Legislative Attack

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Abstract
Israel's 22-day attack on Gaza in December 2008–January 2009 exposed a paradox: the attack was not only one of the most violent and destructive of Israel's recent wars on the Palestinians and the one most strongly opposed by its critics, but also the one in which Israeli experts in international humanitarian law (IHL) – the area of the law that regulates the conduct of war – were most closely involved. The article demonstrates how these facts are connected.

Key words
international law ■ lawfare ■ urban destruction ■ violence

> If, therefore, conclusions can be drawn from military violence it is that . . . there is a lawmaking character inherent in it. (Walter Benjamin)

ISRAEL'S 22-DAY attack on Gaza in December 2008–January 2009 exposed a paradox: the attack was not only one of the most violent and destructive of Israel's recent wars on the Palestinians and the one most strongly opposed by its critics, but also the one in which Israeli experts in international humanitarian law (IHL) – the area of the law that regulates the conduct of war – were most closely involved. Could these facts be connected?

The killing of about 1400 people and the destruction or damaging of about 15,000 buildings – almost 15 percent of all buildings in Gaza[1] – led to widespread international accusations that Israel had violated the laws of war. The battle shifted to the legal domain. Critics relied on the language of international law to designate some of the conduct of the Israeli military as war crimes. Testimonies by Israeli soldiers and investigations by international organizations indicated that the extent of civilian death and destruction might have been premeditated and intentional. The UN Secretary-General Ban Ki-moon joined the call for an investigation and potential accountability which led to the appointment of Richard Goldstone, a prosecutor at the International Criminal Court in The Hague, to head a

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commission that would author the *Report of the United Nations Fact Finding Mission on the Gaza Conflict* (Goldstone Report, 2009) alleging that the Israeli army and Hamas committed war crimes.[2]

Israeli officials described the attack as an act of 'self-defence', and claimed that the extensive harm to the civilian population was not, in and of itself, proof of violations of the laws of war. The Israeli government launched an international campaign to argue its legal position: it claimed that Hamas used the citizens of Gaza as human shields and fired indiscriminately at Israeli cities and towns.[3] It tried to convince the international community that this military operation, like the other mechanisms of its siege and occupation, were legal institutions in the sense that they are shaped by international humanitarian law. At the same time, and revealingly, Israeli censors have taken to striking out the names of authors of written reports and to masking the faces in photographs of military personnel involved.

IHL – the body of law to which the term 'war crimes' refers – is made of customs and conventions that aim to reduce the human suffering caused by war and to protect civilians from attack. It is a restrictive legal regime. It aims to contain the tendency of violence to escalate towards the extremes. Within the chaos and horror of war it seeks to designate who can be attacked and how. Its function is to reduce rather than to eradicate suffering. IHL has in recent decades become an important part of the global political culture as exercised by states as a post-Cold War response to conflicts in Africa and the Balkans. As a vocabulary for expressing political opposition to Western states it grew in importance in the face of the legal nihilism of George W. Bush era neo-conservatism. However, rather than simply exploring the illegality of Israel's attack on Gaza, we must ask several other questions: Might a certain reading of the law have contributed to the *proliferation* of violence rather than to its containment? Might it be that the attack was not restrained by an extensive use of IHL – but rather that a certain interpretation and use of this law has enabled, not only the justification of violence, but crucially, the inflicting of greater levels of destruction? Was the chaos, death and destruction perpetrated with the terrible force of the law?

Figure 1 The destruction of destruction: The aftermath of the Gaza attack. Photograph: Kai Wiedenhoefer, 2009

The Landscapes of Lawfare

The new frontiers of military development, which complement developments in the area of surveillance and targeting, are being explored via a combination of legal technologies and complex institutional practices that are now often refereed to as *lawfare* – the use of law as a weapon of war. The former American general and military judge Charles Dunlap, credited with the introduction of this term, argued that lawfare demonstrates a compounded phenomenon (Dunlap, 2001; see also Dunlap, 2007). Lawfare could be used as a form of asymmetric warfare waged via the use of international law. In its first meaning it is concerned with the multiple ways that a weaker, non-state actor could constrain military action against it by claiming that war crimes have been committed. It is in this vein that Israel now claims that it is facing an unprecedented campaign of lawfare directed by a variety of international NGOs that seek not only to constrain its military but also to undermine the very legitimacy of the state of Israel.[4]

On the other hand, lawfare could also be used by the state. The legal scholar David Kennedy claimed that lawfare 'demonstrates an emergent relation between modern war and modern law' (2006: 33), and that at present, and to a great extent, contemporary warfare is conditioned (rather than merely justified) by international law. It is in this way that IHL becomes the ethical vocabulary for marking legitimate power and justifiable death. 'War is a legal institution because the institutions that fight – and those that seek to restrain the fight – are complex bureaucracies, managed by professionals' (Kennedy, 2006: 33) with a shared language in IHL. Contemporary militaries are complex bureaucracies and contemporary wars and occupations are technical practices, governed by innumerable local, national, and international rules and regulations that involve the details of economic and social life, patterns of traffic and sewage and development, as well as the logistics and deployment of force. Rather than being external to war, IHL is thus relevant to its making.

Cases of colonial powers seeking to justify themselves with the rhetoric of restraint and civility are almost a constant of colonial history. Indeed, the early stages of the body of regulation that would later develop into international law was formulated in the 17th and 18th centuries in order to regulate conflicts that arose between colonial powers. It has turned property law into the scaffolding upon which the territorial rights of states were allocated and those of native nations ignored. Similarly, the right to subjugate colonized people was derived from a delegation and aggregation of 'natural rights' of any individual in the 'state of nature'. Written from a Western perspective of expansionism, it has acted to monopolize the means of legitimate violence, with the laws tailored to the tactics of Western warfare, and to delegitimize the subaltern violence of the colonized.[5] This may explain why colonial power developed legal terminologies concerning the proper form of violence in spaces which they otherwise considered as legal exceptions.

We must be alert to another structural paradox that the laws of war still pose: for when they prohibit some things, they authorize others. Thus a line is being drawn between what is allowed and what is forbidden. This line is not a stable one; rather, it is dynamic and elastic, and its path is complex and ever changing. An intense struggle is conducted around and for the purpose of shaping this borderline. In this process the law will be pulled and pushed in different directions, articulated in conflicting ways, by those with different strategic objectives. International organizations, non-governmental organizations (NGOs) and human rights groups seek to push it in one direction and state militaries seek to push it in the opposite one. National courts, the Red Cross and even certain individuals who are highly regarded authorities on IHL can also influence the path of this normative line. Recently Hamas and the Iranian government have entered the squabble by announcing they are starting to conduct their own investigations into and trials concerning war crimes in Gaza (Mackey, 2009). International law thus cannot be thought of as a static body of rules but rather as a diagram shaped by an endless series of diffused and multivalenced border conflicts. The question is not which interpretation is right, but who has the political influence, the cultural authority or the military power to force their interpretation to become authoritative.[6]

The Logic of Destruction

The planning for the Israeli attack of 2008–9 was conditioned by an unprecedented number of international-law experts (Feldman and Blau, 2009a). They were employed mainly in advising military personnel on procedures, targets and operational alternatives. One of the officers in the international law unit of the Israeli military explained in *Ha'aretz* that their goal: 'was not to fetter the army, but to give it the tools to win in a lawful manner' (Feldman and Blau, 2009a).

Israeli military spokespeople also seemed to have been trained in explaining the ongoing attack in the language of international humanitarian

Figure 2 The destruction of destruction: The aftermath of the Gaza attack. Photograph: Kai Wiedenhoefer, 2009

law. They routinely used such legal terms as 'distinction' (between civilians and combatants)[7] and 'proportionality' (between civilian damage and military objectives),[8] thus describing targets as 'legitimate' and civilian deaths as 'unintended' or 'collateral'.

'Proportionality' is a fundamental tenet of IHL, which seeks to establish a proper relation between means and ends. It is a principle that constrains the use of force. While considering the choice of means, the principle of proportionality demands of those applying violence to seek to establish a balance between military ends and their negative effect on civilians. The law does not answer the question 'How much is too much?' It is law in action that rather demands an *in situ* and case-by-case assessment. When enacted as self-imposed form of restraint, the moderating function of proportionality often coincides with military objectives, and coincides with attempts to make the military effort more efficient. Proportionality could become thus an important part of the logic of violence.

Military experts in law describe attempts to limit the death of bystanders as a pragmatic compromise that seeks to establish the supposedly 'correct' relation between a *necessary* attack on targets and the number of civilians killed. The question is of course: what is *necessary*, what ratio is *correct*, who is to decide that and who is to judge that?

It also seemed as if the adjective 'humanitarian' has become the default one in the context of explaining the various aspects of the attack. To the familiar 'humanitarian corridors' (in space) and 'humanitarian ceasefires' (in time) were now added 'humanitarian munitions' (of smaller kill-ratios), and a newly designated 'minister of humanitarian affairs' operating from the 'office for humanitarian co-ordination' in a military base near Tel Aviv. This person – Yitzhak Herzog, sitting as the state's appropriately named 'Minister of Welfare and Social Services, the Diaspora, Society, and the Fight Against Antisemitism' – was in charge both of 'humanitarian coordination' and of 'explaining Israel's reasons and legal position regarding the inflicted damage'.[9]

During the winter attack, the military established a makeshift humanitarian war room in one of the terminals along Gaza's walls. In it, humanitarian agents including UNRWA, ICRC, USAID, various European NGOs, and technical advisers on gas, water and electricity supply, sat together with Israeli officers working out how best to deal with humanitarian needs during the operation. Its commanding officer, Baruch Spiegel, explained that:

> This model of a combined humanitarian center reflected shared interest and understanding. It was a unique, ad hoc project that had to be managed in a very serious way. I believe it was very helpful for the IDF, Israel and the international agencies. We are now checking how to employ it in future at times of emergency and urgency for humanitarian issues. (Bitterlemons International, 2009)

A few months after the attack *Ha'aretz* journalists Yotam Feldman and Uri Blau (2009b) exposed an IDF document titled 'Red Lines', conceived in early 2008 and made operational since in different variations. The document outlines the minimum calories required to sustain Gaza's population of 1.5 million, organized according to gender and age, at a level just above the UN definition of hunger. The calculation of nutrition defines Israel's closure and humanitarian politics during the attack and since. Its findings are translated into numbers of trucks, and tonnage of allowed goods (Sharon-fruit, bananas and apples) and forbidden luxury ones (apricots, plums, avocados and grapes). It also discussed the balance of this calorie intake, divided into cereals, fruits and vegetables, meat, milk and oil. For example, adult males are allocated 2100 daily calories, females 1700, and children variable intakes depending on gender and age. Physicians for Human Rights–Israel claimed that Israeli medics have been directly involved in the formation of dietary policy under the sanctions regime, which they say raises concerns about medical ethics violations. Feldman later conceptualized these red lines in bio-political terms as a new type of control that 'regulates Palestinian life on the biological minimum . . . a system of rule in which Life is taken as the very object of politics' (Feldman, 2010). These figures were by no means uncontested. While UN and other international bodies claim there is a humanitarian crisis in Gaza, the Israeli government claims that the situation has not reached that level. The nutritional minimum has been established separately by various humanitarian and UN agencies who undertake nutrition analysis for crisis management. UNRWA, which is responsible for sustaining over 70 percent of Gaza's population, has claimed that it was unable to provide more than 61 percent of the necessary calories to refugees.

Israel's appeal to international humanitarian law could easily be dismissed as cynical propaganda. The Goldstone Report and most human rights groups have also correctly pointed out that international law was either not properly observed in the sense that it was used too permissively, or that legal directives didn't make it from the military lawyers in their Tel Aviv headquarters to the pilots and the soldiers in the field, resulting in serious war crimes. Indeed charges, based on evidence collected by human rights groups and from soldiers' testimonies, reveal in baroquely nightmarish detail some of the most obvious violations: about 20 claims of Israeli soldiers firing at women and children carrying white flags, instances where Israeli military personnel denied medical aid to wounded Palestinians and others where ambulances were prevented from reaching their destinations. Human Rights Watch uncovered the 'misuse' of air-burst white phosphorus in densely populated areas (HRW, 2009). Some of these crimes could be potentially prosecuted by military courts, but these courts mostly refrained from taking any action.

These claims, however, demonstrate faith in international law in a way that needs to be problematized in the age of lawfare, when to enter this arena of the law and talking in its name might itself be part of the problem.

Figure 3 The destruction of destruction: The aftermath of the Gaza attack. Photograph: Kai Wiedenhoefer, 2009

The Intended Collateral

The logic of Israel's attack on Gaza can be understood as an extension of a doctrine developed in Israel's attack on Lebanon in July–August 2006. It was in Lebanon that Israel first realized that it could not confront Hezbollah militarily, paralyse its operational networks and effectively stop their rocket-fire. The alternative was articulated in what was later referred to as the 'Dahiya Doctrine'. The notoriety of its namesake referred to the near-complete destruction of Dahiya (short for al-Dahiya al-Janubiya or 'the southern suburb' of Beirut), an overwhelmingly Shiite district and the Beirut stronghold of Hezbollah, located next to the international Airport.[10] The Institute for National Security Studies, a think-tank based in Tel Aviv University, articulated Israel's possible response in the context of this doctrine:

> With an outbreak of hostilities, the IDF will need to act immediately, decisively, and with force that is disproportionate to the enemy's actions and the threat it poses. Such a response aims at inflicting damage and meting out punishment to an extent that will demand long and expensive reconstruction processes. (see Siboni, 2008)

According to the doctrine, massive destruction is necessary to create deterrence. In order to have its political effect, the damage must include civilian property. This, those drafting the doctrine believed, may create or extend fissures between civilians and the militants. Reconstruction must be expensive and time-consuming. The doctrine will also precipitate a new urban reality. People will not like to lose their new homes. Reconstruction work, usually funded by international donors and organizations, is thus often incorporated into this logic of destruction. When the destruction is that of refugee camps and reconstruction means the upgrading of the conditions of living in them, making them seem more permanent, or even 'urbanizing' them, it generates another order of political problem.[11]

This order of urban violence seeks to influence political process. Contemporary militaries see urbanized areas, most often the target of attacks, as a complex fields of pre-existing conflicts. It is the very nature of urban areas, with their tendencies to density, congestion, diversities and heterogeneity, to foster these conflicts in which different groups are in permanent conflict with each other. If the city is a site of already existing conflicts, then military violence must be understood as violence introduced into a field already saturated with violence. It is violence that seeks to extend and unleash the potential violence that might be dormant in the city, to open fissures, to cause the violence saturating the social and political relations of the city to erupt. This might explain why the military sometimes refers to aerial bombing as the 'injection of kinetic energy into the fabric of social relations'. Military attacks are often conceived as intervention in, rather than a replacement for, politics. When, in the 1980s, Israel faced rocket-fire from Palestinian fractions in Lebanon, it responded with the shelling of Shiite villages, precipitating inter-communal violence.

In Gaza the logic of this approach – as noted in the Goldstone Report – was to inflict pain on the inhabitants of Gaza in order to force them to exert political pressure on Hamas. According to this logic, the death of civilians is not a regrettable collateral effect of military attempts to hit militant targets, but the very reason these targets are hit. The destruction of cities and camps, the overflowing hospitals and the general fear were part of the rationale of the attack rather than its collateral by-product.[12] Furthermore, in such cases, it is through the 'collateral destruction' that the military campaign becomes politically effective. When, as in the Lebanon attack, bombing targets are pinned on military targets but aim to generate punishing civilian damage around them, we might need to invert the relation between the 'collateral damage' and the 'targets'.

Gadi Eisenkot, former chief of Northern Command, articulated this approach as the negation of the proportionality principle of IHL:

> What happened in the Dahiya quarter of Beirut in 2006 will happen in every village from which Israel is fired on . . . a *disproportionate* strike at the heart of the enemy's weak spot, in which efforts to hurt launch capability are secondary . . . we will wield *disproportionate* power against every village from which shots are fired on Israel, and cause immense damage and destruction . . . This is not a suggestion. This is a plan that has already been authorized. (quoted in Fishman and Ringel-Hoffman, 2008, emphasis added)

After the end of the Gaza attack and before realizing the intensity of the legal investigations his government is about to face, Prime Minister Ehud Olmert explained that this doctrine, and in particular the breach of the proportionality principle, will become Israel's guiding principle in future wars: 'Our response will be *disproportionate*. We won't go back to

the rules that the terrorist organizations tried to dictate' (emphasis added).[13]

Most of the quotes above were reproduced in the Goldstone Report (2009: 331–2) for the purpose of demonstrating that Israeli policy was based on an intentional *disregard* for the law. However, even in its negation ('*disproportionate*'), the use of legal language is apparent. It demonstrates a relation between violence and law that is more complex than mere disregard. The law is indeed part of this military doctrine, and is effective both in its *enforcement* and in its *violation*. The threat of breaking the principle of proportionality, of skewing the arithmetic it implies, of 'changing the equation', could only be effective if that principle is otherwise upheld, if there is an envelope whose piercing could resonate. The law thus marks a normative line against which the breaking of all rules acquires its communicative effectiveness. Reflecting upon the ways in which violence could be understood as forms of communication – the human rights scholar Thomas Keenan (2010) pointed to related pronouncements by Israeli politicians, notably to Israel's Foreign Minister Tzipi Livni's announcement that: 'Israel is a country that when you fire on its citizens it responds *by going wild*' (in 'Israeli Cabinet Divided Over Fresh Gaza Surge', 2009). This quote was also reproduced in the Goldstone Report (2009: 332) for the purpose of demonstrating Israel's deliberate disregard of IHL. Keenan's observation is subtler though: 'losing control', he argues, is the necessary other side of the careful legalistic regulation of war by IHL. Being in control and out of control are not a contradiction but the complementary characteristics of the violence of war (or any other form of violence for that matter). It is a complex bind; this doubling might make violence effective, but it might also become self-destructive. This Janus face of violence testifies to the tendency of the language of violence to escape the control of its wielders and to destroy the logic that seemingly governs it. It becomes self-destructive, that is, destructive to the very message that is supposedly communicated by the violence. Keenan writes:

> 'Going wild' means no longer making sense, no longer participating in the system of discursive exchange, no longer adhering to the rules or the norms that make signs and signals understandable. The discourse no longer seeks to be understood, in effect. Perhaps she is saying: we want to destroy the equation part of the equation, and at the same time continue to treat that destruction as if it were a message. There will be no message, [Livni] effectively says, and you had better get that message. (Keenan, 2010)[14]

The consecutive or simultaneous upholding and violation of international law cannot be understood as a simple contradiction but as the very logic of law's operative power as a discursive sign on the battlefield, and also its illogic. This slippage between legalism and violation could also be noticed in the discursive violence of other militaries. As he prepared to attack

Fallujah, US Major-General James Mattis concluded his address to the inhabitants of the town and its insurgents with these words: 'We will always be humanitarian in all our efforts. We will fight the enemy on our own terms. May God help them when we're done with them' (CNN, 2004, cited in Kennedy, 2006: 136).

The Logic of Restraint

In the above examples, the language of IHL relates to the discursive nature of warfare, and especially to the discursive nature of low-intensity war. This discursivity of military threats can function only if gaps are maintained between the *possible* destruction that an army can inflict in the application of its full destructive capacity and the *actual* destruction that it does inflict. Restraint is what allows for the possibility of further escalation. A degree of restraint is thus part of the logic of almost every conventional military operation: however bad military attacks may appear to be, they could always get worse. At the moment when this gap between the possible and the actual application of force closes, war is no longer a language, and violence is stripped of semiotics and simply aims to make the enemy disappear as a subject.[15] The promoters of the instruments, techniques and rhetoric supporting such 'lesser evils' believe that, by developing and perfecting them, they actually exercise a restraining effect on the government and on the rest of the security forces. The former believe that the latter would otherwise succeed in pushing for the further radicalization of violence, and that targeted assassinations are the more moderate alternative to the devastating capacity for destruction that the military actually possesses and can unleash, whenever the enemy is deemed to have breached some unspoken agreement in the violent discourse of attacks and retaliations.

As brutal as the attack was, communicating its restraint was in fact central to the Israeli attack on Gaza: military spokespersons explained that Israel could 'carpet-bomb' Gaza-city from the air without warning, kill Hamas leaders hiding in al-Shifa hospital, prevent humanitarian convoys entering the Gaza Strip, but that it refrains from doing so because of its ethical values ('The IDF is the most ethical military in the world') and regard for IHL (Gordon, 2009). But the 'lesser-evil' arguments could also be understood according to the Israeli utilitarian logic of warfare, its efficiency, and the way it is mediated locally and internationally. Restraint is also the potential for escalation. Regardless of how lethal Israel's military attacks already are, the violence can always become worse. The total catastrophe, philosopher Adi Ophir claims in a series of articles on the logic of catastrophization, is always held in suspense, at the horizon of every action. 'Catastrophization is a process in which catastrophe is imminent. However, what is imminent has not happened yet . . . [moreover] the catastrophe [is effective because it] is suspended' (Ophir, n.d.).[16]

The Technologies of Warning

Since the Lebanon War of 2006, the Israeli military has become ever more mindful about its exposure to international legal action. Accordingly, legal technologies had to complement development in the technology of targeting. The military's 'international law division' and its operational branch have devised tactics that would allow soldiers to apply what might be called 'technologies of warning'. The legal addendum to Operation Cast Lead's order reads: 'As much as possible and under the circumstances of the matter, the civilian population in a target area is to be warned . . . unless so doing endangers the operation or the forces' (Feldman and Blau, 2009a). In this the legal advisers followed the guidelines of the 1977 First Additional Protocol to the 1949 Geneva Convention, which called for 'effective advance warning . . . of attacks which may affect the civilian population, unless circumstances do not permit'.[17]

It is complicated to communicate a warning during battle. Battlespaces are messy, dangerous and confusing environments. To communicate a 'warning' can be to save a life; but it can also in principle have the advantage of rendering 'legitimate' targets those whose destruction would otherwise have been in contravention of the law. There might be a direct relationship between the proliferation of warnings and the proliferation of destruction.

Israeli warnings during the Gaza attack ranged from general ones, directed at all inhabitants of the Gaza strip, cities or particular neighbourhoods within it, to individual ones. The former were communicated by breaking into Palestinian TV and radio broadcasts, and in leaflets dropped from the air.[18] All mobile phone subscribers in Gaza also received a number of SMS messages from the Israeli military demanding that they renounce Hamas and warning that 'every person with weapons, ammunition or a hidden tunnel in his house should leave it immediately'. The latter were delivered to individuals and homesteads by telephone and megaphone, or by the firing of warning shots.

An innovation in this emerging military field of 'technologies of warning' has been the so-called 'knock on the roof' procedure. According to the military spokesperson, in certain circumstances 'warning shots [were fired] from light weapons that hit the roofs of the designated targets' (Israel Ministry of Foreign Affairs, 2009b). At other times this involved the deployment of 'teaser bombs' without explosives, or of low explosive contents, designed to make an impact on the roof of buildings strong enough to scare the inhabitants into escaping their home before it is destroyed by a live bomb.

The bizarre codename is a twist on the established 'knock on the door' method that was also employed. This involves the military (usually in the person of an Arabic-speaking military phone-operator, and/or by recorded message) telephoning a house to inform the inhabitants that in a few minutes their house will be destroyed. Sometimes telephones that had

been disconnected for months because the bill had not been paid were activated in order to make such calls. The military claims that it made 164,000 such warning calls during the Gaza attack, a number that cannot be verified independently. Nizar Rayan, a Hamas minister, received such a call – but chose not to respond and did not evacuate his home, where he died together with 15 members of his family. In making this choice he sought to undermine the logic that has organized the field of alternatives and supersede its terms.

Many inhabitants of Gaza do not own a telephone or a cellphone; in many cases, a different branch of the military disabled the cellphone network and electricity cuts left batteries uncharged. The military's legal experts recommended the use of leaflets or megaphones to communicate the warning that would allow the expulsion of people from their homes prior to the latter's destruction. Soldiers' testimonies, delivered in protest at military orders, recalled how one such warning was delivered: an armoured personnel carrier crashed through the front door of an eight-storey apartment building allowing scores of soldiers to burst out directly into its interior. Standing in the stairwell soldiers used megaphones to yell out the evacuation warning: 'You have five minutes to leave the house, anyone left in the house will be killed.' After some residents managed to leave the house, soldiers went between the 20-odd flats in this building, throwing grenades before entering each room and killing most of the people left inside (Harel, 2009a).

An officer at the international law division explained the legal function of these warnings:

> The people who go into a house [or stay within it] despite a warning do not have to be taken into account in terms of injury to civilians, because they are voluntary human shields. From the legal point of view, [once warned] I do not have to show consideration for them. In the case of people who return to their home in order to protect it, they are taking part in the fighting. (Feldman and Blau, 2009a)

This military interpretation of international law uses warnings to shift people between legal designations. As one picks up his phone, one's legal designation might change from an 'uninvolved civilian', protected by IHL, to a voluntary 'human shield', or even to a person taking part in hostilities who could be killed as a 'legitimate target'.[19]

The Israeli military's ability to warn people in Gaza about the impending destruction of their homes has also allowed it to regard most buildings in Gaza as legitimate targets. The military ability to warn and perform 'controlled' destruction might have created more devastation than traditional tactics do, in part because the manipulative rhetoric used to promulgate such warnings induces officers and politicians to authorize their frequent and extended use. In this case, the technologies of mass warning contributed to the proliferation of mass destruction.

Crimes without Laws

Besides the laws of war, the attack on Gaza was regulated by two other normative systems: the *military ethical code* and the *religious code* of the military rabbinate.

Previously involved only in setting up kosher kitchens and conducting religious ceremonies and burials, the rabbinate has in recent years come to play an increasing role in influencing the mindset with which soldiers go to battle. Soldier testimonies tell of military rabbis describing the impending attack in biblical terms as 'the fight is between the children of light and the children of darkness' (Boudreaux, 2009). A booklet titled 'Go Fight My Fight', written especially for the Gaza attack, described the invasion as an act of public vengeance and called upon soldiers 'not to be afraid of showing no mercy' (Boudreaux, 2009). The rabbinate even described the invasion as a form of return that would wipe away the shame of the 'expulsion' of religious settlements from Gaza in 2005.

The other normative code that legitimized Israel's overwhelming use of force was the military code of ethics. Seeking to combine legal policy with moral justifications, in 2003 the Israeli military invited in Asa Kasher, a distinguished professor of ethics at Tel Aviv University and recipient of Israel Prize for philosophy, to offer a systematic ethical code for the new tactics in the war on Palestinians. The resulting 'principles of military ethics in fighting terror', developed together with Major-General Amos Yadlin, former head of the IDF's National Defense College, with a team of officers of the IDF's College of National Defense, demonstrated how a combination of the law of war and ethical considerations could be made compatible with the principles of military efficiency (Kasher and Yadlin, 2005a, 2005b). One of the important tenets in this discussion involves the ethics of risk, and in particular the justification for certain new tactics that transferred the risk of death from Israeli soldiers to Palestinian civilians. 'From the standpoint of the state of Israel, the [Palestinian civilian] neighbour [of a 'terrorist'] is much less important. I owe the soldier more. If it's between the soldier and the terrorist's neighbour, the priority is the soldier' (Harel, 2009a). But still, there remains the question of calculating the proper measures. The death ratio is one of the gruesome ways in which the risk economy is calculated and managed. It has its macabre side effects too: in a meeting held in an Israeli military base in 2002, a team of experts on law and military ethics was tasked with considering the laws of war in relation to moral attitudes. It included senior military officers in addition to the commander of the legal division of the Israeli military, Daniel Reisner, and Professor Asa Kasher. Each of these members was asked about the ratio of 'collateral civilian death' he would considered legitimate in the context of the killing of an armed militant. The average number arrived at was 3.14 – very approximately the mathematical constant π, whose value is the ratio of a circle's circumference to its diameter in Euclidean space (Feldman, 2010).

Shifts in the policy of risk management constituted one of the factors that led to the massive increase in civilian casualties in Gaza. During the first *intifada* of 1987–91, when Israel had a direct presence, contact and some responsibility towards the population, the ratio between soldiers and Palestinians killed was 1 to 6. After the recent attack on Gaza that ratio stood at 1 Israeli death for every 100 Palestinians.

The 20,000 soldiers, 200 tanks and 100 bulldozers that invaded Gaza progressed in a slow manner, after hundreds of aerial platforms created what the military called a 'rolling curtain of fire' that levelled large parts of refugee camps, villages, suburbs and city parts before the soldiers and bulldozers even moved in. By killing and destroying the built environment in front of them, the risk of ambush was supposedly reduced. The clear geometrical patterns of the destruction demonstrated a premeditated and drawing-board-planned destruction rather than the result of battle contingencies.

The Elastic Limits of the Law

International humanitarian law is based upon treaty law and customary international law. The former is fundamentally *indeterminate* and subject to constant struggles over interpretation. The latter means that military practice can continue to shape the law. As such the law is pragmatic; its borders are elastic enough to enable diverse interpretations and subsequent expansion. Rather than being simply positioned as a restraint to violence, the law is developed and reshaped through innovation in the field of military violence. Practices applied long enough by different states could eventually become law. To be effective, violence needs to be applied in the grey zone between obvious violations and possible legality. Indeed, the legal tactics sanctioned by military lawyers in Israel's attack on Gaza were in this zone. Operating at the margin of the law is a way to expand it.

Asa Kasher has explained how this might be applied within the context of Israel's war on the Palestinians:

> International law [is] not like tough traffic laws. Much of it is customary law, in regards to which the crucial question is how enlightened states (such as Israel) conduct their wars . . . Customary international law accrues through an historic process. If states are involved in a certain type of military activity against other states, militias, and the like, and if all of them act quite similarly to each other, then there is a chance that it will become customary international law . . . [T]here is a joint international effort to rewrite the Geneva Conventions in order to fit the nature of contemporary war . . . We in Israel have a crucial part to play in the developing of this area of the law because we are at the forefront of the war against terror, and [the tactics we use] are gradually becoming acceptable in Israeli and in international courts of law . . . My hope is that our doctrine, give or take some amendments, will be incorporated into customary international law . . . what we *do* might become the law. (2009)

Military attacks may thus do two simultaneous and seemingly paradoxical things: violate the law and retroactively shift it to exonerate the act. In this cyclical logic, the illegal becomes legal though continuous violation and retroactive rewriting. This is a law in action, legislative violence as seen from the perspective of those who seek to violate it.

This line of legal practice relies on a strand of legal scholarship known as 'critical legal studies', an approach that emerged together with postmodernism and post-structuralism at the end of the 1970s and the beginning of the 1980s to offer an insight into the internal contradictions and *intedeterminacies* of (international) law, and which otherwise attempts to deploy international law in the service of a socially transformative agenda. It is a form of legal scholarship that assumes a turbulent world characterized by 'differentiation and vertiginous changes in social, technological and consequently, in ethical matters' (Mieville, 2005: 56). Critical legal studies scholars like to quote Jacques Derrida to the effect that interpretation of a law will always be unstable, locked in endless 'chains of differential references', maintaining a situation of radical indeterminacy. This 'postmodern' legal interpretation seeks to replace rigid rules with a 'shifting' and 'situated' justice. It is easy to see what modern forms of power would find appealing in this line of thought.

The former legal adviser to the Israeli military, Daniel Reisner,[20] explained that his job was to find 'untapped potential in the interpretation of international law', one that would allow military actions in the grey zone to reshape the law.

> International law develops through its *violation* . . . an act that is forbidden today becomes permissible if executed by enough countries . . . If the same process occurred in private law, the legal speed limit would be 115 kilometres an hour and we would pay an income tax of 4 percent. (Feldman and Blau 2009a)

He gave an example: when Israel's policy of targeted assassinations was given official imprimatur at the end of 2000, most governments and international bodies considered it illegal; but, Reisner explained, 'eight years later [and one attack on the United States in between] it is in the centre of the bounds of legitimacy' (Feldman and Blau, 2009a).

This use of the law tracks closely with that of the Bush administration's misappropriation of the 'Office of Special Counsel' in the Justice Department to figure out a way to torture legally. The clear intent there too was to stretch the law as far as possible without actually winding up breaking it (Yoo, 2009).

The elastic nature of the law and the power of military action to extend it in the age of lawfare combined to make Gaza a laboratory in more than one sense. Gaza is a closed-off zone, with all access controlled by Israel. Within this enclosed zone and on its 1.5 million inhabitants all sorts of new control and surveillance technologies, munitions and warfare techniques are tried out. Tested particularly is the ability to control – without

the risk entailed by physical presence – large populations; these technologies are then marketed internationally. Second, certain limits are tested and shifted: the limits of the legal, the limits of the ethical, the limits of the tolerable, which, sure enough, become the limits of what can be done to people in the name of 'war on terror'. When violence seeks to transform the law, in effect to legislate, the consequence will be felt by Palestinians as well as other oppressed peoples everywhere.

Israel's domination of the Palestinians operates by making elastic all borders – physical, organizational and legal. The elastic border has become the contemporary pathology of Israel's regime of control. Once it made the borders elastic, they could be shifted endlessly. This elasticity renders indistinguishable rigid categories of law and crime, norm and transgression.

Should we argue with military lawyers about the law, enter into the economic accountancy of death and destruction, the 'correct' ratio of proportionality? Should our notion of crime necessarily derive from the existing law?

The attack on Gaza must be opposed not because its tactics were 'illegal', but because it serves the logic of Israeli control and dispossession of the Palestinians; because it was an act of aggression within the context of colonization, occupation and siege.[21]

Many activists believe that IHL offers a promise for a better and more just world, but nothing of this promise exists within this law. To oppose war in the name of law only is to misunderstand the complex relationship between war and law. The law that is legislated by violence is not external to it. The attack on Gaza was not moderated and restrained by awareness of IHL, rather the attackers managed to unlock the chaotic power of destruction that lies dormant within it.

Notes

I would like to thank Emilio Distretti, Eitan Diamond and Thomas Keenan for their useful comments.

1. The UN Office for the Coordination of Humanitarian Affairs estimated that 3914 buildings were destroyed, 21,000 housing units were destroyed or badly damaged and about 51,000 people were displaced (OCHA, 2009: 1). Another report by the independent committee appointed by the Arab League concluded that:

> over 3000 homes were destroyed and over 11,000 damaged; 215 factories and 700 private businesses were seriously damaged or destroyed; 15 hospitals and 43 primary health care centres were destroyed or damaged; 28 government buildings and 60 police stations were destroyed or damaged; 30 mosques were destroyed and 28 damaged; 10 schools were destroyed and 168 damaged; three universities were destroyed and 14 damaged; and 53 United Nations properties were damaged. ('No Safe Place', 2009: 3)

2. The Goldstone fact-finding committee was accepted and aided by the Palestinian 'governments' in Gaza and in Ramallah, but was refused by the Israeli government. It was not allowed entry into Israel or access to official Israeli sources. On 15 September 2009 it published its report accusing both Israel and the Hamas government of Gaza of committing war crimes and possibly 'crimes against humanity' (Goldstone Report, 2009).

3. Israeli lawyers cited Article 51 of the UN Charter, which claims that a state 'has the inherent duty to exercise its right to self-defence'.

4. For similar readings of lawfare, see non-profit organizations set up to confront this phenomenon: http://www.thelawfareproject.org/ and http://www.ngo-monitor.org/article/ngo_lawfare (both consulted July 2010).

5. If this was its aim, at least in the case of Gaza this has not been entirely successful. The attack has ended by increasing legitimacy of the rule of Hamas.

6. Beyond an issue of politics and military might, it is a cultural struggle. The ability to influence the international community to adopt a certain norm depends on the concerned agent's standing within the community. The International Committee of the Red Cross (ICRC), or even certain individuals who are highly regarded authorities on IHL, can influence the evolution of IHL norms far more than many states could. Even within the state, the elements capable of exercising most influence on the evolution of IHL are not usually those with the most political and military power, but the courts. Thus, in order to effect a change in IHL, the Israeli army and executive usually first have to persuade the Israeli Supreme Court to accept their position. The Court, which has more influence in the sphere of international jurisprudence, can however quite easily be pressured by the authorities to accept their position because it is wary of losing Israeli public support in its power struggle with those who seek to undermine its authority from within.

7. Article 3 of the Fourth Geneva Convention states:

> Persons taking no active part in the hostilities . . . shall in all circumstances be treated humanely . . . To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: violence to life and person . . . and outrages upon personal dignity.

8. The Principle of Proportionality, embodied in the 1977 Protocols to the Fourth Geneva Convention, considers it a war crime to intentionally attack a military objective in the knowledge that the incidental civilian injuries would be clearly excessive in relation to the anticipated military advantage. The principles of 'proportionate' and 'disproportionate' force were born with The Hague Conventions of 1899 and 1907, but were reinforced in the Fourth Geneva Convention of 1949 and additional accords. The idea is that civilians should not be targeted, but if there is a military necessity in targeting combatants that are located near civilians there needs to be a proportional relation between military advantage and civilian damage. Any attack on a 'military objective' is considered necessary. The question, when applying the principle of proportionality, is whether or not the civilian losses (to property, life and limb) that

can be expected to be caused as an unintended consequence of the attack are excessive in relation to 'the concrete and direct military advantage anticipated'. The legal terms in this equation are difficult to apply in practice. The most obvious example is the term 'excessive'. But the other terms also pose problems. The IDF has argued, for instance, that the term 'military advantage' includes force protection (implying that you can cause incidental losses to enemy civilians in order to protect your own forces).

9. A daily average of 100 truckloads – 20,000 tons of food and medical supplies, industrial fuel and gas – were brought in during the attack. An IDF spokesperson released a video on YouTube to demonstrate this effort (see: http://www.youtube.com/watch?v=eAfbLZgnIpI).

10. This is based upon detailed research of this doctrine published by PCATI (Public Committee Against Torture in Israel; PCATI, 2009).

11. On the function of military destruction in drawing in monies and the urbanization of refugee camps see Weizman (2007: ch. 8).

12. One of Israel's strongest defenders in the US, the *New York Times* journalist Thomas Friedman, was parroting Israeli spokespeople when he argued that it is Israel's right to inflict 'pain on civilians' and 'substantial property damage and collateral casualties' (Friedman, 2009).

13. See Israel Channel 2 News, 1 February 2009 (in Hebrew), URL (consulted July 2010): http://www.mako.co.il/news-military/security/Article-34a14179le03f11004.htm

14. Keenan adds (personal communication, 2010):

> What I mean is, when she says 'we want to change the equation', she in fact seems to mean, we don't want any equation at all anymore. It's not a matter of x=y, or if x then y, where there's a predictable relation between x (what the Pal[estinian]s do) and y (what the IDF does), any longer. Now there's no equation, no prediction, no proportion, no rule governing the ratio of x to y. That would be the meaning of disproportion, wildness, recklessness: the destruction of the equation (any equation) itself.

15. Beyond their meaning in the total mobilization of society, 'total wars' – marking the other limit of the conceptual spectrum – are wars that no longer allow any communication to take place. Colonial wars have often been total wars, because the 'natives' were not perceived to share the same 'humanity' as the colonizers, and thus could not be considered a party capable of rational behaviour and discourse. Terror is 'total', as well, because, most often, it places no legal or moral limits on violence and makes no distinction between innocence and guilt. Moreover, it acts to attack the very possibility of discourse. Degrees and distinctions are precisely what make war less than total.

16. In *The Order of Evils: Toward an Ontology of Morals*, Ophir writes: 'Evils can only be justified by appealing to more grave hypothetical evils that could

have been caused if the prevention or disengagement actions would have taken place' (2005: 449, section 7.100). And, further:

> The justification displaces the discussion from one order of exchange, in which the one harmed tries to create a link between damage or suffering and compensation, to another order of exchange, in which the defendant tries to create a link between evils that occurred to possible evils that might have occurred. (2005: 152, section 3.432)

17. See: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Chapter IV Precautionary measures (c), URL (consulted July 2010): http://www.icrc.org/IHL.nsf/FULL/470?OpenDocument

18. The military claims that, in total, some 165,000 telephone calls were made and some 2,500,000 leaflets were dropped throughout the military operations. It also claimed that there were two main types of telephone calls. One was a direct and specific warning, and the other was a more generic, recorded message (Israel Ministry of Foreign Affairs, 2009a).

19. Technologies of warning intervene in the legal categories of both 'distinction' and 'proportionality'; with regard to the former they transfer people from illegitimate to legitimate targets by forcing them into a legal category that is not protected and with regard to the latter they imply a different calculation. Human shields are not designated as combatants but are not counted as uninvolved civilians in the calculations of proportionality which must assess damage against the life lost.

20. Reisner is now Senior Research Fellow in the Israel Democracy Institute, focusing on 'democratic responses to terrorism'. He was a senior member of Israel's peace delegations with both Jordan and the Palestinians. He teaches in three of Israel's leading academic institutions.

21. International and human rights organizations routinely avoid discussing this aspect of the law, busying themselves solely with the details. For example, this is how Human Rights Watch explains its position:

> Human Rights Watch maintains a position of neutrality on these issues of *jus ad bellum* (law concerning acceptable justifications to use armed force), because we believe it is the best way to promote our primary goal of encouraging all sides in armed conflicts to respect international humanitarian law, or *jus in bello* (law concerning acceptable conduct in war).

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