food and medical supplies to civilians trapped between warring parties.

Now, whether or not this is a correct interpretation of international law can be debated. What cannot be debated is that never in the history of Western legal tradition – I'm not such an expert in other legal traditions, perhaps there is another legal tradition – but in Western legal tradition, never in the history of Western legal tradition has a court heard a similar claim in the middle of battle regarding the rights of enemies' civilians.

Now, the decision is a very interesting one. It reads like a protocol of a discussion in which the court attempts to facilitate an agreement between the petitioners – a group of NGOs – and the IDF. The parties are described as willing to negotiate on the basis of international law and arrive at quite reasonable results. At the end the court was left with just one contentious issue on which it issued a decision.

Here we can see one strategy adopted by the Israeli supreme court to solve the problem associated with asymmetrical application of laws on armed conflict. The solution is institutional rather than substantive. If the sides could be brought to the table, then solutions could be found. Of course, the sides here is the problematic point. The strategy worked because the NGOs were willing to represent the Palestinians and the IDF was willing to deal with their claims.

Now, this decision is usually – or this line of decision, where the court serves as a facilitator – is usually associated with the personality of the previous president of the Israeli supreme court, Aaron Barak. This is a legal giant and strong and respected personality and one who was accepted by all parties as a fair and impartial judge – he was able to conduct these

negotiations and arrive at specific results which both protect the security interests of Israel and human rights of civilians.

It is easy then to discard the relevance of the decisions to all other situations, claiming these decisions were possible only in the Israeli context only with this specific judge, with Aaron Barak. I would like to caution against this view. Perhaps the specific judicial decision could have been handed down only by Aaron Barak in the Israeli supreme court, but its lessons might be taken somewhere else.

Modern asymmetrical wars require constant negotiation, recognition of the role of NGO and their special role taken in balance with the security of the states. The willingness and flexibility to consider different methods in order to consider the rights of civilians in times of war is required of the army. I'll explain why a little later.

Now, let us look at the second role that the Israeli supreme court played. Of course, facilitating a discussion works only if there are two sides who are willing to engage in discussion. And when the other side is comprised of terrorists then no discussion is possible, Barak or no Barak.

Here the Israeli supreme court moved to consider the legality of specific actions of the IDF according to the international laws of armed conflict. Now, there are many discussions, perhaps dozens, where the Israeli supreme court applies or references the international law of armed conflict. Now, naturally I will not deal with all of these because Sarah asked me to be brief, so I'll be brief, but – I can speak –

But I want to get to one principle and it's, I think – I chose it in advance, but having heard Nate Lewin, it's good I chose it in advance, it's the principle of proportionality. And I'll try to analyze how the Israeli supreme court has dealt with this problematic – and I agree, of course, that this is a problematic principle.

Now, the case I want to deal with is the 2006 case of the Public Committee against Torture in Israel v. the Government of Israel, or in its more common name, the targeted killing case. And this is one of the, I think, one of the most interesting and comprehensive recent judicial pronouncements of the rule of – the laws of armed conflict governing military operation against non-state military groups in armed conflict, asymmetrical armed conflict.

I have a (proof ?), I think it's interesting, I've written a lot about it, so – although the Israeli supreme court did not rule out the possibility that some targeted killing operations undertaken by the Israeli Defense Forces against Palestinians would be illegal, the court emphasized that under certain conditions, targeted killing, or killing of combatants without any judicial proceeding, even though these combatants are not considered as soldiers according to international law of armed conflict, is legal.

The court – the basic phrase of the court is, we cannot determine that the preventive strike – this is the term the court uses, “preventive strike” – is always legal, just as we cannot

determine that it's always illegal. All depends upon the question whether the standards of international law regarding international armed conflict allow the preventive strike or not.

Now, the court made two separate observations. The first one was that targeted killing might be permitted in specific cases where the object, meaning the target, takes direct part in the hostilities. This was the simple discussion. The second part of the decision was an application of the principle of proportionality to the case of targeted killing. The principle of proportionality in the immediate context of targeted killing decision means something very specific. If too many – and here, the question, what are too many? – innocent civilians would be killed as a result of the attack, then it may not take place.

However, Barak's use of proportionality here is based on his general conception. And I would like to spend a couple of minutes to speak about Barak's conceptions of what is proportionality. Now, Barak has a very broad view of what is proportionality. This might serve as a direct source for introducing limitations on the conduct of hostilities. And again, he uses it in all his jurisprudence regarding all the international law of armed conflict, not only regarding targeted killing.

According to Barak, a reviewed military measure must conform to three proportionality requirements: First is a rational link. The means selected should rationally lead to the desired military objective. There should be a connection. Second is choosing the least injurious alternative. The means selected ought to cause the least possible harm. And third – what he calls, proportionality in the narrow sense – the harm caused by the measure should stand in reasonable proportion to the anticipated military benefits of it.

Now, the earlier two tests are just logical tests. You have to have a rational link, meaning you have to achieve the military objective. And second you have to choose the least injurious way which is possible. This is just logic. It's also military logic. I mean, why spend military power and resources on something that won't give you any result or something which you could get with less power.

But the third one is the problematic one and I think that Nate Lewin was alluding to this one when he was saying that proportionality is a problematic test. And how do we require from soldiers in the midst of battle to ask themselves, will too many civilians be hurt by our attack? This is the basic question of the test of proportionality.

I suggest that what the Israeli supreme court was offering in the targeted killing case is a different approach. What we really want to know is whether the commanders in the field, when making their decisions, took into account the likelihood of civilians being hurt. We cannot possibly judge whether the decision ultimately taken was correct. We do not possess all the required information and, even if we did, we wouldn't know which parameters to apply: How much is a life of a civilian worth? What are worth more: the life of a soldier or life of a civilian? Civilian Israeli whether – we don't know the result. The best we can do is to judge the decision-making process.

Naturally, then, some mode of prior review is required. A military operation should be initiated only if you can be sure that an appropriate investigation has been carried out. Of course, this requirement carries different meanings in different contexts. In pre-planned attack of a large scale, it mandates gathering all of our available information and subjecting planned operation to in-depth analysis.

By contrast, should an immediate action be required during the course of an operation underway, an entirely different level of both information-gathering and decision-making should be applied. Ex ante review, this prior review, is a most important facet of any military operation. In any case, the military takes this investigation before a planned attack and especially so when civilian casualties are involved. This is one of the basic requirements of the first additional protocol to the Geneva Convention.

And it seems that most armies, in the West at least, are indeed – and here I'm trying to look into what armies are actually doing on the ground – this is what armies on the ground are indeed doing. They are using, for example, legal advisers such as David Benjamin to ask them exactly this question: How should we look at the civilian casualties? Whatever the context, the important point is to verify that the question, the question of how many civilian casualties will be, was asked.

Now, there is also a moral principle here, I think. When we are at war, even with a party that does not respect the laws of war, we can still require from a soldier to act as reasonable decision-making – in other words, to act as moral agents. The consideration – though of course taking into account the specific context of a battle, the requirement to defend their state, the requirement to defend their own citizens – should still be moral in the following sense. They should take into account the possible results of their actions.

So just to conclude. The Israeli supreme court jurisprudence on the laws of armed conflict, I think, could be taken as two lessons which I might say are universal ones about the applications of the law on armed conflict in asymmetrical conflict. The first principle is that of flexibility: Armies and states should negotiate and take into account changing circumstances when fighting these kinds of enemies. The second principle is the principle of proportionality: Armies fighting these wars should not lose sight of their moral character and consider the injuries to civilians even if the enemy is not doing so.

I would add two points to conclude this lecture. First, perhaps there are other principles that should be considered regarding to the applications of the law of armed conflict to asymmetrical conflict. However, I suggest that any attempt to create new norms to fighting asymmetrical conflicts that would be specific and exact would be self-defeating.

An enemy which does not respect the law of armed conflict will only try to evade and bypass any new rules we create. We will create new rules and if the enemy does not respect them, he will evade them anyway. So we must stay at somewhat flexible and abstract level. The most we can ask of our soldiers and indeed, I think, the minimum we can ask of them as well, is to be flexible in their attention to the needs of civilian and act morally in conducting their attacks.

Second, I would just add that, I think, a practical – I think it’s important comment regarding the application. The IDF, during the course of its recent operations and after them, has made an immense effort to operationalize the principles I just mentioned by creating humanitarian offices, by taking humanitarian breaks during attacks, by meticulously considering the effects of each and every attack.

And I would just like to mention there is an ethical code adopted by the Israeli Defense Forces and the ethical code has a very important article; it’s called “Purity of the Arms”:

“The IDF servicemen and women will use their weapons and force only for the purpose of their mission, only to the necessary extent and will maintain their humanity even during conduct. IDF soldiers will not use their weapons and force to harm human beings who are not combatants and will do all in their power to avoid causing harms to their lives, bodies, dignity and property.” Thank you very much.

MS. STERN: Okay, and finally – for the person who really has got to struggle on the ground with these very, very weighty issues, David.

LT. COL. DAVID BENJAMIN: Okay, thank you. I just have to confess that my worst fear has been realized, which I was concerned about being at the end of a panel with five such distinguished experts: Will I have anything left to say? (Laughter.) I’ve been frantically erasing things that I intended to say here. So I think perhaps what I ought to do is maybe filibuster a bit and maybe start with a joke about lawyers just going on in that tradition.

Although what I have to say is really not a joke; in fact, it’s quite sad. I’d just like to give you a statistic, that in Israel, apparently, we have, by far, the highest ratio of lawyers to human beings anywhere in the world. (Laughter.) And you may be curious to know that the – we are at a ratio – at the moment, and it could be changing as we speak – of about one lawyer to every 160 people. And as I say, that’s increasing.

A distant second, by the way, you may be interested to know, is your fine country which is at about 1-to-220 at the moment, according to the statistics I found on the Internet. So you’ve got a lot of catching up to do. But I think as Nate so eloquently said, you know, often if one sees confusion then the source of confusion could quite possibly be the lawyers themselves. And of course, every time you have a lawyer making a problem you need another lawyer to try and answer him so –

And I think it’s fair to say that as a nation, as a people we have a problem with law, in the sense that we seem to be obsessed by it. You know, the Torah, the law starts there and it kind of grows out from there. Israelis particularly are a particularly legally obsessed society. I read in a – also another statistic that apparently in any given year, one in every four Israelis is involved in some kind of legal proceeding which is a very quite startling statistic.

Now, so we have law, and we have international law too, and we deal a lot with international law. So the first thing I’d like to do is to respond to Nat’s comment, which is

maybe what we need to do is scrap all the law and then worry, and then, you know, see what the problems are and then start again. That certainly has not been the approach up until now. In fact, we in Israel have been dealing with these issues of law and the law to apply it to the situations we have to face, very, very intensively indeed.

And that is by no small measure also due to the policy – the legal policy of our supreme court, which Amichai so eloquently spoke about. But perhaps I'll give you a more concrete definition – illustration of that. In the past I was a legal advisor in the Gaza Strip – legal advisor to military commands in the Gaza Strip, at a period where there was quite a lot of military activity. In fact, it was basically from the end of the year 2000 up until 2005, what the Palestinians call the second intifada and which we never really found an appropriate name for, but what was, sort of, very serious violence emanating from the West Bank too but in the Gaza Strip.

And there were hundreds of military operations carried out by the IDF in that period. And the thing is that we had the supreme court supervising us all the time. All the time. We knew, as legal advisors, it made our job a little bit easier, as legal advisors, because if the legal sanction, as it were, was far away in the Hague, it's a lot less concrete for the military commander that you're advising. But we have it in Jerusalem, which from any front line that Israel might be engaged in, is at most a couple of hours' drive away.

An example I take, and this happened more than once: 2:00 in the morning, we're in the middle of an operation in Gaza aimed at a certain military facility. Israel troops are on the ground, inside, near this particular facility, and one of the objects of this exercise is to destroy this facility, but from the ground. The reason we would do it from the ground is to lessen the risk of an air attack. So we have a collection of bulldozers on the ground.

The owner of a building, in the vicinity of the operation, saw these bulldozers, got very anxious, and somehow, within the space of about half an hour, there was a petition filed to the supreme court asking for an injunction against the proposed – what he perceived to be the proposed military operation.

So I was in the war room, I suppose you would call it, with the military commander, and I get a phone call from the secretariat of the supreme court, saying, look, there's a petition being filed; they just rolled the judge out of bed to hear the petition. It's 2:00 a.m. in the morning. What's your response?

So we're in consultation with the military commander; we phoned in a response. Fortunately we weren't required to report for a hearing at the court at the time, but by telephone we actually had to justify ourselves, and we were literally sitting there waiting by the telephone for a decision from the court whether the judge would give an injunction or not. As it happens, the judge didn't give an injunction, but that's – and they are, obviously, reticent to do so, I think, under those circumstances.

But that is very indicative of the kind of legal supervision we have over the IDF. So certainly, there's no question of Israelis treating our situation – even though we do regard it as

being in some ways novel and different to the classical warfare scenario, which was perhaps envisioned in the Geneva Conventions and other sources of international law. We're very concerned with the law and what the law says.

And of course there's another very practical reason here, why we deal with the existing law and we don't come with the approach of saying, okay, well there's a kind of legal vacuum, it's all new, what we have to do is invent laws. We can't really do that. As a matter of realpolitik, we are little Israel – you know, who are we to start inventing the laws and then looking behind and hoping the rest of the world will follow suit?

So I can tell you, from my knowledge, having been a legal advisor in the past, our policy has always been, okay, we have to work with existing law, and make the best of it. And of course our supreme court is being very helpful in that, because that's, to a large extent, what has happened. The supreme court has also made leaps, which perhaps one, some would consider them as being unnecessary.

For example, there's a distinction in international law between an international armed conflict and a non-international armed conflict. I won't bore you with the details, but the restrictions on parties to an international armed conflict are stricter. As a matter of policy, Israel has decided that it would submit to the laws related to international armed conflict and the supreme court decided that it would adopt that policy into law.

Another aspect, which is also – didn't necessarily follow from law, what we call the targeted killings case: whether you can actually kill a combatant who's out of uniform on the other side. Under the laws of war, an enemy combatant is a legitimate target, and you're entitled to kill that person, as nasty as that may sound, unless they are surrendering in such a way that they are making their intention to surrender very clear.

There is certainly no obligation to try and arrest that person first. However, that has been the policy. And that policy was made law by the supreme court. The supreme court said, you can only target such a person as long as the arrest option is not viable any more. So maybe the court went a bit far, but that's the kind of – just to give you an illustration of the kind of supervision, of the kind of intense occupation with the law that we're involving.

And I would submit, as I said, not just to results of realpolitik: I actually think personally that the problem is not so much with the law. I think we can work with the existing law, and we do. I think the problem is that there's a distortion being created by interest groups who are taking that law and, actually, first of all, interpreting it incorrectly, also applying legal standards which are not supposed to apply. And that's creating this whole debate which maybe in some ways shouldn't even be held that there are laws of war.

I can tell you that Israel does its best to abide by those laws. Of course there are challenges and questions which arise, but not to the extent that one wants to throw the baby out with the bathwater. What we are not looking for – and let me make this absolutely clear – we are not looking for a license to kill civilians. Okay? Even though the big, the number-one problem

is civilians being placed in the line of fire, we are not looking for a license to just ignore those civilians or to kill them. No, not at all.

Let me try and give you an illustration of what our critics – the people who are responsible for this distortion are saying. Let's take Justice Goldstone – I think, is a good and current example. And I won't talk about his report at the moment. I'll talk about a lecture that he gave at one of the universities in the United States.

And he was asked, by one of the questioners, okay, we've read your report. But tell me, what do you think Israel should have done to deal with the rocket attacks? And I think, in his response, Israeli – it almost says it all. And his response was that Israel should have conducted police raids to deal with the Hamas in Gaza.

Now, anybody who's even slightly acquainted with Gaza and the reality of Gaza on the ground, from a military point of view, just from the facts on the ground, will realize that police raids in Gaza to deal with the missile problem are a completely – you know, that's out of a storybook. There's no way that can possibly work.

And what Justice Goldstone, I think, was giving – what he was reflecting was a general idea in the world which I think is based on some kind of confusion: the idea being that terrorism, in whatever manifestation it may appear is essentially a problem for the criminal law. A terrorist is a criminal. Terrorists don't necessarily cause more damage than organized crime, okay, and we deal with organized crime through the criminal law. We don't have – you know, we don't use tanks and planes against organized crime. And those are the tools.

And if you want to take that to its – it maybe sounds absurd, but to its logical conclusion, it means that first of all, in order to deal with a terrorist, you have to arrest them, you have to read them their rights, you Mirandize them, you have to bring them to court. If you detain them in advance, it has to be court-sanctioned.

You have to bring them to court; all the rules of evidence will apply, about what's admissible, what isn't. The defendant is entitled to obviously see all the evidence available against him. Then there's a court, then there's a judgment, by jury or by judge, whoever. Then of course there are at least probably two instances of appeal above that. And that has to be done in the case of every single terrorist.

And of course the most important aspect about criminal law is that it deals *ex post facto*: In other words, if there's no crime, there's no trial. We have no business dealing with things which haven't happened yet. The criminal law is not involved in preventing future risks – it's involved in punishing past deeds. So if you want to take the perhaps absurd example of the suicide bomber, again, simplifying the argument, but you can only really put him on trial once he's actually blown himself up.

But that model is out there. And I'm not talking theoretically at all. It's reflected in what Judge Goldstone has said, who today is considered perhaps the number-one authority in what

Israel does wrong. And it's reflected in the statement by people who say that targeted killing is a form of extrajudicial execution. In other words, it's killing people instead of trying them.

Now, let me hasten to say: I think it's correct that in many circumstances, terrorism is a matter for the criminal law, if terrorism is on a sporadic, and it's a local, on a local level, and it's not something which people have to deal with every day. Perhaps in most of Europe, that is the case, although in parts of Europe, the risk is more – it is greater. Okay, I can accept where these people are coming from.

What their model doesn't take into account at all, okay, is the kind of situation that Israel faces with Hezbollah in the North and Hamas from Gaza. This isn't – this is completely different. Okay, it's true, they're terrorists. Yes, that's true. Okay, but these are terrorist armies. These are terrorists who are organized militarily. They have substantial military force. I don't know how many people are aware of this, but Hezbollah, as a military force, is actually a lot more formidable and better-armed than the armies of most countries in the world. If you look down the list of members of the U.N., you will see Hezbollah is much better on than most of them.

MR. RABKIN: And even better than the army of Lebanon.

LT. COL. BENJAMIN: And better – (laughter). Goes without saying. You know they have a rocket arsenal alone of just tens of thousands of rockets, including rockets which can reach, pretty much, the whole length of Israel. That is a very, what? Okay, yes, they are terrorists!

But they're also an army. They engage in military activity. And the only way to deal with them is by military means. That criminal law model is completely irrelevant. Police raids against Hezbollah are not relevant. Police raids – and, all right, Hamas is not Hezbollah, although they would very much like to be, and they're working on it – police raids against Hamas in Gaza are completely irrelevant. That is not a solution, okay?

We have made a very, very clear paradigm shift. We are now in the field of armed conflict. Now, unfortunately, there are formalists out there, believe it or not, even in the International Court of Justice, who think, as long the side attacking you is not a state, there's no armed conflict, there's no right of self-defense. It's a law enforcement problem, okay?

It kind of ignores that there are these Hezbollah and Hamas. Yes, they don't represent states, but they are substantial military forces who are attacking us. In the International Court of Justice case where they spoke about the separation barrier, wall, fence, whatever people want to call it, they said, Israel has no right of self-defense against acts – attacks from the West Bank because it's not a state. That may sound a bit odd, it may sound a bit over-formalistic, but the judges – the majority opinion actually held that in the International Court of Justice.

Now, I was taught as a lawyer, and I think this has been a while now, that we lawyers, we look at substance over form. Perhaps many hundreds of years ago it was different, but we'll tend to look at substance over form. And surely the substance of a non-state entity, heavily armed,

firing a total of, since 2005, 8,000 missiles – 8,000 missiles. It's kind of a statistic we're used to; we've kind of become numbed to what it means. Believe me, even one missile dropped, falling now from the sky is a hugely traumatic event, even if people aren't being injured. And of course people are being injured.

And the reason people are not being injured, by the way, in Israel, because Israel takes extraordinary measures to protect the population, by having an alarm system and bomb shelters, et cetera – something which is sorely lacking on the Hamas side, which is no accident, because of course civilian casualties on the Hamas side of the fence are actually considered an advantage. But it first of all has to be clear that we are in an armed conflict mode.

Now, let me tell you something about targeted killing if you're in the armed conflict mode. It ceases to be an issue, okay? It's surely a big issue if you're in the criminal law mode, but in the – if you're in the armed conflict mode, a combatant, or also a civilian taking part in the hostilities, is a target. And whether they happen to be wearing a uniform or not is entirely irrelevant – so no-brainer.

But you just have to accept the paradigm shift that we're now in an armed conflict. And that's a lot of what the confusion is about. But that's not the only issue, but it's a lot of what it's about, and it's reflected in the Goldstone. You know, Goldstone, just as a matter of – and he also regards the Gaza Strip as being occupied territory, occupied. And he uses that also to apply his criminal law message, because if it's occupied, it means it's under the control of Israel. The legal test of occupation is effective control.

Now, I ask in a maybe glib way, but how can you possibly argue that Israel has effective control over Gaza if there are 8,000 missiles since 2005 coming? Just in 2008 alone, 3,000 missiles in one year. Is that effective control? That is not effective control! That is not occupation. It might be something else, but it's not occupation, okay? And applying the criminal law to Gaza, as if Israel is somehow the ruler and has to apply the law with its police force is completely, completely ludicrous. It's completely detached from reality. And that is a major problem with Goldstone.

Okay, let's assume we've made that paradigm shift, we're in the armed conflict mode. There are all sorts of questions which still arise. There are principles which one has to apply. And I won't – again, won't go into detail, but let's say there are two basic principles which have come up here. The one is the principle of distinction, which requires parties to distinguish at all times between combatants and military targets on the one hand, and civilians and civilian objects on the other. You can attack the former – you may never attack the latter.

And then, kind of linked to that, is the principle of proportionality, which says that you may attack a military target, but even when you're attacking a legitimate target, you have to take into account the collateral damage, the harm to civilians or civilian objects. And if that would be excessive in relation to the benefit of the military attack, you have to refrain from doing so. Those are the two principles.

And I think it's clear they become a bit difficult when you're fighting an enemy like Hezbollah or Hamas, where the underlying assumption of the rule of law is completely subverted. What is that underlying assumption? The underlying assumption is that military forces exist to protect their own civilian populations. There's probably, if you have to define what the IDF exists for, it's for that. When soldiers are sent to battle and expected to put themselves in extreme danger, they think of the folks back home they're protecting – that's what you're there for, okay?

Now, Hamas has turned that entirely on its head. Their tactic is to actually deliberately put civilians in danger, and that underlying assumption, which I assume was in the air, even if it wasn't even – nobody even found the need to specifically state it in the deliberations on the Geneva Conventions. That assumption has completely fallen away. Does it mean we have to say, okay, that means legal vacuum, no more – no, I don't think we can do that. I don't think we can make that leap.

We still have to work with the principles because the issue is not just reciprocity. It's also about, there are higher values involved here. Not just reciprocity. As Justice Barak said, the president of the supreme court, he says that democracy which has the rule of law, of course you must fight terror. You must fight terrorists, but you do so with one arm tied behind your back. And you do so – you do that voluntarily. My contention is, and I think it's been borne out, you can still win, even with one arm tied behind your back.

I think, in Gaza – maybe this may sound controversial – so far, at least, I think we won. We did it with one arm tied behind our back, maybe even more than one arm. Goldstone and others would like to portray that as having been differently, but I can tell you that the IDF operated under very, very severe restrictions, with – which were imposed by people, the likes of myself. And I think we still succeeded in that military operation.

Why is it so difficult? Well, first of all, if we talk about distinction – five minutes, is that okay? – if we talk about distinction. Okay, how are you supposed to distinguish an enemy where everything looks civilian? Everything! A military commander looking at Gaza from the outside – there aren't military bases which are painted green or camouflage. There aren't people in khaki uniforms – “okay, those are the targets, the rest aren't,” like there are in a normal state. Everything looks civilian.

So you base your decisions on something else entirely. You base your decisions on intelligence, on the information you have. Israel, by the way, was quite lucky, in this sense because we know, obviously – very well-acquainted with Gaza. We have relatively good intelligence. So we knew, pretty much, where to go, where the targets were.

There were all sorts of situations one can easily envisage in other parts of the world where you have a similar threat – a terrorist army holding up among civilians. Well, you don't have the intelligence: How do you know where to go? How do you know where they are, all right? What kind of means can you use? What's the big problem with intelligence? The big problem is where military targets are not openly identified, as is required by the rule of law.

Who is under the onus of proof that they attacked a legitimate target? That's us; we're stuck with that.

So Goldstone and others are saying, okay, you know, what it looks like is that you guys deliberately targeted civilians. You know, we'd prove that you didn't. Now, it's obviously difficult to prove a negative in any case, but what if I can tell you we have files like that full of intelligence material but I just cannot divulge them because it's intelligence? And intelligence is sensitive; it means if you divulge it, you're letting out how you got hold of it. And that, you can't do because you can never let your enemy know how you got hold of your intelligence.

So you're stuck in this awful situation, which you shouldn't be in, in the first place because parties to conflicts are supposed to abide by rules. We actually stuck with the onus of proof but you can't actually meet the onus because you can't use the information that you have available. Very, very difficult.

Just to give you, like – there is no such thing as a suicide bomber who doesn't look innocent. There's no such thing! A suicide bomber doesn't run at you looking like Rambo, okay. A suicide bomber is normally – it's either a child or somebody who looks like a woman or a shepherd herding sheep near IDF forces. That's what suicide bombers look like. You know, difficult to distinguish.

So first off, we have to understand there can be mistakes. There are rules of engagement; we try and limit the mistakes and we generally actually are statistically quite successful in picking out the wheat from the chaff, and say, okay, that guy's a terrorist and this one isn't. Even though they look the same, we've become more and more expert at it. But of course, there's room for mistakes.

And what I'm arguing for is that we can apply the existing law; that's fine. But when you come to apply it, and you realize that you're applying it in an environment where everything's being turned on its head and the other side is using it against you, then apply it with an understanding of how difficult that is. Don't nitpick.

You know, I was actually looking for a quote from Goldstone on my computer. I couldn't find it; the report is almost 600 pages long. It's very, very difficult to work with this, okay. There's 600 pages of nitpicking about whether we drafted the warnings to civilians effectively enough. No credit for having actually given the warnings but, were they drafted effectively? That's just one example out of many.

And the other problem, of course, is the issue of proportionality. What do you do with proportionality if you telephone a building which you're about to attack, which is not necessarily – under the laws of war, you're not necessarily required to give up the element of surprise, an absolutely essential element of military activity – but we did it anyway.

We telephoned the people in the building which is, say, a weapons store; you tell them to get out of the building. Instead of getting out of the building, they call their friends and relatives

and go onto the roof of the building. So they try and make the attack disproportional and impossible to attack.

What do you do? well, let me give you an example of what we did and how Goldstone reacts as, again, someone who doesn't understand the reality. What we developed after bashing our heads against the wall for a long time because this was a bit of a dilemma for the lawyers, is what we call the "knocking on the roof" procedure. What does that mean? We've warned them by telephone – okay, they call their friends; you warn them again by telephone; you warn them a third time by telephone; it hasn't worked.

What do you do? you fire from the air or from whatever munitions which makes a lot of noise but doesn't actually cause any harm. It's like a stun grenade kind of thing with a light, explosive charge. So the people in the house are actually under the impression that they're actually under attack, and then that normally causes them to leave, which was actually proved to be quite effective.

Obviously, the whole object of that is to reduce civilian casualties. Justice Goldstone, what does he say? No, he says, that is an unlawful attack on civilians. You can twist anything around.

When we evacuated civilians from South Lebanon in order to try and level the playing field with Hezbollah, we were accused of ethnic cleansing, okay. Everything gets turned on its head. The problem here is the distortion that specifically anti-Israel groups are trying to make which doesn't correctly reflect the law as it should be. I could go on but I won't, and I think – but, thanks – (inaudible, off mike).

MR. RABKIN: When are you going to publish your official response?

LT. COL. BENJAMIN: Well, first of all, it's not me. I'm not the –

(Cross talk.)

LT. COL. BENJAMIN: I understand very soon indeed. In the next few days or weeks, there's supposed to be an official response forthcoming.

MS. STERN: This was actually astounding. Before we open it up to the audience for Q&A, I'm wondering if the panelists have any questions for one another.

MR. LEWIN: Yeah, I would like to really pursue further what David had been talking about. And I guess what Amichai was discussing in terms of the supreme court of Israel. My view is that in the United States, for example, the courts and the Supreme Court will give total deference to military judgments.

You have a democracy; the democratic system has selected commanders-in-chief to make military judgments which they have to make, and ultimately the elected authorities are responsible for them. And then the courts stay out of it; total deference to the military.

With all respect to the legal genius of Justice Aharon Barak, I think he is totally wrong in allowing the courts to get involved. Precisely the kind of situation that David described; that a judge who is woken up in the middle of the night might issue an injunction against some military action because somebody there says, look, I'm running to court. The courts have no business – and that's why I say that all this legal talk, all these legal principles, do not belong in today's military situations.

You mentioned before we began that many years ago, I litigated with the military up to the Supreme Court of the United States the right to wear a yarmulke on the part of a psychologist in the Air Force. The Supreme Court by a 5-to-4 vote decided that the military has the last word on whether somebody can wear a yarmulke, and the courts were not going to get into that. Now, that, I thought at the time, was really extreme. And ultimately Congress changed that. But that's exactly the attitude I think that the courts properly have in the United States.

And the whole notion that you've got to fight a war in Israel with one hand tied behind your back so you can proudly say, look, I read this book and on the basis of it, I can find ways around it so as to justify this or that action on the basis of proportionality, on the basis of some other legal, novel attitude and argument that you can make, I think that's all wrong.

The fact is today – both because there's a lack of symmetry in terms of the sides abiding by any of these legal principles and because what is paramount and should be paramount is the protection of civilians who are trying to go through ordinary lives and are attacked by terrorists in this war against terrorism – I think it is imperative that the military be given the authority, certainly in a democratic country, to do what they think is necessary totally unfettered by any kind of legal judgments.

And the whole idea that the law can enter into this – I think what will prove to be one of the major bumbles of the Obama administration is this whole idea that people who are ready to give up their lives on behalf of a terrorist cause should be brought to trial.

I've gone through many trials in the United States. The whole theory of the adversary system is that the defendant wants to show that he's not guilty. He doesn't want to be put to death; he doesn't want to go to jail. Obama and the Department of Justice in the United States are now going to be putting to trial in New York people who have said that their lives – they want to forfeit their lives for their cause. They are not interested in proving that they're not guilty. The whole adversary system collapses when you're talking about those kinds of defendants.

And to me – again, we're involved in a major war on terrorism. Military personnel and a democratic society should have the authority regardless of any legal principles to do what they think is necessary to protect their population and the people who live in that democratic society.

MS. STERN: Amichai?

MR. COHEN: I'll do two points. First, a comparative point. Although this view was widely held by courts of all Western countries, I would say until the 1990s, if I'm not such an expert in American constitutional law, although I don't think that the United States Supreme Court even agrees with you, but the point to the side. The majority view of Western courts is that at some level, courts should be involved. This is both the British court and the Spanish court and the German court. And these are courts of countries who have problems with terrorists.

Now, we don't have to agree but I'm just pointing out. You could still say they're wrong; that's okay. But this is the – and I think also the American Supreme Court now with the last string of decisions has made the point that – (inaudible) – however, however, the point I made in my talk, and I think it's an important distinction that has to be made is between the involvement of the court as an institution and laws as substance.

Now, you might agree or disagree whether courts should get involved in enforcing the laws of war. This is a legitimate discussion; perhaps I agree with you on certain – and perhaps – and it's even probable that the Israel supreme court because of issues that are not connected to the laws of war, which are connected to the internal Israeli working of the system, have taken it too far, perhaps. It's completely legitimate.

There is a completely different question whether soldiers should be subject to a set of laws. It doesn't matter who enforces them – okay, not supreme courts. Create some kind of an institutional discipline within the army. Of course they are supposed to be subject to a set of laws. The discussion is: Which laws? But I don't think – I don't know, but I don't think that there is a claim that armies should fight without laws limiting their actions. Of course they should fight with laws.

The question is where do these laws come from? Do they come from some kind of international treaty or from within? Who should enforce them? Should this be disciplined? Should we have legal advisors embedded in combat units? As we now have just the recent decision of the Israeli chief of staff to embed legal advisors within combat units.

I don't think there is a legitimate – perhaps you think otherwise – but there is no claim that armies should not follow a set of rules when they are in engagement. Some of these rules will be exactly what we talked about. It must be.

There will never be, I don't believe, in a Western, democratic army, and for reasons that are completely in the self-interest of this army, a rule that says, listen, if you have an enemy, one terrorist, within a thousand civilians in a hospital, shoot to kill. It will never be allowed. Not because I care for the terrorist so much but because for my sake, for the legitimacy of my actions to my country in a democracy, I will never be able to justify such a result. So there will always be rules. Once again, we can discuss who should enforce them; that's a different point.

MR. LEWIN: Well, let me make two distinctions with regard to that. My view is certainly that within the military, obviously there is a military system of justice. Soldiers can't go out and commit rape and murder and do all kinds of terrible things outside of a military system of justice. There are military systems of justice. That's item one.

Item two is decisions have to be made at the proper level of command and of responsibility. Right, individual soldiers can't go out and decide they're going to kill one targeted killer among a thousand civilians. The judgment has to be made up the line of command. But subject to those two restrictions, courts have no business getting involved.

Courts should not be making decisions, as you say, as Justice Barak says, well, here are the three standards with regard to targeted killings. It's none of your business, Justice Barak, what the standards are for targeted killings! That's not a job of the supreme court of Israel. That's the job of the chief of staff of the Israeli Defense Forces. End. Period.

MR. COHEN: Do you agree to criminal trials?

MR. LEWIN: Pardon?

MR. COHEN: Do you agree to criminal trials of soldiers who violate –

MR. LEWIN: Of course. Internally within the military –

MR. COHEN: Well, then you agree –

MR. FONTE: No, military – he means military –

(Cross talk.)

MR. COHEN: The fact that institutions hold a military court doesn't mean that there are no judges sitting there and applying specific sets of laws. If you agree to a military court – criminal military court – with judges sitting and reviewing the discretion of the military commander according to the law – according to the law – then you agree to a legal, institutional –

MR. LEWIN: Not according to “this” law –

MR. COHEN: Of course they will do it according to this law because this law is the source of every law of every country even if it doesn't say, the Lieber Code, which was the source of the – as Jeremy Rabkin discussed – was based on international law.

Now, you could say, listen, this isn't American; it has nothing to do – I know the people who are writing these laws in Israel, and I know of them and I read what they write – for example, Hayes Parks in the United States – of course they pay attention to what this says! They must pay attention to what this says because part of it is based on logic.

Even if you say, this is the global, part of it is based on logic; part of it is based on tradition; part of it is based on military professionalism – what do you want of the specific soldier? Even if they don't mention the Geneva Convention, even in a citation, they will apply some of the principles of the Geneva Convention because it makes it –

MR. LEWIN: Those are principles of civilized society which are accepted, and which the Israeli Defense Forces would accept regardless of whether they are articulated in a protocol to the Geneva Convention. Of course. And the truth is, in the United States it would be accepted. And if there were a military commander in the United States who would commit wanton killings, then he would be removed by the president of the United States or the president of the United States would not be reelected. I mean, ultimately, that's what popular will is. That's how a democracy works.

MR. COHEN: We can go on with it but I suggest if a person will commit a wanton killing, he will be judged in front of judges applying law. That means that law has something to say in how military operations are conducted. The level is a discussion, certainly.

MR. FONTE: Yeah, let me ask a question to one of our Israeli colleagues because we're talking about Judge Barak. In January, Judge Barak gave a major speech – I haven't had a chance to read it all but he said – basically said that Israel should join the international criminal court.

In other words, he's not talking now about simply Israeli law and the law of the Israeli supreme court; he believes in military operations that Israel should now abide by the international criminal court. So he's moving to that level. So I wonder if either of you have any comments or any thoughts on– maybe you've read it in full – his speech where he's advocated this, which would be, of course, a major break.

LT. COL. BENJAMIN: Okay, I'll respond because it's also – part of my response is a response to Nathan. And I'll basically quote what Justice Barak says in answer to your question. And I'll say, for, certainly, the military, it's been for many years a point of contention. There were commanders who were not happy about this.

What I can just tell you as a matter of fact, I think over the last several years, the military has perhaps moved to the conclusion that maybe it's a good thing and not a bad thing. And this is because the logic of Chief Justice Barak's – which personally I subscribe to, too – is that he said, look, rather our commanders and soldiers be accountable in Jerusalem than in The Hague or in other countries. In other words, it's going to happen anyway. You're going to be judged – you're going to be looked at through a microscope; that's just the way it is. Surely, it's better that that happens.

Let me, or a judge – okay, let me take this on my shoulders. The minute I say this is legal – and by the way, in 90-odd percent of cases, we normally wouldn't. We normally manage to defend the positions of the IDF; not always but normally. And that's no accident because we put a lot of thought and legal advice and legal analysis into our positions.

And the fact that the supreme court is actually vindicating a certain source of action is obviously an asset to the IDF. So at the end of the day, on balance, the fact that the Israeli supreme court has said, targeted killings is legal – with or without the conditions being applied, but that it's legal – that's a big deal.

Because up until then, we were really in that situation of being there with our necks out, hoping the rest of the world will follow. By the way, the rest of the world has followed, of course. The Americans have followed, just without admitting it, but definitely they do it; I'm sure that's absolutely clear.

MR. RABKIN: They even admit it.

LT. COL. BENJAMIN: Yeah, I know they admit it, too. It's just become – the logic has been accepted. So there's actually a benefit here. It does make – yeah, it's less convenient and comfortable. Often, it's not only us lawyers who have to report to the court. Sometimes, the commanders themselves are called upon to come and explain the logic of their actions. But in fairness, there's a case to be made that it's actually more beneficial than harmful.

MR. LEWIN: How often is a favorable decision of the Israeli supreme court really given credit in The Hague?

LT. COL. BENJAMIN: Never.

MR. LEWIN: Never? Well, that's not –

LT. COL. BENJAMIN: You only have to look at the Goldstone. Goldstone says that we don't abide by international standards of accountability. I can tell you –

MR. LEWIN: You're right! He's right.

MR. COHEN: You have to mention the Spanish decision –

LT. COL. BENJAMIN: Yes, yes, okay –

MR. COHEN: – of universal jurisdiction, saying, we will not adjudicate Israeli officers because the Israeli supreme court makes a good job of it. We don't want to involve ourselves in universal jurisdiction. This is a decision of the Spanish appeals court – or, constitutional court – saying, we don't want to deal with universal jurisdiction. Why? Because you have the Israeli supreme court and it's doing a good job and you have an investigation. We don't have to do it.

LT. COL. BENJAMIN: Barak – sorry, if I may – that sort of leads me to the answer of the second question. I think it fits in with Barak's world view. I think he says that as long as an Israeli supreme court is sitting here as this umbrella, scrutinizing everything the IDF does, we have nothing to fear from the ICC because an important principle in international justice is that if the domestic tribunal is going to do the job properly, then the international tribunals don't come into the picture.

I disagree with Justice Barak, by the way. I mean, Goldstone is the perfect proof. With this huge, incredible level of accountability that doesn't exist anywhere else in the world, he says that our system doesn't abide by international standards. And I'd say, he's right; just the international standards are lower than ours.

MR. FONTE: According to ICC rules, Israel could – on the principle of the government doing it first – have the trial; say the soldier is acquitted, then the ICC could say, they were unwilling to convict. In other words, the final decision on where they have a trial is with the ICC; it's not with the nation-state.

LT. COL. BENJAMIN: Okay, but in Spain, it worked.

MR. LEWIN: But, Spain is one jurisdiction. I mean, the fact is, for various other reasons, it's very possible Spain decided it wasn't going to do this. And therefore, they seized on the fact that the Israeli supreme court issues decisions. I put to you that, really, your answer to my question, and generally, the Israeli supreme court is not given great accountability in the world of our enemies; in the world of those who are looking to criticize Israel, who are looking to find that the Israeli Defense Forces are guilty of war crimes. The fact that Aharon Barak says, no, I didn't think that was a war crime, they're going to give that zero accountability.

MR. FONTE: Well, in Spain, actually, the Garzón investigation is continuing right now about the Bush six, or seven, or whatever it is. So there is an investigation in Spain under way.

MR. RABKIN: I actually want to support our Israeli colleagues here. This is, like, the one thing where I think that I could –

MR. COHEN: Thank you very much. (Laughter.)

MR. RABKIN: I wanted to say it's the one thing where I think I have something to add, which is, I go to a lot of conferences, and, surprisingly, people cite the Israeli supreme court as an authority who are not – like, Anne-Marie Slaughter. I mean, I've heard her several times invoke this.

Now, that is in a way his target, right? He's looking for globally-minded academics in the West. And these people are somewhat important, I have to say – I mean, they shouldn't be but they are. And they're impressed by that. I mean, it does mean something to them. They do think, okay, Israel is making an effort.

And personally, I'd be horrified if the United States courts ever tried to do what the Israeli supreme court is doing. But one does have to say, Israel really is in a different situation from the United States. I mean, it is a very much smaller country with, could I say, a lot more vulnerability.

And I think it's not – I don't even know whether, on balance, if I were in Israel and anyone was asking my advice, I would say he should do this or shouldn't do this. But they do get benefit from it. It's wrong to say they don't get benefit from it. The important benefit they get is that within the world of international law scholarship, people notice this and think, okay, you are making an effort.

And that actually is worth something to the extent that that world matters. And actually, that world does matter for Israel much more than for the United States because, as you said, Israel is not in the same position as the United States to say, oh, we've been attacked; the rules are changed. This is literally what the United States said after September 11<sup>th</sup> – we've changed our mind; we've been attacked. It's much, much harder for Israel to do that and it gets much less credit for being attacked.

MR. FONTE: Anne-Marie Slaughter is praising the Goldstone decision because she'd like the United States Supreme Court to pick it up.

MR. RABKIN: This is not true. She's not praising the Goldstone –

MR. FONTE: I mean not – I'm sorry, not Goldstone. I mean the Barak – she said the Israeli supreme court. She's praising the Israeli supreme court because she'd like the American Supreme Court – (inaudible, cross talk).

MR. RABKIN: But I think she also does think this is genuinely a good-faith effort and it is serious. And I have to say, I've heard her quote decisions of the Israeli supreme court not in the context of, yes or no, should courts be involved, but just saying, Justice Barak articulated a good principle and this is worth thinking about. She treats it as a source, which, in a way, it is. But that is conceding that it's serious.

FONTE: And it's setting a precedent for the U.S. That's the main point.

MR. RABKIN: There is that point. There is that point

MS. STERN: Would any of our guests like to jump into this fray? Deborah (sp)?

Q: John Fonte, you were talking about the new global entities and how that's going to be something that we have to take into consideration. And you were talking about how it's good that Israel is coming into the international community and taking that into consideration. But the change is so quickly and we have the Islamization of Europe taking places and in other areas taking place. A lot of these places that you're placing your trust into are going to be changing, and I'm just wondering how you're taking that into effect with everything you're saying.

MR. FONTE: Well, of course, I'm not trusting them; that's the point. I think we have to reconceptualize someone like Goldstone, and not give him the benefit of the doubt or not assume that he's operating in good faith. I think he's operating in bad faith. I think he has a particular strategic, ideological goal, as many people I'm calling "supporters of global governance" have a goal, which is to establish a super-national authority above a democratic nation-state.

So they have a principled, ideological goal. They're not that concerned, I don't think, necessarily with humanitarian concerns in Gaza. I think that's a means to an end. The end is a global rule of law, the promotion of what they call global governance. You can read this; there's 40 years of literature on this. So I think that's the end goal.

Human Rights Watch is not that concerned, I don't think, necessarily with losses with Palestinian civilians. They are concerned with the military efforts of Israel and the United States. They'd like to constrain them; they'd like to put Western, democratic military forces under the scrutiny and under the global rule of law where they have an influence; where they actually write the rules.

So I think we should consider them in bad faith and we should look at them – reconceptualize world politics and realize we have a competitor. Now, it's not the same thing, obviously, as a competitor like radical Islam or Russia or China. But even within the West, there is a strategic, transnational competitor that has different strategic goals than those of the liberal, democratic nation-state. So it requires a reconceptualization of world politics.

LT. COL. BENJAMIN: Maybe I didn't make it clear when I spoke to what Justice Barak's view was. I don't think Israel should join the ICC; not at this stage. For the reasons, I mean, not as such, but I just don't think – it's definitely not right. And I would say – you talk about Islamicization – there is still – it's more complicated than that.

and I think it makes a difference whether you speak to governments or whether you speak to, you know, the press and academia. Now, obviously, the press and academia get a lot of "airplay," by definition, and they tend to be a lot more Goldstone-ish in their approach.

But if you want to take the British government, for example. The British government are not happy about the fact that Israelis can be prosecuted for war crimes on their soil. It's just that they're stuck with the law, which says that people can institute private prosecutions and give an arrest warrant against somebody who's accused of war crimes.

MR. RABKIN: Why are they stuck with it? why can't they change it?

LT. COL. BENJAMIN: Well, it's very difficult. They see that as being a political hot potato. The government would like to change it but just because of all sorts of political problems. And also, not all of Europe – I mean, but a lot of governments at the end of the day have to defend their citizens.

You see, the human rights community is such – I mean, I don't want to generalize and say they're all in bad faith. They might be in bad faith in the sense that they're not necessarily looking at the Israeli interest specifically. They're not in bad faith as being anti-Israel necessarily. Just that they have this idea about this global order and they're prepared to sacrifice Israel just so that everything fits in nicely.

That is the problem, I think. And it has to be counted because it's not going to bring – I don't think that it's going to bring about the global order. I think governments are aware but there are political sensitivities which are maybe holding them back.

Q: Yeah, hi, I'm Dan Pollak from the Zionist Organization of America. This is particularly for the Israeli panelists. I was outraged at the suggestion that there's a phone call in

the middle of the night in the middle of a military operation to stop it. I have two hard questions about that.

First, would it be legally binding if, by phone, they told you that you had to stop? I suspect the answer is no, so – but – and then I think the reason you would have stopped is a whole ‘nother reason – that there’s a difference between what you’re legally required to do and what you feel the idea is morally required to do, for our own moral purposes.

And I wanted you both to speak about the difference between what you’re legally required to do, and this idea that Israel is better than that. But all of that can be done without that hook of international law, simply because we have our own moral standards.

LT. COL. BENJAMIN: Well, actually, yes, it is absolutely legally binding.

Q: (Inaudible) – says that you don’t have to –

LT. COL. BENJAMIN: No, no, if the supreme court issues an injunction and they call me by telephone and say there’s an injunction, that’s it. I tell the commander stop what you’re doing; pull the guys out, absolutely.

Q: Don’t let the people know that they can use phone calls to –

LT. COL. BENJAMIN: No, it’s 100 percent legally binding. There’s no question at all.

MR. LEWIN: The Israeli supreme court has no, Barak, has no limitation of non-justiciability, which the U.S. supreme court and the U.S. court system does have. Barak has publicly stated that everything is justiciable; there is nothing that you cannot bring to the supreme court of Israel if you’re attacking a government action and bringing it with a Badatz – that’s his view.

The United States Supreme Court has said no, there are various subjects that are simply not justiciable. And a military judgment such as this one is not justiciable under American law. Aharon Barak doesn’t accept that.

MR. COHEN: Yeah, I would say two point – two comments, I think, to your second question. About the legal, with the phone call, I don’t know. But I doubt it – not a national security issue, okay. A building issue where a federal judge issues a – someone is going to destroy my house and a federal judge issues an injunction, it has to come by mail. Of course, if you get the telephone call from the secretary saying listen, he wrote down an injunction, you stop, in every country, the question is the substance matter of the additional security makes it look difficult.

In the middle of the night, military operation, but of course, if the judge says and – but on the moral issue, first, there are voices within the idea saying this over-legalization of the question corrupts our moral thinking about this, because now the question becomes not whether is it moral or unmoral to do it, but whether it’s legal or illegal to do it. And there are voices within Israeli

public legal quarters and also within the general staff who are saying this is a problem here. We have to think about what's moral and not – we have to educate the soldiers about what's moral and immoral and not necessarily about what's legal and illegal.

The point is, of course – and you are completely correct – that moral and immoral is a problematic concept for judges to operate by – also for everyone trying to use law to enforce some kind of standard on other people. It's immoral to do it – it's a difficult concept to enforce on people – you're doing something immoral. What we use – but this is the character of the modern, liberal democracy – we use law too much, right, saying this is legal or illegal. So this is the way that the court went in, was with this legal and illegal.

And the problem – this is a unique Israeli problem, but if you're asking, I'll tell you – the problem is that Israel has no internal law of war crimes. There is no Israeli law – specifically Israeli law – saying what's allowed or not allowed. And even the military justice law is relatively narrow in this sense. It's not very, very detailed.

So what's left for the supreme court – or for anyone; it doesn't matter if it's the supreme court or a legal advisor or whatever, or a military judge – what's left for him to go by is international law because this is the default. It's the default. There is no – in most cases, there is no specific Israeli law. So this is why they moved to use international law. But any kind of law, this is how, in our society – I think also in the American society – things operate.

Q: I wanted to ask a question about legal or military doctrine. And I think we have seen the Israeli – (inaudible) – what I call something like deliberate, measured disproportion, which I think is why, in my view, as Lt. Benjamin was saying, one bullet to Hezbollah in Gaza – (inaudible). And what that means is, it's essentially a tradeoff. You're destroying more infrastructure that is not necessarily military – (inaudible) – to raise the cost and increase the pressure, from deterrence, on the other side.

And it seems to have worked. You could almost say, rather than kill a thousand civilians, you should flatten a hundred or 500 buildings. And if that's happening – and I not only think it works, but I think it's very good – it's relatively – (inaudible) – moral questions about war, it's relatively humane. Is that any kind of a legal or military doctrine you think should be publicly articulated?

LT. COL. BENJAMIN: Let me say there's nothing I can – I'm not in the IDF anymore, but I think I can say this very confidently and categorically, that there is no such doctrine. When politicians and, perhaps, IDF officers use the term – and they do use it, unfortunately, in public discourse – about disproportionate responses, they don't mean that in a legal sense; they mean that in the generally accepted sense of what's disproportionate.

In other words, the fact that, perhaps, you kill, I don't know, 10 soldiers of ours, we might kill 100 of yours. There's nothing illegal about that. There's not tit-for-tat law in international law. The issue of proportionality, though, legally talks about collateral damage – about how much damage you're causing to civilians while you go after legitimate targets.

Q: Or civilian objects.

LT. COL. BENJAMIN: Or civilian objects – all civilians, all civilian objects. And there, the legal position is very clear and, to the best of my knowledge, that's the legal doctrine. In other words, you can be disproportionate in the amount of force you apply against the enemy, but against the military targets of the enemy. In other words, you can kill – even, they kill 10 of yours, you can kill 1,000 of theirs, okay, but you have to go after military targets, only military targets.

There can be never an issue of attacking civilians or civilian objects, okay, for the purpose of putting pressure on the government or on the military. That's just not – that's not part of the doctrine. So some outside observers seem to say one and one makes two, for some reason, but they don't realize, perhaps, what the logic behind – yes, some people call it the "Dahieh doctrine," because of the neighborhood in Beirut where Hezbollah had all of their headquarters concentrated.

Yes, we did – we caused considerable damage to the Dahieh. But if you look at the Dahieh, you will see individual buildings still standing among the rubble. Why are they still standing? Because they weren't targeted. We never took a decision, let's just waste the whole neighborhood because the Hezbollah are there. It was always based on there being specific targets in specific buildings – military targets. So perhaps this is a good opportunity to make it clear – there is no such doctrine and I would be very surprised if something has happened, since I retired the IDF, that would have changed that.

MS. STERN: Any other questions from the audience? Yes, Renee, yes.

Q: I wondered if I could ask the panel to look forward a little bit. As more and more countries are in situations similar to Israel and the United States and will have to deal increasingly with terrorists who use civilians and do all the things we've been talking about, is there a movement to adjust international law and take a different look at, basically, the primary issue of the difference between state and non-state actors, which I think, logically, is one of the key issues. That the non-state actors seem to be considered civilians. But the general question is what I'd like to hear you address. Is that change happening?

LT. COL. BENJAMIN: There's no – I don't know of any major movement to do that, okay. I mean, there are – to the extent that there is discussion, there have been a few isolated conferences of this nature over the last – not many over the last few – that's what I know about.

Perhaps the most significant project is something which, actually, the International Committee of the Red Cross is doing. They are examining – they've called in experts from various countries and they've been doing this over the last two or 3 years, I think – to examine the issue of what we call direct participation in hostilities.

Just to tell you what that is, the rule says that you can target combatants, okay, and you can also target civilians who are directly and actively taking part in hostilities. The question is – the legal question – what exactly does that mean? You know, where do you draw the line.

Okay, obviously, if the civilian is standing there pointing a weapon at you, then he's a legitimate target. But what if he's the guy who drives the truck, or what if he's the guy who bankrolls the terrorists? I don't know – those kind of things and the question of where do you draw the line.

So there is a realization, even on behalf of the International Red Cross, that there are questions that need to be resolved. And I think it's significant that the discussion is taking place under the auspices of the Red Cross, even though there hasn't been a result – I mean, there hasn't been, like a decision, yes, we have to move forward. There's no consensus. But the very fact that the Red Cross is hosting such a discussion, which shows that there is an understanding somewhere that things need to be looked at again.

MR. COHEN: Two quick points. One is that if there has been a movement in the past, I would say, 15 years, it's been the opposite. And it has nothing to do with Israel; it has everything to do with the Balkan issues in former Yugoslavia, where almost everyone who has looked at it said we have to apply – it's not clear whether, there, it was an international conflict, a non-international conflict, whether the parties were states, non-states, who was acting there. It's all – if you know the history, it's all conflated there.

And the courts will be looking at the end, you know, it's basically the same rules applying in both states. This has been the move in some, you might call them these legal, global internationalists were moving in this direction. The point, I think, is that – and some people have written about it – is, who's carrying the burden of fighting the terrorism? And it's mostly two countries who are carrying the burden of fighting terrorism on a global scale. And it's the United States, who's doing most of the work outside its own borders, and Israel, who has, within its borders, a lot of work.

What happened in the United Kingdom, for example, was much closer to a criminal activity than some kind of international action. Now, what the United States did – and it should do more, and I think it's doing more and this is a positive view – is take on all these nations and say listen, you have to share the responsibility for this, too. Because you're just free-riders, here, right? You're free-riding on this. So once it's done, then it seems that every state has this notion of, we have to change the laws of war, right?

What happened a few months ago – a German force in Afghanistan had this incident, where they found out that al-Qaida stole several tanks – gas tankers – and they just bombed them and they didn't care about who is the civilians around. There were civilians around and they didn't – of course it's true. As more nations will participate in this, more nations will realize they have to find solutions to what's going on.

The problem is that currently, there are two countries who are interested in law. It's not true, of course, that there are other countries who have this. You know, if you look at Sri Lanka, then you realize that some countries are doing something completely different when they have internal – but Western countries. One country which is interesting, and people have not looked on, is Colombia. Because Colombia have very detailed jurisprudence. They have a strong court and they have very detailed jurisprudence about how to fight terrorism and what's allowed, what's not allowed.

Other countries are looking on it, and it's in the periphery, but it's getting there and courts will deal with it and courts will, as opposed to what, I think, Nate was suggesting, courts will contribute to this. Because people are interested in what's legal and illegal, and courts who are faced with these issues will have to find solutions. Otherwise, they'll become illegitimate. You cannot say something and then the country will do something completely different. So courts will have to find solutions and I think courts will contribute – national. International courts – I agree with David; it's a problem. But national courts will have to find solutions and will contribute to this.

MR. FONTE: I guess I'd be more pessimistic and think that what we will have is more restriction on what Western defense and security forces can do.

Q: Does the imminent nuclearization of Iran change this dialogue, and should it?

MR. COHEN: Which dialogue? The courts dialogue?

MS. STERN: In terms of the legality of how to conduct oneself.

MR. LEWIN: Well, it proves that, when you have an asymmetrical system – I mean, you know, you're talking about protecting civilians and all this, and yet Iran is a country which, at least as it has publicly expressed it, is prepared to nuke Israel's civilians – I mean, just simply to go and bomb the country into devastation. What do you do about a totally asymmetrical system?

To me, the Iran situation is a demonstration of the fact that these rules are really not applicable. They only work on those who want to have a rule that limits their own operations, and that's what ends up with Israel. Israel limits itself. It purports to do it with very good legal assistance under the international system. But I think it really would be best off if it applied its own moral principles internally and said look, the rest of the world isn't following it; we will follow it anyway. But we don't expect to live up to some kind of a published standard that people are going to apply against us consistently.

LT. COL. BENJAMIN: In the early 1980s – I forget exactly when it was – Israelis bombed a nuclear reactor in Iraq, which met with, sort of, pretty much wall-to-wall condemnation in the international community.

Although it's interesting to note that if you look in international law textbooks ever since under the chapter on anticipatory self-defense, you'll find that discussed. Whether that's a good precedent – I mean, so that has been done. (Chuckles.) Whether that's a good precedent or a bad one, but it's kind of – look, the whole issue is obviously a very sensitive one. I can tell you, like, generally, also coming from the IDF, mum's the word.

MS. STERN: Being the least qualified person to respond to that question, I think it's going to become increasingly more relevant as nuclear weaponry becomes more transportable and can go into one's briefcase. And I think that people are worried that this is the trend down

the road. And considering that Israel's neighbors are – they have Hezbollah on the north and they have Hamas on the south, so I think it is a very valid question.

Q: Just to sort of follow up on what Lewin was saying, in sort of that line of thought, given the working assumption that there's this sort of international governance ideology in play and the international community, and certainly at the institutional and NGO level and all that, and given that both sides sort of, at the very least an average on the left, perhaps, of where many people in the international community prefer to view Israel, is there a sense that, by the Israelis holding themselves up to a standard that no one else in the entire world maintains, making it as explicit as it can and as laid out with every jot and tittle as possible, with one hand held behind its back, is there a sense within Israel that perhaps this is a cost that is illegitimate for the government or the IDF to ask the citizenry to pay?

Is there a sense that somehow, there is a perversion of morality that Israeli's lives are, perhaps, less valuable than the civilian casualties that might incur by holding themselves merely to the standard that the United States applies to it, as opposed to his higher standard? And is there any sense, politically, that any of this is subject to re-evaluation or change imminently, given the sense of greater danger either because of Iran or because of, perhaps, some sense that Iran is using Hezbollah as a proxy or whatever – the sense that the asymmetry is not just the localized things that people are more familiar with via intifada and so forth, but perhaps even this sort of larger nuclear threat, and since there's this sense among many in the intelligence community that these things all intertwine at a certain level?

MR. COHEN: I'll suggest the following: Almost never – perhaps you can debate one instance, but almost never – has the Israeli parliament, the Knesset, overturned a decision of the Israeli supreme court in national security matters. If this is an indication of popular opinion, then – and it has the authority – it's almost never constitutional opinions. The opinions of the supreme court are almost never – so it's possible to overturn them.

But it has almost never been done. One case, you can discuss, and at the end, it was resolved as if – so if this is an indication of popular opinion, then this is – although, of course, the Knesset has restraints with overturning the decision. There are always voices saying the supreme court – and you can find these research polls saying the supreme court has become less legitimate and its decisions are risking lives. But at the end of the day, all the decisions have been held and they have not been overturned, at least not explicitly.

But I think this reflects something else, and it reflects a position by the – I think it's not only in legal circles, although perhaps we are not the ones to say; I mean, you would have to find some Israeli in the street – but at the end of the day, the limitations are in the self-interest of Israel, meaning at the end of the day, terrorism was not because of the Israeli supreme court. It didn't start because of decisions of the Israeli supreme court; it started for other reasons. And we won. The public opinion in Israel is that, at least in the West Bank – Judea and Samaria – we won.

The problems in Gaza will not be solved by force, meaning if we didn't have the Israeli supreme court and we could have done, then we would have destroyed – I don't think there is an

Israeli opinion saying let's destroy Gaza and send them to the ocean. There is no – at least not majority or mainstream opinion – Israeli public opinion. And at the end, most policies were approved by the Israeli supreme court. The separation barrier was approved; the limitations were approved; the targeted killings were approved.

There are specific – perhaps one policy is the neighbor policy, you know. I don't want to get into this – it was completely bad. But other cases, what the court does is put restraints. And most people agree, I think, but you have to ask the Israeli on the street – that these restraints, they make sense at the end of the day. Perhaps I don't agree with the specific decision, but at the end of the day, they make sense. And perhaps we are used to it because we have the Israeli supreme court in our lives so much in so many issues. It's not only national security; in everything. Everything goes to the supreme court.

So it makes sense to us, you know, that the court decides and puts restraints to the government in this, and we're not so unhappy about it, you know. We'd like our government to be restrained a little and we don't fuss around, you know. The justiciability issue is – the main achievement, I would say, of Barak, was that it took the justiciability issue off the table. You know, there is no issue.

We accept that the court has something to say in almost everything. You could disagree with it on – for many reasons, but it's not any more – it's almost not an issue in Israeli politics. We accept that the court would deal with almost any issue. It would have some standard. We will agree with the final decision yes or no; we might not. But at the end of the day –

MR. LEWIN: I don't know what the latest polls show, but at least from what I have read at different times, reading Israeli papers, too, there is a substantial body of opinion in Israel that thinks that the Barak court, and Barak, went much, much too far in intruding into things which were none of their business, and military judgments is among them.

The fact that Israelis continue to live and have not demanded the impeachment of – if there was such a method – of the supreme court and the fact that the Knesset – I mean, I've been at panels when members of the Knesset themselves have acknowledged that they are cowards – that the only reason that they have not voted to overrule Barak judgments is because it is, A, a cowardly bunch. It's not really representative of Israeli public opinion with this strange electoral system they have in Israel.

You know, it's a bunch of parties and the people who lead those parties, and they have accepted the fact that, well, that's the supreme court; they're not going to go and start overruling individual decisions of the Barak court. But I think there is unhappiness in Israel from what I have read and from what I hear on my visits there, with Aharon Barak and his court, and how far they've gone.

MR. COHEN: There is opposition to specific decisions, I agree. There is a minority.

LT. COL. BENJAMIN: There is a movement like that. It's not necessarily all concerning the military –

MR. LEWIN: No, not at all – not by any means only the military. But the military and the whole justiciability notion, which Amichai says everybody accepts, I don't think everybody accepts it. I think a lot of people are very critical of the fact that Aharon Barak and his court believe they can meddle into everything in Israeli society, including the military.

LT. COL. BENJAMIN: The immediate past minister of justice, for example, he was very much into that. But you know, he's finished his job and now, it's kind of gone off the table.

(Cross talk.)

MR. LEWIN: His successor is viewed as being him in disguise, I mean, from what I'm told.

LT. COL. BENJAMIN: It's kind of simmering, but I wouldn't say it's a major cause of dissatisfaction. It is there, but I would just say – I like to paraphrase the question, it's like can we have our cake and eat it, too, or can we win and still maintain our humanity? And I would say yes. The answer is yes, we can. And you have to remember that one of the objects of terrorism – okay, because the terrorist, from the start, he knows that a military victory of terrorism over the state of Israel – that's not going to happen, okay.

What they are aiming for is a psychological victory of, kind of, tearing the state apart from the inside out. It's kind of breaking things down. Where does that happen? People give a good example, I think, which is Argentina. Argentina – the whole military junta, all the oppressive actions of the regime – took place, which people forget because history is kind of like that, as a response to terrorism. Nobody remembers the terrorism anymore; everybody talks about the suppressive military regime in Argentina.

So the problem is if you overreact and you get the balance wrong, you're actually playing into their hands. I mean, you know, I don't think we got it wrong in Gaza, but even the perception that we got it wrong is actually causing huge strategic problems for Israel today and almost – almost, you can say, we won a military victory in Gaza, but perhaps strategically speaking, we might have caused ourselves a lot of damage, if only in not succeeding in explaining ourselves sufficiently well. So I think, you know, the Goldstone Report is a victory for Hamas. It caused Israel more damage, arguably, than missiles.

MS. STERN: Okay, one final question before we wrap up. Yes, Ginger (ph)?

Q: Let me address the idea of prosecuting terrorists as criminals in an open court: How do you protect the sources and methods of operation and the intelligence agencies in cases like that – (inaudible, off mike) – open information. And also how do you pick the jurors? (Inaudible.)

MR. FONTE: You don't, I'd say.

MR. LEWIN: It's a big mistake. I mean, that's just definitely wrong. I mean, for all those reasons and more –

MS. STERN: All right, on that very sanguine note, I'd like to wrap up. I'd like to thank our wonderful panel of tremendous experts. And if everybody walks away with one thing after this discussion, I want you to realize with which tremendous sensitivity and gravity Israel wrestles with these issues every single day. Thank you very much. (Applause.)

(END)