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## VIOLENCE'S LAW: ISRAEL'S CAMPAIGN TO TRANSFORM INTERNATIONAL LEGAL NORMS

GEORGE E. BISHARAT

*Commonly law is seen as an alternative to violence, although it relies on violence or its threat for enforcement. Through a study of Israel's campaign to transform international humanitarian law (IHL) by systematically violating it, this essay considers the possibility that violence precedes and even creates law. Israel has a long history of ad hoc "legal entrepreneurialism," but its current effort, launched during the second intifada, is institutionalized, persistent, and internally coherent. The essay reviews the specific legal innovations Israel has sought to establish, all of which expand the scope of "legitimate" violence and its targets, contrary to IHL's fundamental purposes of limiting violence and protecting non-combatants from it.*

WHAT IS THE RELATIONSHIP between law and violence? Students of the role of law in society have pondered this question for decades. Prominent Yale legal scholar Robert Cover began a widely-read law review article a number of years ago with the striking introduction: "Legal interpretation takes place in a field of pain and death. . . . Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life." The article, entitled "Violence and the Word," spurred renewed inquiry into the relationship between law, language, and violence, and underscored law's ultimate, though not always visible, reliance on force.<sup>1</sup> A later volume, inspired by Cover, was entitled "Law's Violence," and expanded on this theme, considering the question of how violence done by and in the name of the law differs from illegal or extralegal violence—or, indeed, if they differ at all.<sup>2</sup>

The relationship between law and violence has also figured prominently in anthropological definitions of law. According to E. Adamson Hoebel, an early and influential legal anthropologist, law was defined by the threat or

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actual application of violence: "A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting."<sup>3</sup> Violence, in other words, or the implicit threat of it, was intrinsic to the very existence of law, and helped mark off the legal domain from other normative spheres of social existence.<sup>4</sup>

What these conceptions of law seem to share is a sense that law precedes violence, and that violence is only the ultimate or end point of law. For Cover, the judge interprets the law, and the subject of that legal act then suffers the violent consequence, while for Hoebel the social norm exists and then is enforced, if necessary, by the individual or social group charged with the capacity to apply physical force. There is no real sense in either case of a role for violence in the generation of law, or in other words, of the possibility of violence's legislative capacities.

This article, in contrast, emphasizes a different relationship between law and violence, in which violence not only is law's ultimate or end point, but also its beginning. This relationship is examined in the context of Israel's attempted transformations of international humanitarian law (IHL; the branch of public international law that governs the behavior of parties at war), beginning with the outbreak of the second Palestinian intifada in 2000, and including its attacks on Lebanon in 2006 and Gaza in 2008–9 and 2012. While much of the international community viewed Israel's actions in each of these circumstances as essentially lawless, in fact, Israeli military lawyers and policy makers very actively participated in helping to define and identify targets and to craft legal doctrines to justify the actions of Israeli soldiers. Hence, these outbursts of violence have involved significant illegality, while, paradoxically, remaining intensively legal at the same time.<sup>5</sup>

The fundamental purposes of IHL as articulated by the International Committee of the Red Cross are to "protect people who are not or are no longer taking part in the hostilities, and to restrict the methods and means of warfare employed."<sup>6</sup> Israel's actions thus threaten to turn international humanitarian law on its head, allowing law to extend the scope of violence and suffering to previously protected areas and persons.<sup>7</sup> One must hasten to add, however, that Israel is by no means alone in the quest to weaponize law. Rather, it is one of a number of nations that pushes, and at times exceeds, the boundaries of international law to enable its military greater freedom and efficacy in combating its enemies—a point to which we shall return later.<sup>8</sup>

While the principal focus of this article is on Israel's post-2000 campaign to transform international law, this period was not the first in which Israel employed illegal force in seemingly novel ways. We will briefly survey some of these previous examples to highlight both their similarities and differences from Israel's more contemporary effort to legislate through violence.

### ISRAEL'S HISTORY OF LEGAL ENTREPRENEURIALISM

Israel is very much of the age, if not the direct product, of contemporary international law.<sup>9</sup> While the Zionist movement emerged in Europe in the late nineteenth century, it was the Nazi holocaust that catapulted it to prominence, and that established the urgency of its goals for Western audiences. Many of the foundations of contemporary international law concerning war—from the definition of the crime of genocide, to the legal principles underpinning the Nuremberg Trials, to the United Nations Charter's limitation on the use of force to circumstances of self-defense—were established in direct response to the events of World War II. Moreover, Israel's legal charter, arguably at least, was UN General Assembly Resolution 181, passed in 1947 recommending the partition of Palestine into Jewish and Arab states, cited as such in Israel's 1948 Declaration of Independence.<sup>10</sup> Israel was founded in the same year that the Universal Declaration of Human Rights was passed.

It would not be unreasonable to expect that a state founded in such a milieu would be extraordinarily conscious of the value and impact of international law. This expectation is bolstered by the broad perception that Israel, as a democratic nation, observes the rule of the law in its domestic practices as well.<sup>11</sup> It is further notable that Israel has often subjected its military governments in the West Bank and Gaza Strip to oversight from the Israeli Supreme Court, which has based many of its decisions on its understandings of international law.<sup>12</sup>

Nonetheless, Israel has a long history of what might be called "legal entrepreneurialism," that is, taking actions that are not accepted under the prevailing norms of international law, but with the hope that they will, ultimately, gain approval.<sup>13</sup> This is possible because of the very structure of international law, which is constituted not only by treaty or contractual law but also by customary international law—that is, simply what states actually do as a matter of practice and that other states accept as lawful.<sup>14</sup> In other words, the determination of an act's legal status turns on the responses of other states, which are not always immediate, explicit, or uniform. Hence, it is sometimes unclear whether a particular state action that deviates from settled international law is, indeed, simply illegal, or whether it is, instead, the leading edge of a new international legal norm. All of this, of course, is in the context of an international legal system that, at least as compared to domestic legal systems, lacks consistent enforcement mechanisms that might otherwise bring about decisive interpretations of what is legal and what is not.

Several early examples of Israel's international legal entrepreneurialism include the 1960 abduction from Argentina and trial of Adolph Eichmann, the attempt after 1967 to characterize the West Bank and the Gaza Strip as "administered" rather than "occupied territories," and the 1981 attack on the Osirak nuclear facility in Iraq.

Whatever one makes of the justice of Eichmann's treatment, in legal terms it involved striking departures from the international legal norms of the times concerning jurisdiction (the rules concerning the propriety of a court in hearing a particular case). As a general matter, courts decline to hear cases that have not arisen within the territory in which they sit, partly for practical reasons and partly to respect the sovereignty of other states and the greater competence of other forums to accurately determine facts and weigh equities. Eichmann, in contrast, was tried by the court of a state that did not exist at the time of his alleged crimes, and which had no territorial relationship to those alleged offenses. As Hannah Arendt famously pointed out, the abduction and trial of Eichmann flew in the face of then-settled principles of international jurisdiction.<sup>15</sup> In retrospect, Israel was one of the first states to exercise what later came to be called "universal jurisdiction," whereby a court will hear cases notwithstanding the absence of standard criteria for jurisdiction, providing that they are sufficiently grave.<sup>16</sup>

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Israel occupied the West Bank and Gaza Strip in 1967 (along with the Golan Heights and the Sinai Peninsula) and soon after began to establish Israeli civilian settlements or colonies in those areas. Israel was aware that the international law of belligerent occupation, in particular the Fourth Geneva Convention of 1949, barred transfers of its civilians into the occupied Palestinian territories.<sup>17</sup> It therefore began to refer to the territories as "administered" rather than occupied on the theory that, as sovereignty over the West Bank and Gaza Strip was unsettled (both had been allocated under UN General Assembly Resolution 181 to the Arab state and had been occupied by Jordan and Egypt respectively), no other sovereign state held reversionary rights that needed to be protected from Israeli actions.<sup>18</sup> Yet, there is no such concept in international law as "administered territories." This was entirely an Israeli concoction, and the characterization of the status of the territories as "administered" has never been explicitly accepted as such outside of Israel itself. On the contrary, the international community has repeatedly affirmed that the West Bank and Gaza Strip are "occupied territories" within the meaning of international law, perhaps most notably and authoritatively in the International Court of Justice's advisory opinion on the illegality of Israel's "separation wall."<sup>19</sup> Nonetheless, the "missing reversioner" thesis, as it came to be known, served as a legal fig leaf for Israeli colonization of the West Bank. Eventually, Israeli settlements received the blessing of at least one influential nation, the United States, in President George W. Bush's April 2004 letter to the Israeli government, acknowledging that the major blocs of Israeli colonies in the West Bank would remain under Israeli sovereignty in any peace agreement.<sup>20</sup>

Israel's attack on the Iraqi nuclear facility in June 1981 similarly defied then-accepted legal norms, in particular the UN Charter's limitation on the

use of force in self-defense. Since the 1837–38 *Caroline* case, the principle has been established that resort to armed self-defense is valid only when a “necessity of self-defense is instant, overwhelming and leaving no choice of means, and no moment of deliberation.”<sup>21</sup> It was clear that the Iraqi nuclear facility, which had not even neared completion, constituted no such imminent threat to Israel. The attack, therefore, was the first explicit exercise in the post-war period of what might be termed a “preventive attack,” that is, one intended to forestall a future, merely emergent threat.<sup>22</sup> At the time, the Israeli action was unanimously condemned by the UN Security Council as a violation of the UN Charter.<sup>23</sup> Arguably, at least, its legal status has been retroactively altered by the enunciation of the “Bush Doctrine” and the U.S.-led coalition 2003 invasion of Iraq (although many nations clearly continue to oppose the legality of “preventive war”).<sup>24</sup> It is also striking that in the current discourse concerning the possibility of either a U.S. or Israeli attack on Iranian nuclear facilities, there is virtually no reference to international legality, suggesting that at least in non-expert opinion in the West the legitimacy of preventive war has become widely accepted.

What accounts for the willingness of Israeli political and military elites to push against, and often transgress, the limits of international law? A few possible factors include a tradition of illegality stemming from the British Mandate period, when the Zionist movement went underground and resorted to terrorist tactics against both Palestinian residents and British authorities,<sup>25</sup> the continuing prominence of “security concerns” in Israeli politics and strategic thinking,<sup>26</sup> and finally—and perhaps most importantly—the recurrent experience of impunity, that is, of an absence of adverse consequences for violations of international law.

What may distinguish Israel is neither its aspirations to escape the bounds of international law (something many states share) nor its occasional transgressions against global legal norms (again, hardly unique) but the fact that it has rarely been held to account for them, beyond condemnation and criticism. Contrast, for example, the experience of Iraq in its illegal 1990 occupation of Kuwait with Israel’s occupation of Arab territories, now over forty-five years old. In the first case, the international community acted with alacrity; the UN Security Council immediately condemned the Iraqi action, and within days imposed economic sanctions against Iraq. When Iraq failed to withdraw unconditionally from Kuwait, a coalition of thirty-four nations was formed that forcefully ended Iraq’s illegal occupation in less than six months. The difference in the case of Israel’s occupation of the Golan Heights, the West Bank (including East Jerusalem), and the Gaza Strip could not be starker. There, the position of Western states, in particular that of the United States, has ensured that no effective action can be taken to end the Israeli occupations.

Despite Israel’s history of legal entrepreneurialism, these earlier examples all seem to have been of an ad hoc character. Driven by specific policy

imperatives, Israeli political/military/legal elites sought legal justifications, usually after the fact, for actions taken by their government that were unlawful under prevailing international legal norms. But there was nothing linking them, and neither were the various legal arguments made part of a conscious or persistent campaign to transform international law. Nor did the international community typically respond with sympathy or understanding. Perhaps Israeli military and political elites saw the circumstances giving rise to the violations as relatively unique, thus diminishing the incentive to craft legal justifications for potential future similar acts.

### ISRAEL'S NEW CAMPAIGN AND THE "WAR ON TERROR"

Israel's current campaign to transform international law is distinct from its earlier history of ad hoc legal entrepreneurialism in several respects: it is conscious and deliberate, as indicated by public statements of Israeli military and political leaders; it is coherent, in the sense that its proposed doctrinal innovations are interconnected, and would consistently result in the expansion of the permissible scope of violence for military powers; it is institutionalized, with specialized personnel devoted to carrying it out; and it has been sustained now for more than a decade. If one accepts that IHL's purpose is minimizing suffering during war, particularly to civilians, this campaign is far more threatening a development to the integrity of international law than Israel's previous "one-off" acts of illegality. Indeed, Israel has achieved some headway in gaining acceptability for some of its purported legal innovations.

The campaign began with the outbreak of the al-Aqsa intifada in 2000. Whereas in the first intifada the Israeli military had faced Palestinian demonstrators armed with little more than rocks and the occasional Molotov cocktail, in the al-Aqsa intifada it faced, for the first time, confrontations with Palestinians at least some of whom bore firearms and wore uniforms. The militarization of the al-Aqsa intifada thus provided Israel with the cover to flex its overwhelming military advantage over the Palestinians, including the use of F-16s, attack helicopters, and other technologies typically employed only against opposing armies.

Israeli military leaders, accustomed to the Israeli Supreme Court's oversight of their conduct in the occupied Palestinian territories, were aware that the new tactics would be subject to challenge, and thus sought legal advice. They turned to the International Law Division (ILD) of the Military Judge Advocate General, a unit previously staffed by a small number of lawyers that has grown both in numbers and influence over the last decade. The unit now comprises some twenty-five lawyers, backed by an additional thirty reservists, and has played a key role in Israel's campaign to re-write international law.<sup>27</sup> The unit's members not only provide "legal operational advice" to the Israeli military, but also aid in the defense of

Israeli military actions before the Israeli Supreme Court. Through interactions with foreign military lawyers at conferences and elsewhere, ILD lawyers have helped to export Israeli legal concepts abroad. As one observer noted: "A feedback loop might thus be created. Policies that are successfully exported enjoy greater immunity from external criticism, since the army can now claim that it simply acted in accordance with custom followed elsewhere."<sup>28</sup>

The condition that has made this campaign possible, moreover, has been the so-called "War on Terror" declared by the United States, and adhered to by some other Western states, following the attacks of 11 September 2001, on the World Trade Center and the Pentagon, and the later U.S.-led invasions of Iraq and Afghanistan. As former ILD head Daniel Reisner commented on the impact of 9/11 on the U.S. attitude: "When we started to define the confrontation with the Palestinians as an armed confrontation, it was a dramatic switch. . . . It took four months and four planes to change the opinion of the United States, and had it not been for those four planes I am not sure we would have been able to develop the thesis of the war against terrorism on the present scale."<sup>29</sup>

Israel hastened to present itself to the United States and to other Western countries as the model for how a democracy responds—militarily, politically, legally, and otherwise—to terrorism, and met much greater sympathy for its claims that special adaptations to international law were necessary to address what became known as "asymmetric warfare." The latter term, although not new in itself, has increasingly been used to describe violent confrontations between states and "terrorist organizations." Terrorists, the argument goes, systematically defy settled rules of international law, for example, by hiding themselves within civilian populations. Requiring states to one-sidedly adhere to traditional laws of war while the terrorists flout them is therefore unreasonable.<sup>30</sup> In the words of Major General Amos Yadlin, co-author with Professor Asa Kasher of Israel's 2003 military code of ethics:

As we sought to try and formulate how to fight terror, we understood that we were in a different kind of war, where the laws and ethics of conventional war did not apply. It involves not only the asymmetry of tanks hunting against guerrilla fighters or airplanes chasing terrorists. The main asymmetry is in the values of the two societies involved in the conflict—in the rules they obey. This is not a war between the U.S. and Russia or Germany and France, where the international rule of law is accepted by both sides. In this case, we are fighting with a people that have totally different values and rules of engagement.<sup>31</sup>

Yet, the War on Terror never bestowed Israel with a completely blank check. On the contrary, emerging international norms and institutions promoting accountability for international crimes—in particular the



International Criminal Court (ICC), which began operation in 2002—have consistently haunted Israeli officials. Describing the ICC, former ILD head Reisner commented: “The commanders hear about this and say, ‘I might find myself in that court; where is my lawyer?’ So it becomes natural for the military to put lawyers in places where they have never been before.”<sup>32</sup> Hence, while the War on Terror offered opportunities to modify international law to Israel’s advantage, a sense of vulnerability to potential prosecutions also forced Israeli generals and other leaders to seek the cover of law for their actions. If current law did not authorize a particular action, it was no longer feasible simply to act—rather, some legal justification had to be crafted.

Let us now turn to the specific legal innovations that Israel has consistently pursued over better than a decade.

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***While the War on Terror gave Israel opportunities to modify international law to its advantage, the vulnerability of public figures to prosecution abroad also required that legal justification be crafted for certain actions.***

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#### LAW OF OCCUPATION OR OF “ARMED CONFLICT SHORT OF WAR”?

Since 2001, Israeli military lawyers have steadily pushed to reclassify military operations in the West Bank and Gaza Strip from the law-enforcement model mandated by the law of occupation to one of “armed conflict short of war.” At the time, this phrase had no established meaning in international law.<sup>33</sup> According to Amnesty International: “Under normal circumstances, the occupying power is bound by law enforcement standards derived from human rights law when maintaining order in occupied territory. For example, these would require the occupying power to arrest, rather than kill, members of armed groups suspected of carrying out attacks, and to use the minimum amount of force necessary in countering any security threat.”<sup>34</sup>

While in armed conflict a military is still constrained by the laws of war—including the duty of distinction between combatants and civilians, and the duty to avoid attacks causing disproportionate harm to civilian persons or objects—the standard permits far greater uses of force. Israel initially began pressing this shift from the occupation/law enforcement model to an “armed conflict short of war” model to justify its assassinations of Palestinians in the occupied territories that clearly violated settled international law. Israel had practiced what were called “targeted killings” in the occupied Palestinian territories since the 1970s (always denying that it did so), but in the second intifada from late 2000 stepped up their frequency, using spectacular means, such as air strikes, that rendered denial implausible if not futile.<sup>35</sup>

The Mitchell Committee was convened by former U.S. president Bill Clinton in 2001 to investigate the causes of the second intifada and to prescribe ways to end it. Israeli lawyers went before the Mitchell Committee in April

2001 and pleaded their case for the “armed conflict short of war,” citing Palestinian uses of live fire and the scale and intensity of alleged attacks on Israeli soldiers and civilians. The committee’s report, issued before 9/11, criticized the blanket application of the model to the Palestinian uprising Israel was then facing, opining that it “does not adequately describe the variety of incidents reported since late September 2000.”<sup>36</sup> But it did not repudiate the concept altogether, and thus tacitly opened the door for its broader application. By the time of the Gaza invasion in 2008–9, neutral observers—including Amnesty International—appeared to have tacitly accepted Israel’s framing of the conflict in Gaza as an “armed conflict,” as their criticism of Israel’s actions in terms of the duties of distinction and the principle of proportionality betrayed. According to Amnesty International, “if a situation arises in which fighting inside the occupied territory reaches the requisite scale and intensity, then international humanitarian law rules governing humane conduct in warfare apply.”<sup>37</sup> Thus, even while Israel suffered strong criticism for its actions during Operation Cast Lead, in a broader sense its strategy of recasting the nature of the conflict appeared to have prevailed.

It should be clear that Israel has attempted to transform international law not simply by words, but also by deeds, consciously violating then current norms of international law, in the hope of winning later international acceptance. As Reisner stated in 2009: “International law progresses through violations. We invented the targeted assassination thesis and we had to push it. At first there were protrusions that made it hard to insert easily into the legal moulds. Eight years later it is in the center of the bounds of legitimacy.”<sup>38</sup>

#### REWRITING THE “DUTY OF DISTINCTION”

In the 2008–9 Gaza fighting, Israel again tried to transform international law through violations. For example, its military lawyers authorized the bombing of a police cadet graduation ceremony on 27 December 2008, instantly killing forty-eight young Palestinian men. This occurred as part of the first wave of surprise bombings, conducted at midday. Thus, there was no possibility these police officers could have engaged yet in any fighting. Rather, it was purely their status as employees of a government run by Hamas that marked them for death. All in all, Israeli troops killed some 248 Palestinian civilian policemen who were not engaged in fighting. Under current international law, such deliberate killings of civilian police are considered war crimes.<sup>39</sup>

In fact, Israel treated all employees of the Hamas-led government in the Gaza Strip as “terrorists,” and thus combatants. Secretaries, court clerks, housing officials, judges—all were, in Israeli eyes, legitimate targets for liquidation. As Israeli military spokesman Captain Benjamin Rutland told the BBC: “Our definition is that anyone who is involved with terrorism

within Hamas is a valid target. This ranges from the strictly military institutions and includes the political institutions that provide the logistical funding and human resources for the terrorist arm."<sup>40</sup>

In Israel's attack on Gaza in late 2012, similar reasoning was extended to defend Israeli strikes on journalists working for the Hamas-operated al-Aqsa television. In a letter to the New York Times, Israeli military spokesperson Lieutenant Colonel Avital Liebovitch claimed:

However, when terrorist organizations exploit reporters, either by posing as them or by hiding behind them, they are the immediate threat to freedom of the press. Such terrorists, who hold cameras and notebooks in their hands, are no different from their colleagues who fire rockets aimed at Israeli cities and cannot enjoy the rights and protection afforded to legitimate journalists.<sup>41</sup>

Yet, Hamas is considered a "terrorist organization" by only a handful of countries in the world, and their designations of it as such have purely domestic meaning. In short, neither Israel nor other individual countries can unilaterally brand Hamas as a "terrorist organization" and expect their determinations to be binding on the entire international community.<sup>42</sup> Indeed, there is no uniform definition of "terrorism" or a "terrorist organization" in international law, and many nations do not regard violent resistance to foreign military occupation as "terrorism."<sup>43</sup>

#### WARNINGS AND "VOLUNTARY HUMAN SHIELDS"

In Operation Cast Lead, Israeli jurists began instructing military commanders that any Palestinian who failed to evacuate a building or area after warnings of an impending bombardment was a "voluntary human shield" and thus a participant in combat, subject to lawful attack. As one Israeli military lawyer stated in 2009, "People who go into a house despite a warning do not have to be taken into account in terms of injury to civilians. . . . From the legal point of view, I do not have to show consideration for them."<sup>44</sup> Warnings were generally issued by one of three methods: by telephone or text message; by leaflets dropped from aircraft over Palestinian neighborhoods; or by artillery, in a procedure dubbed "knocking on the roof." Using this technique, Israeli gunners would fire first at a building's corner, then, a few minutes later, to strike more structurally vulnerable points. In 2012, "knocking on the roof" was further refined by the use of low-explosive "teaser" bombs or missiles that initially inflicted minimal damage, and were ostensibly designed to induce flight by Palestinian occupants of targeted structures.<sup>45</sup>

In themselves, warnings to civilians to vacate a targeted structure or area do not violate IHL and could, if timely and effective, aid a military in respecting the obligation of distinction between combatants and

non-combatants. In practice, however, particularly in the limited space of the Gaza Strip, from which exit is barred by Israel itself, the voluntary human shield policy functioned to transform warned areas into virtual free-fire zones for Israeli troops. As one Israeli soldier commented with respect to Israel's ground invasion of the Gaza Strip in 2008–9: "Any movement must entail gunfire. No one's supposed to be there. . . . If you see any signs of movement at all you shoot. This is essentially the rules of engagement."<sup>46</sup>

### DELIBERATE DISPROPORTIONALITY: THE "DAHIYA DOCTRINE"

In 2008–9 and to a lesser but still measurable extent in 2012, Israel deliberately used disproportionate force against the civilian population of Gaza, consistent with what was named the "Dahiya Doctrine," after the quarter of Beirut that housed many Hizballah offices and enterprises and was flattened by Israel in the 2006 war on Lebanon. As the head of Israel's Northern Command, General Gadi Eisenkott said in an interview published before the Gaza invasion: "What happened in the Dahiya quarter of Beirut in 2006 will happen in every village from which Israel is fired on. . . . We will apply disproportionate force on it and cause great damage and destruction there. From our standpoint, these are not civilian villages, they are military bases. . . . This is not a recommendation. This is a plan. And it has been approved."<sup>47</sup> The primary objective of the "Dahiya Doctrine" is future deterrence, according to Gabi Sabroni, of Tel Aviv University's Institute for National Security Studies: "Such a response aims at inflicting damage and meting out punishment to an extent that will demand long and expensive reconstruction processes."<sup>48</sup> As the Goldstone Report on Operation Cast Lead further recognized: "The Mission concludes from a review of the facts on the ground that it witnessed for itself that what was prescribed as the best strategy appears to have been precisely what was put into practice."<sup>49</sup> The explicit purpose of this doctrine, of course, was to put pressure on the civilian population to repudiate Hamas. That, of course, is a political, not military purpose, and is therefore barred by settled international law, which requires that harm to civilians and to civilian objects must be proportional to the military advantage gained by employing the particular tactic or striking a particular target.

### CONCLUSIONS

This brief overview does not afford space for a detailed critique of each of Israel's proposed innovations in international humanitarian law. Suffice it to say, however, that they are unidirectional, and none would, if accepted as law, limit or constrain violence, which are IHL's underlying purposes. Rather, they would legalize the extension of violence to new

spaces and against new persons. This, of course, was precisely their intent: as one Israeli military lawyer remarked about the Gaza invasion: "Our goal was not to fetter the army, but to give it the tools to win in a lawful manner."<sup>50</sup>

What is, and what is not, unique in Israel's current campaign to transform IHL to its advantage, its effort to write new law through violence? Is this a new and possibly dangerous development? Or does it merely represent the age-old tradition that "might makes right"? There may be some elements in this campaign that are new and unique to the current conjuncture of global legal and political developments, and others, perhaps, that are not.

Certainly Israel is not the only state that is a legal entrepreneur. We have already referred to the Bush Doctrine of preventive war articulated after the fact to justify the Iraq invasion of 2003 by the United States and a small coalition of other countries. In a similar vein, during the lead up to the Iraq invasion, former British prime minister Tony Blair was asked in a BBC interview whether he would pledge to seek explicit UN Security Council authorization for the use of force. He replied that he would so pledge except in the event of "an unreasonable veto" by one of the five permanent Security Council members. In fact no new Security Council resolution was sought, so no veto—reasonable or unreasonable—could have been cast. But it must be pointed out that the notion of an "unreasonable veto" is totally novel, and has no grounding in current international law.<sup>51</sup>

It is also notable that the Obama administration has not only continued but expanded the program of extrajudicial assassinations via unmanned aerial drones begun under the Bush administration (with the killings of suspected al-Qa'ida operatives in Yemen in 2004), and that its purportedly liberal State Department legal advisor, Harold Koh, has asserted the legality of these killings under international law.<sup>52</sup> It is now publicly acknowledged that President Obama, trained at Harvard Law School and once a professor of constitutional law, directly approves targeting decisions by his government.<sup>53</sup>

It may not be coincidental that the nations currently at the forefront of legal entrepreneurialism in respect of IHL—Israel, the United Kingdom, the United States—are all formal democracies. While this may seem counterintuitive, it may be the very concern of democracies to legitimate their actions in legal terms that impels them to seek changes in law to conform to new policy imperatives. Respect for the rule of law is a fundament in the self-representation of modern democratic societies, which see "a government of laws, not of men," according to the second U.S. president John Adams, as a necessary bulwark against arbitrary intrusions against the rights of citizens by the state. As Laleh Khalili has observed of the similarities between U.S. and Israeli practices: "The two powers converge on their use of overwhelming force alongside a discourse of legality. In both cases,

the law has been innovatively interpreted and deployed to allow a fairly unfettered freedom of action for the military.”<sup>54</sup> If, indeed, democratic nations prize conformity with law more highly than non-democratic nations, then they may have greater incentive to seek legislative changes to extant law when pursuing novel policies that are viewed as vital to security or other basic national interests. For this reason, democracies, ironically, may be more challenging to the international legal order than states that have less regard for law. Whether the challenge is positive or negative turns on the specific innovations that are being sought.

Moreover, democracies that are waging wars may be prone to particular kinds of international legal violations due to the challenges they face in maintaining political support for military actions from domestic constituencies. This consideration places a premium on speed, that is, on accomplishing military objectives before domestic political opposition to war can mobilize, as well as on tactics and technologies—such as air power and drones—that minimize casualties among one’s own soldiers.<sup>55</sup> These imperatives may be particularly acute in states with armies of conscripts, particularly if the conscripts come not only from less privileged classes or segments of societies.

Thus, Israel, a country with an army of conscripts, pounded the Gaza Strip for more than a week with aerial bombings in late 2008 and early 2009, and then deployed massive force in the subsequent ground invasion. This was, apparently, a direct reaction to Israel’s experience in attacking Lebanon in 2006. That campaign had lasted sixty-six days and killed more than a hundred Israeli soldiers, which evoked considerable domestic opposition before the war’s end. It is further notable that Israel’s attack on Gaza in 2012 was purely via artillery and air; no ground invasion was launched at all.

Of course, these tactics and technologies—despite the increasing sophistication of targeting mechanisms and the development of purportedly “smart” weaponry—tend to shift risks from one’s own military to the other side, including the other side’s civilian population. Smart weaponry is less smart than advertised, and tends to lead to so-called “collateral damage,” and thus potentially to violations of the legal duty to distinguish between combatants and non-combatants.<sup>56</sup>

What is also evident, however, is that Israel’s effective capacity to write law through violence is a function of power. Israel is, after all, among the top ten, and perhaps even top five, military powers in the world, possessing an estimated 100–200 nuclear weapons. At least as important, however, is the diplomatic cover that is provided to Israel by the United States, exemplified most visibly in the forty-four exercises of the U.S.’s veto power in the UN Security Council on Israel’s behalf—more than all of the other U.S. vetoes since the birth of the United Nations in 1945. Releases of diplomatic documents through Wikileaks have revealed the behind-the-scenes role that U.S. envoy Susan Rice has played in efforts to thwart the progress

of the Goldstone Report and other UN studies of Israel's Operation Cast Lead, a role she reprised, in the event unsuccessfully, regarding the Palestine Liberation Organization's effort to upgrade Palestine's UN status in both 2011 and 2012.

In fact, if Israel is a serial legal entrepreneur, it would not be misleading to suggest that since 2001 it has engaged with the United States in a joint venture, in which the violent actions of each pave the way for the violent actions of the other. While neither country has gained wide acceptance of, for example, the lawfulness of preventive war or of targeted killings, the fact that another powerful state has set a precedent normalizes that action, and endows it with an aura of acceptability, if not outright legality, that it would otherwise lack.

There is a burgeoning movement within international civil society to boycott Israel to end its impunity from international law. The movement has arisen in response to a call issued in 2005 by approximately 170 Palestinian civil society organizations, representing all three major segments of the Palestinian people (those living as citizens of Israel, those in exile, and those living under military occupation). The call, issued on the first anniversary of the International Court of Justice opinion that held Israel's separation wall to be illegal, requested international support for a comprehensive boycott of Israel to force it to comply with international law. The call has been supported by trade unions in South Africa, the United Kingdom, Canada, and by churches, artists, and other prominent individuals in a variety of countries.

Interestingly, this movement has resorted to the kinds of sanctions—ostracism and withdrawal of reciprocity—that anthropologists such as Malinowski found were typical of acephalous (“headless”) societies, which lack distinct, formal, political, and judicial institutions.<sup>57</sup> It remains to be seen whether the international community, in some senses analogous to an acephalous society, succeeds in reigning in Israel's legislative initiatives in the field of IHL via a boycott.

There is at least some evidence that Israel's run of impunity is coming to a close. An indication of this was present in Israel's cooperation with a UN investigation into the legality of its attack on the Gaza “freedom flotilla” in May 2010—whereas, for a decade or so, Israel's policy had been to reject cooperation with UN investigations of its actions. Moreover, the PLO, having secured non-member state status for Palestine, may be on the verge of acceding to the ICC statute, raising the prospect of possible international criminal prosecutions for war crimes or crimes against humanity that have been committed on Palestinian soil. On the other hand, in January 2013, Israel became the first country to decline to participate in the Universal Review Process of the UN Human Rights Council, seemingly reviving its policy of non-cooperation with international investigations. We cannot know, therefore, whether we are at the end, or merely the middle, of a prolonged encounter with violence's law.

## ENDNOTES

1. Robert Cover, "Violence and the Word," *Yale Law Journal* 95 (1986), p. 1601.
2. Thomas Kearns and Austin Sarat, eds., *Law's Violence* (Ann Arbor: University of Michigan Press, 1992).
3. E. Adamson Hoebel, *The Law of Primitive Man: A Study in Comparative Legal Dynamics* (Cambridge, MA: Harvard University Press, 1954), p. 28.
4. See also Ugo Mattei and Laura Nader, *Plunder: When the Rule of Law is Illegal* (Malden, MA: Blackwell Press, 2008).
5. See David Kennedy, *Of War and Law* (Princeton, NJ: Princeton University Press, 2006), especially chapter 1.
6. International Committee of the Red Cross, "International Humanitarian Law: Answers to Your Questions," available at <http://www.icrc.org>.
7. Eyal Weizman, "Lawfare in Gaza: Legislative Attack," 1 March 2009, at <http://www.opendemocracy.net>.
8. See Kennedy, *Of War and Law*, p. 167; and Nathaniel Berman, "Privileging Combat: Contemporary Conflict and the Legal Construction of War," *Columbia Journal of Transnational Law* 43, no. 1 (2004), pp. 1–72.
9. On the other hand, post-World War II Western support of the Zionist movement can be seen as an expression of the badly dented faith in international law and the minority-rights treaties of the interwar years, and an emerging view of ethnic homogeneity as a desirable feature of national self-determination and international stability. Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton, NJ: Princeton University Press, 2013), especially chapter 3.
10. Arguably, the UN General Assembly lacked authority to partition Palestine and never purported to do so in Resolution 181. See John Quigley, *The Case for Palestine* (Durham, NC: Duke University Press, 2005), pp. 32–53.
11. Israel's status as a democracy is disputed, some characterizing it as an "ethnocracy," a democracy for Jews only; Oren Yiftachel, *Ethnocracy: Land and Identity Politics in Israel/Palestine* (Philadelphia: University of Pennsylvania Press, 2006).
12. David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (Albany, NY: State University of New York Press, 2002).
13. On "legal entrepreneurialism," see Michael Byers, *War Law* (New York: Grove Press, 2005).
14. Byers, *War Law*, pp. 3–4.
15. Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Viking, 1963). UN Security Council Resolution 138 (1960) of 23 June 1960 [S/4349] declared Eichmann's abduction a violation of Argentine sovereignty and requested that Israel make "appropriate reparation."
16. Universal jurisdiction is controversial. See M. Cherif Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice," *Virginia Journal of International Law* 42, no. 1 (2001), pp. 81–162.
17. The Israeli government knew settlements were illegal because its own legal advisors told it so; see Gershom Gorenberg, *The Accidental Empire: Israel and the Birth of the Settlements, 1967–1977* (New York: Times Books, 2007), pp. 99–100. The Fourth Geneva Convention (of which Israel was an original signatory), Article 49, explicitly states "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."
18. Yehuda Blum, "The Missing Reversioner: Reflections on the Status of Judea and Samaria," *Israel Law Review* 3 (1968), p. 279.
19. International Court of Justice, "Legal Consequences of the Construction of a Wall in the occupied Palestinian territory," 9 July 2004, excerpted in *JPS* 34, no. 1 (Autumn 2004), document A3, pp. 152–54.
20. The 2012 Israeli government "Levy Commission" reiterated the claim that the Fourth Geneva Convention does not apply to the West Bank ("Judea and Samaria") and that settlements are therefore permitted. The authorized English translation of the commission's



conclusions and recommendations is in *JPS* 42, no. 1 (Autumn 2012), document C1, pp. 179–82.

21. Secretary of State Daniel Webster, quoted in Anthony Clark Arend, "International Law and the Preemptive Use of Military Force," *The Washington Quarterly*, Spring 2003, p. 91. The SS *Caroline* was an American ship destroyed in U.S. waters by Britain in 1837 during a Canadian rebellion, killing one U.S. citizen. Settled by the 1842 Webster-Ashburton treaty, the case articulated the modern standard of the right of self-defense.

22. Israel had argued that its 1967 attacks on Egypt and Syria responded to imminent threats in conformity to traditional principles of self-defense.

23. UN Security Council Resolution 487 (1981) of 19 June 1981 [S/RES/487(1981)], reprinted in Regina S. Sherif (ed.), *United Nations Resolutions on Palestine and the Arab-Israeli Conflict. Volume II: 1975–1981* (Washington, DC: Institute for Palestine Studies, 1988), pp. 198–99

24. For a brief but balanced discussion, see Duncan E. J. Curry, "Preventive War' and International Law after Iraq," available at <http://www.globe.law.com/Iraq/Preventive War After Iraq.pdf>.

25. Ehud Sprinzak, "Illegalism in Israeli Political Culture: Theoretical and Historical Footnotes to the Pollard Affair and the Shin Bet Cover Up," *The Jerusalem Quarterly* 47 (1988), pp. 77–94.

26. Zeev Maoz, *Defending the Holy Land* (Ann Arbor: University of Michigan Press, 2006).

27. Amichai Cohen, "Legal Operational Advice in the Israel Defense Forces," *Connecticut Journal of International Law* 26 (2011), pp. 367–413.

28. Cohen, "Legal Operational Advice," p. 384.

29. Yoav Feldman and Uri Blau, "Consent and Advise," *Ha'Aretz*, 29 January 2009, quoting Daniel Reisner. The Israeli High Court, in a 2006 judgment, found that Israel faced "a continuous situation of armed conflict" since the first intifada, upheld the practice of targeted killings in limited circumstances, and that the law of

international armed conflict was applicable.

30. See Wolff Heintschel von Heinegg, "Asymmetric Warfare: How to Respond," *International Law Studies Series* 87, U.S. Naval College, (2011), pp. 463–82, for a skeptical view of such claims.

31. Amos Yadlin, "Ethical Dilemmas in Fighting Terrorism," *Jerusalem Issue Brief* 4, no. 8 (25 November 2003).

32. Feldman and Blau, "Consent and Advise."

33. Josef Mrazek, "Armed Conflicts and the Use of Force Law," *Czech Yearbook of International Law* 1 (2010), p. 101.

34. Amnesty International, "The conflict in Gaza: a Briefing on Applicable Law, Investigations, and Accountability," (London: Amnesty International, January 2009), p. 6.

35. See Steven David, *Fatal Choices: Israel's policy of targeted killings* (Ramat Gan: The Begin-Sadat Center for Strategic Studies, Bar Ilan University; Mideast Security and Policy Studies no. 51, 2002).

36. The "Mitchell Report" of the Sharm al-Shaykh Fact-Finding Committee, 20 May 2001, excerpted in *JPS* 30, no. 4 (Summer 2001), document A2, pp. 146–51 (quoted passage on p. 150).

37. Amnesty International, "The Conflict in Gaza," p. 7.

38. Feldman and Blau, "Consent and Advise."

39. "Report of the United Nations Fact-Finding Mission on the Gaza Conflict" (the "Goldstone Report"), 25 September 2009 (UN document A/64/490 of 29 October 2009, annex), paras. 424–31. Full report: <http://unispal.un.org>. Excerpts: *JPS* 39, no. 2 (Winter 2010), pp. 65–104. The commission found "insufficient information" to support the Israeli claim that Gaza civilian police had been "incorporated" into the armed forces and thus were combatants (para. 427).

40. BBC, 5 January 2009.

41. Avital Leibovich, "Terrorist or Journalist?" *New York Times*, 28 November 2012.

42. Hamas is referred to in international legal literature as a "non-state actor" but is regarded as being bound by the principles of IHL when it engages in combat. See, for

example, Sigal Horowitz, "Accountability of the Hamas under International Humanitarian Law," Jerusalem Center for Public Affairs, 16 June 2009. On non-state actors more generally, see M. Cherif Bassiouni, "The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-state Actors," *Journal of Criminal Law and Criminology* 98, no. 3 (2008), pp. 711–810.

43. For example, Article 2(a) of the Organization of Islamic Conference Convention to Combat Terrorism (1999–1420H) stipulates: "Peoples struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered a terrorist crime."

44. Quoted in Eyal Weizman, "Short Cuts: The Book of Destruction," *London Review of Books* 34, no. 23 (6 December 2012), p. 28.

45. Weizman, "Short Cuts."

46. Quoted in Donald Macintyre, "Israeli Commander: we rewrote the rules of war for Gaza," *The Independent*, 3 February 2010.

47. Amos Harel, "Israel plans to use disproportionate force," *Ha'Aretz*, 8 October 2008.

48. Gabi Saboni, "Disproportionate Force: Israel's Concept of Response in Light of the Second Lebanon War," *INSS Insight*, no. 74 (2 October 2008).

49. Goldstone Report, para. 62. See also its chapter 16 (paras. 1177–1216).

50. Feldman and Blau, "Consent and Advise."

51. Byers, *War Law*, pp. 1–2.

52. See, for example, Scott Shane, Mark Mazzetti, and Robert F. Worth, "Secret Assault on Terrorism Widens on Two Continents," *New York Times*, 14 August 2010.

53. Jo Baker and Scott Shane, "Secret Kill List a Test of Obama's Principles and Will," *New York Times*, 29 May 2012.

54. Laleh Khalili, *Time in the Shadows: Confinement in Counterinsurgencies* (Palo Alto, CA: Stanford University Press, 2013), p. 64.

55. Such arguments are persuasive: 62 percent of Americans support drone strikes against "extremists": Pew Global Attitudes Project, "Global Opinion of Obama Slips, International Policies Faulted: Drone Strikes Widely Opposed" (Washington, DC: Pew Research Center, 13 June 2012), pp. 2, 18–19, 103.

56. On 26 July 2010, Afghan officials claimed that a NATO strike had killed fifty-two civilians in a rocket attack on a home intended to kill combatants; Richard Opiel and Taimoor Shah, "Afghan Officials and NATO Differ on Civilian Deaths," *New York Times*, 26 July 2010.

57. Bronislaw Malinowski, *Crime and Custom in Savage Society* (London: Routledge and Kegan Paul, 1926).