

**THE STRUGGLE FOR LEGITIMACY: A STUDY OF MILITARY
LAWYERS IN ISRAEL**

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The candidate confirms that the work submitted is his own and that appropriate credit has been given where reference has been made to the work of others.

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Abstract

This thesis examines the involvement of lawyers in Israel Defence Forces operational decision-making. By linking the legal requirements of international legitimacy to the institutional relations within Israel, the thesis reveals a dynamic of Israeli civil-military relations that connects the demands of Israel's external environment to its internal political relations and exposes the role of the IDF lawyers as an important locus of Israeli civil-military relations.

The traditional approach to civil-military relations in Israel employs a framework of analysis that relies heavily upon domestic legitimacy, rooted in the requirements of representative government. In so far as such an analysis considers the role of law and lawyers at all, the domestic perspective focuses on the importance of the Israeli Supreme Court as a mechanism of civil control of the military. However, this level of analysis alone fails to explain the growing importance of military lawyers in operational matters. This study argues that Israeli civil-military relations cannot be properly understood without an examination of the requirements of international legitimacy and the largely unexplored field of legal-military relations.

It is the conclusion of this thesis that there has been a rapid growth in the involvement of lawyers in IDF operational decision-making since the start of the Second Intifada in 2000 that can be only partially explained in terms of an institutional response to a growing involvement of the Israeli Supreme Court in matters of security at a time of heightened military activity. The increased power of the military lawyers is further explained by a domestic political response to the growing external demand for military compliance with international humanitarian law by the Israeli military as a prerequisite of legitimate military action and the legitimacy of the Israeli state itself. The result has been a strengthening of the position of the military lawyers that has secured for them a veto over operational decision-making. Analysis of international reaction to Israel's military operations during the Second Intifada, which began in 2002, the 2006 Second Lebanon War, Cast Lead 2008-2009 and the 2010 Turkish Flotilla reveals a growing appreciation among Israeli elites of the importance of defending Israel's legitimacy that is likely to lead to greater empowerment of the military lawyers and increase their importance to the study of Israeli civil-military relations.

A legal analysis reveals not just a strengthening of international humanitarian law, but also the extent to which the balancing of humanitarian and military requirements in conflicts involving non-state actors politicises the processes of construction of judgments of the legality of IDF military operations. The analysis exposes the opportunity for military behaviour to be constrained or enabled by the exercise of choice in the selection of legal advice. The case studies and previously unpublished accounts of the legal actors show that, to date, the International Law Department of the IDF has acted to empower the military. However, the increasing pressures of international and domestic civil institutional constraints, which are driven by a growing recognition of the need to use international humanitarian law to defend the legitimacy of Israeli military operations against non-state actors, suggests that the unbridled support of the military lawyers for their military employers may soon become a thing of the past with the choice of law to be applied a matter of political contestation rather than military preference.

In short, the role of lawyers in the military is a new area of research. The methodology brings together legal and IR scholarship with original variations. The thesis examines previously neglected aspects of the Israeli legal environment, analysing previously unexplored and highly topical developments including the Universal Jurisdiction arrest warrants for Israeli political and military elites travelling abroad, the legal controversies surrounding the Goldstone Report and the Israeli responses to the Gaza flotillas. While the research focuses on Israel, the analysis and many of the conclusions are of wider application for those interested in the uses of law in promoting and condemning military strategies employed in military conflict against non-state actors, and more generally law and the employment of lawyers as a mechanism for the civil control of the military.

Abbreviations

HRL	Human Rights Law
IDF	Israel Defence Forces
IDL	International Law Department
IHL	International Humanitarian Law
IR	International Relations

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Chapter 1: Introduction

Military lawyers are understood to spend their time and energies enforcing military discipline. In Israel, their most visible function has been to administer a military court system through which violent Palestinian opposition to the occupation is criminalised and punished¹. Meanwhile, the increasing involvement of Israeli military lawyers in operational decision making has, until recently, largely gone unnoticed.

The close relationship between the Israeli Defence Forces (IDF) and its lawyers became the subject of political debate in the aftermath of the 2006 Lebanon war. The role of the IDF lawyers was publicly revealed in the Israeli responses to international legal condemnation of various military operations that had taken place during the war. At the Hebrew University in Jerusalem on 6, September 2007, when Human Rights Watch launched its report on the Israeli conduct of the 2006 Lebanon war², Daniel Reisner³, former head of the IDF International Law Department (IDL), replied to the Human Rights Watch allegations of disproportionate killing of Lebanese villagers by reassuring the gathering that every Israeli air force target had been vetted by the military lawyers before approval. Reisner described how the lawyers had sat in the 'pit' (Israeli military command centre) with the military planners and if a lawyer said that an operation was not legal it was called off no matter how late in the

¹ The Israeli military court system remains largely unresearched, but see Michael Sfard (ed.), *Backyard Proceedings: The Implementation of Due Process Rights in the Military Courts in the Occupied Territories* (Tel Aviv: Yesh Din- Volunteers for Human Rights, 2007) and Lisa Hajjar, *Courting Conflict. The Israeli Military Court System in the West Bank and Gaza* (California: California University Press, 2005)

² Human Rights Watch. *Why They Died: Civilian Casualties in Lebanon during the 2006 War*. Available at, www.hrw.org/en/node/10734/section/1. Last accessed 4 February 2011.

³ Colonel Reisner served as a legal adviser in the Israel Defence Forces Military Advocate General's Corps for 19 years. Between 1995 and 2004 he held the position of Head of the International Law Department. In this capacity, Reisner was responsible for advising the IDF General Staff and other senior IDF officers, the Ministry of Defence and the Prime Minister's Office on a wide variety of issues including the framework of internal legal oversight of Israel's targeted killing operations. (Author's interview with Daniel Reisner, Jerusalem, 24, May 2009).

day. This operational involvement of military lawyers had already attracted the attention of the Winograd Commission, which had been appointed by the Israeli government to report on the conduct of a war that was popularly perceived as a failure. With all eyes on the criticism of Prime Minister Olmert, little attention had been paid to the concluding sections of the report discussing the involvement of lawyers in military decision-making- comments that have yet to be translated from the Hebrew⁴.

In fact the Weinograd Commission, whose focus was on uncovering reasons for the IDF's poor performance in the 2006 Lebanon War, was very critical of the growing involvement of military lawyers in operational matters. The commission demanded live testimony from the Israeli Attorney General Menachem Mazuz and the Military Advocate General Brigadier Avihai Mandelblit. Commission member Ruth Gavison, a distinguished and influential Israeli constitutional lawyer, was highly critical of legal involvement in IDF. Her concerns were twofold; firstly, that legal involvement would inhibit the soldier on the ground and prevent efficient response to changing circumstances and secondly, that unnecessary legal restrictions would be imposed through the application of perceived legal restraints where, in her view, few in fact exist. In short, involving lawyers was dangerous and unnecessary. The Winograd Report records that the commission found no evidence that the military lawyers had caused adverse military outcomes but did recommend that the growth of legal involvement be arrested:

‘[W]e fear that the increasing leaning on legal advisors during military action can divert responsibility from the elected figures or commanders to the advisers, and can disrupt both the essential nature of the decisions and the military activity. It seems to us, that it is appropriate that fighting forces, certainly at field ranks, concentrate on fighting and not consulting with legal advisers’⁵.

⁴ The Winograd Commission official site including the report and testimony (in Hebrew) can be accessed at <http://www.vaadatwino.org.il/statements.html#null>. (Last accessed 4 February 2011). My quotations of testimony and findings are based on my own unofficial translations.

⁵ Ibid, Winograd, Chapter 14: The Conduct of Israel in the Light of International Law.

In fact, research presented in this thesis shows that the involvement of the IDF International Law Department in operational decision-making has accelerated rather than slowed. This adds urgency to the task of understanding the role of the IDF military lawyers within a domestic and international context.

1) Methodology, research question and hypotheses

In examining the significance of the increasing involvement of IDF military lawyers in operational matters, this thesis, which is based on empirical research into the involvement of Israeli military lawyers in operational matters and which draws heavily on exclusive interviews with IDF lawyers past and present, is an attempt to understand the operational role of Israeli military lawyers within the wider context of Israeli civil-military relations and its neglected sub-field of legal-military relations. Using a New Institutional approach, the IDF lawyers are seen as simultaneously part of legal institutions and military institutions with a network of connections with civil and military actors that puts them at the focal point of a power struggle for control of the military. This struggle between the military and power centres within Israeli society uses law and lawyers to promote power, empowering the military lawyers in the process.

Existing civil-military relations scholarship at the level of the Israeli state and society, within a context of weak civil control of the military, reveals an increasing legal control of the military by civil elites through the medium of the Israeli Supreme Court. However, this domestic institutional struggle between the Supreme Court and the military is only a fragment of a much larger picture. To reveal the wider complexity of military-legal relations, this thesis extends existing scholarship of legal-military relations from the domestic to the international. The additional level of analysis, the international level, reveals the increasing importance of international humanitarian law (IHL) as part of a wider discourse of legitimacy of military

operations and the states that conduct them. Indeed, this thesis argues that it is legitimacy as understood within International Relations scholarship that gives IHL the traction that legal scholarship struggles to explain. These processes impact at the state level demanding the implementation of Israeli foreign policy in defence of Israeli legitimacy and the legitimacy of its wars and military operations. Such strategies in defence of legitimacy are increasingly dependent for their effectiveness on a legal defence of Israeli military operations and a demonstrable legal control of a military fighting non-state actors within the law. With its emphasis on the domestic, current civil-military relations scholarship fails to recognise this important dynamic relationship and cannot explain the role of the military lawyers.

While stopping short of offering a theory of international relations that explains the domestic and international interaction of security and legal regimes⁶ as predictors of state behaviour, by adopting a dual level of analysis, the approach adopted by this thesis suggests linkages between domestic politics and foreign policy that complicates the institutional struggle for control of the military and offers a framework within which to study the role of the IDF's lawyers and the legal regime of international humanitarian law within the discipline of international relations. In so doing, the thesis argues for a rebalancing of Israeli civil-military relations by adding greater weight to research into legal-military relations as a key to understanding the power relationships between the military and its wider environment. While this thesis is firmly grounded in an international relations approach, there is necessarily an interdisciplinary aspect to the research and analysis that reveals the political within the apparently legal. Consideration of IHL relating to targeting reveals a breadth of choice available to the military legal advisor in the construction of International humanitarian law that informs the discussion of the exercise of power by the military lawyers. Having

⁶ Regime is used here in the sense of Krasner's generally accepted formulation of a set of 'implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations', Stephen D. Krasner, (ed.) *International Regimes*, (Ithaca, NY: Cornell University Press, 1983), p.2.

established the breadth of choice in the construction of legal advice on targeting, this thesis uses Legal Realism to recognise the political function of law and, by extension, the legal advisor. While legal realism recognises legitimacy in its discussions of why laws are obeyed domestically, an IR understanding of legitimacy allows for greater traction and recognition that legality and legitimacy is not the same thing. This position relies to a large extent on Ian Clark's work on the connections and disconnections between international legitimacy and international law.

The requirements of international legitimacy may, depending on the particular consensus position they reflect, demand constructions of international humanitarian law that differ from those of the Israeli courts, the Israeli military or the Israeli government. Adopting Emanuel Adler's concept of 'communities of choice', which enables law, legitimacy and security policy to be tailored to the consensus position of preferred communities, allows for a political discussion of the choice exercised by the lawyers in areas of pluralistic international humanitarian law. This analysis allows the question not just of which law to apply but the more nuanced enquiry of whose law to apply? In these circumstances, the application of IHL to IDF targeting decisions expected by the Israeli government amounts to a policy preference that exerts a further level of institutional pressure on the IDF military lawyers that may or may not conflict with the policy preferences of other institutional actors that are also expressed in legal terms.

The question then arises of how the military lawyers reconcile the differing institutional pressures and roles ascribed to them and how this affects the exercise of their judgment. As such, this thesis sets out to examine, within the context of international humanitarian law and values, the increasing role of lawyers within military decision-making, how Israeli military lawyers act when faced with the conflicting institutional requirements of the law and the

military, and the extent to which this process affects the balance of Israeli civil-military relations. In the process, this thesis will test the following hypotheses:

1) The IDF military lawyers exercise choice in the construction of their advice and apply a permissive construction of international humanitarian law to IDF targeting decision making.

2) Their choice of IHL accords with a consensus among states conducting military actions against non-state actors and conflicts with legal positions adopted by communities of NGOs and UN commissions of enquiry.

3) The increased involvement of lawyers in Israeli military decision-making is an institutional reaction by the IDF to the following changes in its external environment:

a) The application of international law by the Israeli Supreme Court.

b) The threat of foreign prosecutions of Israeli decision-makers for war crimes.

c) The increased use of humanitarian law as a measure of the legitimacy of military actions.

The following sections of this chapter will examine civil-military relations scholarship and its sub-field of Israeli legal-military relations before concluding with an outline of the remaining chapters.

2) Civil-military relations literature

A historical approach to the review of the literature charts developments in a field that has moved from old-style institutionalism, with its normative emphasis on constitutional arrangements, to the more recent employment of rational choice theory and the behavioral tools of cognitive, sociological and cultural methodology. The field of enquiry has widened from a discussion of how the military is to be kept from seizing political power, to an

exploration of the connections between civil and military actors and the power of military ideology. While a sub-field of legal-military relations is identified, the subject is under-researched and fails to recognize the importance of international humanitarian law as a measure of the legitimacy of Israel's military operations and as a regime that is contested by Israel and its military in international and domestic forums. As such, the existing scholarship fails to capture the role of both law and the Israeli military lawyers in understanding the relationship between the Israeli military and civil actors.

The study of civil-military relations really took off in the 1950s in an effort to explain the rash of military coups. The question posed by this generation of scholars was whether such coups could be explained and predicted within an analysis of the power and role of the military. If military coups could be understood in terms of a failure of the institutional relationship between the military and civilian society, then a proper ordering and restructuring of the relationship would amount to a prescription for the preservation of democratic government. This reasoning led scholars to seek a normative system to govern the relationship between the military and their civilian superiors in mature democracies. They adopted an institutional approach that promoted an instrumental model of decision making with the military the instrument of the state. The military were seen as having operational autonomy and freedom in return for keeping out of the political sphere. Coups were to be avoided not just by legally constraining constitutional arrangements but also, more importantly, by a professional military internalising the need for political neutrality and absolute civilian authority. Samuel Huntington, Morris Janowitz and Samuel Finer were the most prominent of this generation of scholars.

Samuel Huntington's contribution in the 1950s and 1960s was the most influential. His *The Soldier and the State: The Theory and Politics of Civil-Military Relations*⁷ built on his best-known work *The Soldier and the State*⁸. Analysing the Prussian military tradition, he made a key distinction between professionalism and statesmanship, concluding that military officers need to be professionals. His model of civilian control over the military uses concepts of subjective and objective control. Subjective control is achieved through rules and principles and objective control through the internalising by professional officers of the imperative that they must operate exclusively in the military domain and be politically neutral. Subjective control maximises the power of the civil over the military while the objective control reduces the power of the military. The basis of his scholarship is that 'the principal form of civil-military relations is the relation of the officer corps to the state' and that 'the modern officer corps is a professional body and the modern military officer is a professional man'. Huntington defines 'professionalism' as comprising expertise, responsibility and corporateness (group identity). Distinguishing officers, who are skilled in the management of violence, from enlisted men who are skilled in the application of violence, Huntington identifies two levels of analysis: the operating level where policy is implemented and the institutional level, which formulates policy. He considers the institutional level, where the nation's military security policy is made, as crucial to the study of civil-military relations. These institutional arrangements provide the model for civilian control of a military that knows its place.

Morris Janowitz, in *The Professional Soldier: A Social and Political Portrait*⁹, first published in 1960, looked at American civil-military relations post WWII and during the cold war. Although making greater use of a sociological analysis, his approach, like Huntington's,

⁷ Samuel P. Huntington, *The Soldier and the State: The Theory and Politics of Civil-Military Relations* (Cambridge, Mass.: Belknap Press, 1964).

⁸ Samuel P. Huntington, *The Soldier and the State*, (Cambridge, Mass.: Belknap Press, 1964).

⁹ Morris Janowitz, *The Professional Soldier: A Social and Political Portrait*, (New York: Free Press, 1960).

relies on a strong professional ethic to maintain the supremacy of the civil over the military without destroying its professional autonomy. His analysis, while recognising the responsibility of the military to be professionally autonomous, emphasises the requirement of the military not just to keep out of politics but also for the politicians to limit their involvement in military affairs. Janowitz argues that the requirement of the military to stay out of politics has been over-emphasised and the over-involvement of politicians in the military needs equal attention.

The third major scholar of this period is Samuel Finer, who in *The Man on Horseback: The Role of Military in Politics*¹⁰, published in 1962, accepts that the military exert influence but are barred from choosing or seizing government. The key to his analysis is that the military is more likely to take over if the civil institutions are weak or lacking in legitimacy. The degree of civil control of the military depends on 'the political culture'. He focuses his study on the third world with its high incidence of military coups, applying a sociological classification of societies according to their level of political culture and type of regime. His central thesis is that political cultures can be graded by reference to the level of respect, support and importance accorded by the population to the institutions and processes of government, the degree to which the regime's legitimacy is founded on popular support and the degree to which there exists a civil society. He argues that the lower the level of political culture, the higher the degree of military intervention in public affairs. Israel was seen as having a 'developed political culture' with both objective and subjective civil control.

This idea of political culture as a measurable variable led later scholars to analyse and categorise military arrangements and to produce models, other than Huntington's subjective and objective control, to describe the roles that the military may play in politics. Huntington's subjective-objective model was generally thought to describe North American and some

¹⁰ Samuel Finer, *The Man on Horseback: The Role of the Military in Politics*, (London : Pall Mall, 1962).

Western European democracies where the military may influence but do not control the choice or policy of government. Janowitz's constabulary concept was used to describe the arrangements in advanced industrial nations such as Switzerland where civilian political power significantly exceeds that of the military. Military arrangements in authoritarian regimes were described by an 'apparat model' formulated by, among others, Ghita Ionescu in *The Politics of the European Communist States*¹¹. This model has the power of the party balancing the army with strictly enforced institutional boundaries. The nation at arms model of universal conscription, which could be further refined to the revolutionary nation at arms, distinguished arrangements that rely on mass mobilisation. In 1962 Rapaport described the characteristics of the nation at arms model in *A comparative Theory of Political and Military Types*,¹². Typically, the professional army is small and civilians are conscripted for periodic military duties and in times of crisis. The military are integrated into civilian society. Israel was seen to typify the 'nation at arms' model with strong civilian control of the military. The revolutionary variant, applied to states such as North Vietnam, relies on popular political support and a shared ideology to sustain the loyalty of the military to the civilian government. In 1941, Harold Lasswell's *The Garrison State*¹³ developed the concept of the garrison state as a society where the needs of the military are so strong that the military is in a position of political pre-eminence. This pre-eminence enables the military to get its way without taking seizing power.

Amos Perlmutter, in his 1977 *The Military and Politics in Modern Times: on Professionals, Praetorians, and Revolutionary Soldiers*¹⁴ sought to extend Finer's categories. In common

¹¹ Ghita Ionescu, *The Politics of the European Communist States*, (New York: Praeger, 1967)

¹² Samuel Huntington (ed.), *Changing Patterns of Military Politics*, (New York: The Free Press of Glencoe, 1962).

¹³ Lasswell, Harold, 'The Garrison State', *American Journal of Sociology*, Vol. 46, No. 4, (1941), pp. 455-468. See also, Harold Lasswell, 'The Garrison State Hypothesis Today' in Samuel Huntington (ed.) *Changing Patterns of Military Politics* (New York: The Free Press of Glencoe, 1962).

¹⁴ Amos Perlmutter, *The Military and Politics in Modern Times: on Professionals, Praetorians, and Revolutionary Soldiers*, (New Haven: Yale University Press, 1977). See also, Amos Perlmutter and Valerie

with later scholars, he was critical of earlier scholarship's reliance on 'the classical tradition of administrative theory', that assumes that professionalism removes the military from politics and maintains a policy making /policy implementation dichotomy. For him, the professional military share with the political elites the formulation of national security policy and also work together in maintaining the bureaucratic-hierarchical system. This forces the military to espouse a political attitude. He has a different definition of professionalism extracting corporatism as a separate independent variable: a group consciousness with professional associations. He uses this in relation to the officer corps. He distinguishes praetorianism from militarism. Praetorian states are where the military is motivated to replace the civilian regime. He was satisfied that Israel was not a garrison or praetorian state. His contribution is to provide three categories of civil- military arrangements: 'professional' where there is civil control of the military, 'praetorian' where the military control the civil and 'professional revolutionary' where the military is independent from and co-equal part of the government in a country where a strong ideological component encompasses the whole of society. His examples of professional revolutionary military are China and Israel. Israeli soldiers are seen as ideologically an instrument of Zionism and subordinate to the party/regime. The military has been created by its ideological partners and the post-revolutionary tensions are resolved in favour of the political masters. Critically, the universal recruitment of the officer class produces a 'nation in arms' that prevents praetoraenism.

This generation of scholars came to be criticised as being overly reliant on administrative theory. Where they had considered Israel, their enquiry had been into the capacity of Israel to maintain democratic arrangements during almost constant military activity. Their scholarship had been informed by the view that the civil and the military are two separate systems and

Bennett, *The Political Influence of the Military: a Comparative Reader*, (New Haven: Yale University Press, 1979) and Amos Perlmutter, *Military and Politics in Israel: Nation-Building and Role Expansion*, (New York: Praeger, 1969).

their conclusion was that, in Israel, the civil system was in control of the military. The focus of Israeli academic investigation now began to shift to the degree of militarization¹⁵ of Israeli civil society. In Israel the question now was not so much why the military had not taken over, the nation at arms model with its civilianised military being the generally accepted answer, but rather a questioning of the nature and extent of military involvement in civilian society and the extent of civil control of military strategic decision-making. Working within the dominant model of Israel as a 'nation at arms' with a 'civilianised military', which relied heavily on the universal nature of Israeli military service, scholars now observed the dominance of military elites in civilian decision-making bodies. The emphasis shifted from the civilian reservists to the professional soldiers who run the military and their links with various sectors of civilian society. Israeli scholars developed a model of exchange of influence that allowed for a militarization of civil society and a civilianisation of military society. This was conceptualised in terms of various forms of permeability or fusion allowing gradual or interrupted exchange. The models of imperfect exchange enabled distinctions to be made in the degree of the exchange of influence depending on the sectors of society or military under examination. Among the most prominent scholars of this school are Baruch Kimmerling, Dan Horowitz, Moshe Lissak, Yoram Peri, Uri Ben-Eliezer and Amos Perlmutter. Their studies developed in an atmosphere of academic challenge to Zionist orthodoxy where 'new historians' contested the orthodoxy of Israel's 'defensive' military and radical sociologists revealed social cleavages to expose a fragmented Israeli identity.

¹⁵ For a discussion of militarism in these terms, see Uri Ben-Eliezer, *The Making of Israeli Militarism*, (Bloomington and Indianapolis: Indiana University Press, 1998), who uses militarism as a 'cultural phenomenon' or ideology. For Ben-Eliezer, 'Militarism comes into being only when the use of military force acquires legitimation, is perceived as a positive value and a high principle that is right and desirable, and is routinized and institutionalised within society.' (p7). It is thus less about choices than the cultural assumptions and interpretations of reality that inform choice.

Scholars, such as Yoram Peri, who tend towards a historical institutional analysis, review Israeli history to examine the relationship between the political elite and the military. The developments are usually examined historically starting with the socialist-Zionist nation building eras of the pre-state *Yishuv* and the early formative years till 1967. The period from 1967 till 1973 is seen by many as the high water point of Israeli military prestige. There then follows the period of the rise of the right wing and the Lebanon Wars and Intifadas to the present day. Such scholars note the influence of the military in Government with senior former military leaders parachuting into positions of political power, the influence the Chief of General Staff (CGS) and the pre-eminent role of the military in the formulation of intelligence and strategy. A historical institutional approach enables the scholarship to identify those occasions when the Israeli military has appeared to control civil decision-making. Here attention is given to pressures on Ben Gurion to push for greater expansionism in 1948, the near coup on the eve of the Six Day War when Prime Minister Eshkol was pressurised by the military to expand his government and appoint Moshe Dyan, Sharon's keeping the Government in the dark over military planning for an expansionist first Lebanon War, the tensions between the military and the government over withdrawal from Lebanon¹⁶, the Oslo Accords, combating the intifada¹⁷ and the disengagement from Gaza. Another area of speculation among these scholars concerns the extent to which the declining prestige of the army and erosion of collective values is eroding the nation at arms model of universal service. Strategies of avoidance of conscription and decline in reserve service are traced to popular opposition to the first Lebanon war, which is usually seen as Israel's first war of choice. Further decline in military prestige is linked to the contested role of the military during the intifada and the perceived failure of the 2006 Lebanon war. For some scholars of

¹⁶ CGS Mofaz was holding out for a withdrawal to a defensible border which would have meant holding some Lebanese territory while PM Barak was opposed to this. Failing that, Mofaz was openly campaigning against a withdrawal without a treaty with Syria.

¹⁷ The IDF was widely seen as failing to implement PM Barak's policies when they required military restraint.

this school the revolution in military affairs, the avoidance of military service and the move towards a professional military that is no longer a nation at arms, raises the old concerns to considerations of pretoreanism and the viability of the Israeli democracy without a mobilised society.

Yoram Peri, *Generals in the Cabinet Room: How the Military Shapes Israeli Policy*¹⁸, focuses on the Al Aqsa intifada to research the relationship between Israeli generals and politicians tracing the relationship through the history of the state. Peri has a special interest in the role of the media in military affairs, which leads him to attach particular importance to the influence of real time battlefield images so that modern wars are conducted under 'politically saturated circumstances'. Peri argues that the post Cold War expansion of the humanitarian role of the military and the 'new wars' inevitably lead to a greater politicisation of the military. He describes the Israeli civil-military relationship as a 'pattern of political military partnership'¹⁹, which, in the context of the Al Aqsa intifada, developed into a dominant role for the military²⁰. With the government weakened by the failure of the peace process and reliant on the military for intelligence²¹ and strategic assessments, the government effectively gave the military a free hand so that the division between operational and strategic decision making evaporated. Further, the military decided that it was essential to bolster the morale of the Israeli population to stand firm in the face of an unprecedented wave of terrorism. This caused senior military figures to appeal to the populace over the heads of

¹⁸ Yoram Peri, *Generals in the Cabinet Room : How the Military Shapes Israeli Policy*, (Washington, D.C. : United States Institute of Peace, 2006). This work continues Peri's earlier historical review of the Ben Gurion to Begin era analysed in Yoram Peri, *Between Battles and ballots*, (Cambridge: Cambridge University Press, 1983).

¹⁹ Ibid, p. 8.

²⁰ Ibid. Pp. 123-127.

²¹ The CGS has at his disposal the intelligence products of the Military Intelligence Directive (MID) whose primary function is to warn the government of threats of war and its research arm the Planning and Policy Directive. These uniformed advisors present assessments directly to the PM and Minister of Defence and prepare an influential annual assessment (NIE) which includes policy recommendations. The NIE is presented to the Cabinet and Knesset Foreign Affairs Committee. This militarization of intelligence assessment and advice which provides the military with critical influence over the policymakers has been frequently criticised by observers and commissions such as the Agranat Commission into the military failures in the 1973 Yom Kippur war but the IDF has always successfully defended its position.

the politicians and even advocate policies opposed by the political echelon, resulting in open dispute between the CGS and the Minister of Defence/Prime Minister²². This leads Peri to suggest that an increased political role for the military is a feature of low intensity warfare, requiring the military to develop a military doctrine that includes political elements.

Peri's institutional analysis enables him to identify the weakness of Israel's coalition system. This acts as a bar to political decision-making, creating a vacuum that is filled by the military at times of unresolved crisis. Peri identifies four factors that produce tension in the relationship between the military and the politicians and which resulted in an increase in military involvement in politics during the intifada: the first is the ongoing political crisis that is reflected in the weakness of the political echelon, which finds expression in the government's inability to formulate clear directives and its tendency to dodge responsibility casting it on the military. The second is the weakness in the structural constitutional mechanisms of civilian control over the military. The third is the nature of the citizen's army that blurs the boundaries between the civilian population and the military; the fourth is the nature of the low intensity conflict with the Palestinians. The combination of these factors has deepened the IDF's involvement in the political process and in policymaking both in matters related to the conduct of the war and in diplomatic negotiations. Peri sees a resulting security culture that is at odds with a diplomatic culture.²³

Other scholars of this later generation are concerned to explore Israeli militarism from a sociological or cultural perspective. They looked at how state institutions impinge on society and institutionalise violence. Much of this scholarship is built on work of the state formation school, which links the development of civil-military arrangements to the process of state

²² Israeli Prime Ministers also act as Minister of Defence unless coalition politics result in the appointment of a political rival. Peri has a strong historical analysis of the political role of GSS Mofaz under Barak and Sharon and GSS Ya'alon under Sharon.

²³ Peri, *Generals*, p216.

formation.²⁴ The emerging radical school of Israeli sociology of the 1980s highlighted the contested nature of Israeli identity and in the process began to cast a more critical eye over Israeli militarism and the role of the military. They explore the processes whereby Israeli culture becomes infused with militarism. They look at the creation of Israeli militarism through an examination of the creation of myth and ideology and their influence on Israeli culture. From this perspective, the fragmenting of Israeli society becomes central to the formation of militaristic ideology and the evolving institutional nature of the military. With Israeli identity fractured by cleavages between Ashkenazi and Mizrahi, secular and religious, Russians, Ethiopians, Druz, Arab, Settlers etc sociological considerations of identity are used to analyse the relationship between these groups and the institutions of state. While some scholars treated the military as a political actor, others saw the military itself as a site of social interaction and examined the composition of the military from an ethnic religious class gender etc perspective. The military has always been important in these studies because of its role in state formation when a combination of collectivist ideology and military prestige made it a powerful force in Ben Gurion's 1950s *mamlachtiyut* project of moulding a Western orientated secular Jewish homogeneous society. Baruch Kimmerling has been influential in examining the processes whereby ideology and social constructions of security produce Israeli cultural militarism.

Kimmerling's early scholarship concentrated on an institutional analysis of Israel's 'interrupted system' to explain Israel's mobilisation of resources and social mechanisms by which the demands of the military are normalised²⁵. This is an interrupted system because the normal functions of a mobilised nation grind to a halt following mobilisation. His later work

²⁴ See in particular, Charles Tilley (ed.), *The Formation of National States in Western Europe*, (Princeton: Princeton University Press, 1975) and Anthony Giddens, *The Nation-State and Violence: A contemporary Critique of Historical Materialism* (Cambridge: Polity Press, 1985).

²⁵ Baruch Kimmerling, *Zionism and Territory: The Socioterritorial Dimensions of Zionist Politics*. (Berkeley: University of California, Institute of International Studies, 1983), Baruch Kimmerling, *The Interrupted System: Israeli Civilians in War and Routine Times*. (New Brunswick: Transaction Books, 1985).

traces the spread of militarism throughout Israeli society. In *Political Subcultures and Civilian Militarism in a Settler-Immigrant Society*²⁶ Kimmerling sees the civil sector as the source of Israeli militarism. The macho nature of Israeli society is 'cognitive militarism'. Here military considerations and national security issues are placed above economic political ideological problems. He contrasts this 'civilian-militarism', which sees war as a continuation of diplomacy and domestic policy, with 'professional-militarism', which contracts the role of the military to its most restricted military tasks. Kimmerling regards the period from 1956 till 1967 as being particularly influential when the military came to represent the state in popular belief systems.

From Kimmerling's perspective, it is Israel's concept of national security that leads to its cultural militarism. Kimmerling recognises national security is a constructed term with its roots in social and cultural conditions. Kimmerling sees Israel's national security doctrine as based on democratic asymmetries, with the use of settlements as a tool to determine the state's geographical and political boundaries and offence. These doctrines construct realities: 'National security doctrines are part of the society's belief- system, perceptions of reality, dominant ideologies and reflect the interests of diverse groups and other societal categories', but the doctrines also construct realities. Military mentality and military culture is absorbed into Israeli culture so that it becomes impossible to distinguish between them. Civilian values are also absorbed by the military. He observes that, 'This intermingling between civilian and military cultures in both the institutional and cultural spheres created what should be regarded as a military-cultural complex which penetrates and connects all the societal spheres (private and collective) in Israel.' He concludes:

²⁶ Baruch Kimmerling, 'Political Subcultures and Civilian Militarism in a Settler- Immigrant Society', in Daniel Bar-Tal, Dan Jacobson and Aharon Klieman, eds., *Society Concerns: Insights from the Israeli Experience*. Contemporary Studies in Sociology, Vol. 17 (Stamford, Conn.: JAI Press, 1998), 395-416.

Israel has developed as a culturally and materially recruited militaristic society in which the component of national security has shaped its culture, values and ideologies and which has needed an extensive construction of a convenient social reality. In turn the ideologies, politics and culture interfere with the 'professional' military and national security considerations until it is almost impossible to differentiate between them²⁷.

Avishai Erlich, *Israel: Conflict War and Social Change*,²⁸ has taken the cognitive militarism model further to argue that Israeli society at all levels is dominated by modes of thought that are dominated by security considerations.

Uri Ben-Eliezar, *The Making of Israeli Militarism*²⁹, also stresses a sociological and cultural approach to the study of Israeli militarism. His detailed analysis of the Ben Gurion era is used to show not only how military ways of thinking have come to dominate everyday Israeli life, but also how the early national leaders made use of militarism in the course of nation building. His definition of militarism stresses a sociological approach that explores militarism within a broad political, sociological and cultural context rather than using Marxist determinism that links production to destruction. Nor does he confine himself to a liberal critique that relies on 'a system of interlocked arrangements- political constitutional and procedural...to prevent the army's intervention in civilian decision making and ensure its supervision by the civilian level'. His thesis is that,

[I]n the course of Israeli history military practices gradually became institutionalised and habitual part of life's routine until finally the idea of implementing a military solution to Israel's national problems was not only enshrined as a value in its own right, but also considered legitimate, desirable and indeed the best option.

He locates the development of a militarist ideology within the pre-state *yishuv* and during the early pre-1956 years of state formation when the military and political are interwoven to form a militaristic view of society. This produces a mobilised society; a structure of a 'nation at

²⁷ Kimmerling, 'Political Subcultures', p.415.

²⁸ Avishai Erlich, 'Israel: Conflict War and Social Change', in Colin Creighton and Martin Shaw (eds.), *The Sociology of War and Peace*. (London : Macmillan, 1987)

²⁹ Uri Ben-Eliezar, *The Making of Israeli Militarism*, (Indiana: Indiana University Press, 1998)

arms', which is exemplified by conscription, reserve duty and parachuting former generals to the top ranks of politics. This nation-at-arms form of militarism acts as a buffer to praetorianism. Militarism is described as 'relatively broad range of behavioural patterns'³⁰ including an aggressive foreign policy, army interference in civilian life, political mobilisation of society for war, coups, reverence for order, discipline, hierarchy, force, courage and self-sacrifice. These are all symptoms of a multifaceted concept. This is a cultural phenomenon producing the habitual viewpoint that organised violence or war is the optimal solution for political problems. For Ben-Eliezar 'the dynamics of social processes practices and interactions that render a military solution legitimate self-evident necessary and desirable so that it becomes integral to the formation of national policy'. The distinctly Israeli version is marked by eight characteristics:

- 1) military solutions to national problems but no coup attempts.
- 2) Militarism crosses all societal divides.
- 3) Non-ceremonial with an emphasis on active service.
- 4) Voluntaristic but with a sense of duty
- 5) Militarism of both the ruled and rulers
- 6) Thrives on the blurring of the distinction between civil and military sectors.
- 7) It often appears as a civilian militarism but is the product of the interaction between the army and politics.
- 8) Since 1950s has been a nation at arms.

Ben-Eliezar distinguishes two different strands; firstly, praetorianism as the seizure of power or determining the leader and secondly, the solution of political problems by military means

³⁰ Ibid p.7

which he calls 'cultural militarism'³¹. His detailed historical analysis identifies the pre-state military arrangements and tensions between the young fighters and the political elite as exposing the polity to a real danger from praetorianism, which then diminishes following the 1948 war with the influence of universal conscription and cultural militarism. His concern is with the decline in the nation-at-arms model that brings with it an increasing danger of praetorianism.

Dan Horowitz and Moshe Lissak have been hugely influential in the development of modern Israeli scholarship. Their institutional analysis adopts a fusion model examined from a sociological perspective. Using a centre and periphery analysis, the military is placed at the centre with fragmented boundaries between the military and social elites. Penetration of the military into the civilian sphere has been matched by the civilianisation of the defence sphere. This civilianisation of the military has come about as a result of army reserve duty and the linking of civilian and military elites in common social networks. Ideology is seen as creating militarism through a combination of creating a security consciousness of Israel under existential threat and the nation at arms military model. The incongruence between ethnic identity and territory and the high degree of legitimacy accorded to the military, results in the uniquely Israeli nation at arms form of militarism. National service and reserve duty are seen as part of the process whereby the centre creates shared experience and consciousness-producing militarised ideologies. In *Trouble in Utopia*³², they observe a close contact between military and civilian elites operating within a political system that is overburdened by the competing expectations and demands of a fractured society. Their analysis of the Israeli political system as fundamentally flawed by its inability to produce majority governments, or even coalitions that last more than two years, is central to their conclusion

³¹ Ibid p.10

³²Dan Horowitz and Moshe Lissak, *Trouble in Utopia: Overburdened Polity of Israel*, (Albany: State University of New York Press, 1989).

that the militarization of Israeli society has produced a military that shares an agenda with civil elites rather than civil control of the military. Indeed, this fragility of Israeli government has become the context of all modern studies of Israeli civil-military relations. Horowitz and Lissak's influence has been such that the dominant institutional conceptualisation of Israeli civil-military relations accepts the fusion model and militarised ideology. Scholars differ in the extent to which they delve into a sociological or cultural model to describe the processes involved and indeed the extent to which they attach any conceptual value to a civil-military divide.

Scholars who tend towards a cultural approach are represented in Eyal Ben-Ari and Edna Lomsky-Feder (Eds.), *The Military and Militarism in Israeli Society*³³. The editors divide their contributions into three sections: Cultural Sites, The Construction of Life-Worlds and Gender, Hegemony and Resistance. This collection of essays has as its general theme, 'uncovering the manner-the processes and mechanisms- by which militarism is constructed'. Sites are seen as places and occasions where groups create their identities by telling to themselves stories about themselves in narrative or performance terms. The contributors examine these processes with reference to Massada, Independence Day parades and Museums. The social construction chapters deal with childhood military rituals as well as the individual encounter of the soldier and reservist with the military; military orientation is naturalised through the officers and NCOs as 'reality constructors'. The periodic stints of reserve service are seen as revalidating the values and experiences of youth. The final section deals with gender issues examined through Israeli poetry, film and nursing. These scholars are representative of a growing trend in Israeli scholarship, referred to by Sheffer and

³³ Eyal Ben-Ari and Edna Lomsky-Feder (Eds.), *The Military and Militarism in Israeli Society*. (Albany: State University of New York Press, 1999).

Barrak³⁴ as 'The New Critical Approach', which is influenced by post-modern traditions to concentrate on cultural aspects of Israeli society to reveal a greater militarization of Israeli society than had been earlier recognised. Here, the emphasis is on informal aspects of the civil-military relationship. The nation at arms model is seen as over-civilianising Israeli society and failing to reveal its high level of militaristic values. The very idea of boundaries between civil and military in Israel, whether fragmented porous or otherwise penetrated, is seen as unhelpful since the civilian sector is viewed as being almost non-existent in Israeli society. There is no agreement as to whether Israeli militarism enables or precludes effective civil control of the military but there is agreement that in many civil spheres the military is hegemonic³⁵. The problem with this approach is that the absolute concentration on culture to paint all things militaristic blunts the analytical tools available to differentiate between institutions. Sheffer and Barrak, themselves adopt a networked institutional approach that recognises the complexity of webs of civil and military contact as a 'security network'.

The dominant threads of the modern civil-military literature reviewed thus far, whether adopting a historical or sociological/cultural institutional approach, share key common concepts of an inefficient Israeli civil political arrangement that is unable to reach and take responsibility for strategic military and security decisions, a militarised culture and a closely connected if not fused civil-military relationship. This has become the accepted context for Israeli civil-military relations research. While sharing this common ground, Yagil Levy uses rational choice³⁶ institutionalism, grounded in state formation theory and the republican contract, to understand the relationship between the military, sectors of Israeli society, and

³⁴ Oren Barak and Gabriel Sheffer, 'The Study of Civil–Military Relations in Israel: A New Perspective', *Israel Studies*, Vol.12, No.1, (2007), p.28-52.

³⁵ For articles selected by Barak and Sheffer reflecting the 'New Critical Approach' see: *Israel Studies*, Vol.12, No.1, (2007).

³⁶ For a discussion of rational choice see Hugh Ward, 'Rational Choice', in David Marsh and Gerry Stoker (eds.), *Theory and Methods in Political Science*, (Basingstoke: Palgrave Macmillan, 2002), pp. 65-89..

individual recruits. Levy constructs a methodology of civil groups outside the military bargaining with the military. Further, this rational choice model is extended to a second level of analysis to examine the relationship between the individual and the military through a bargaining process. The analysis sits well with the apparent decline of Israel's republican ethic and rise of a liberal ethos that is based on individualist consumerism.

In *The Other Army of Israel; Materialism Militarism in Israel*³⁷, Levy adopts the fusion model and builds on the work of the state formation school and in particular Tilley. Central to this analysis is the republican contract, whereby the citizenry sacrifices body and wealth in war in return for state rights. For Levy this process both legitimates the military and provides a bargaining model within which to analyse the relationship between individuals and sections of society to the military. Levy calls this 'materialist militarism' as opposed to state militarism. The bargaining position of the military fluctuates with its prestige. Levy uses a historical review of the prestige of the Israeli military to chart the decline of state militarism and the drift away from the military of the Ashkenazi elite, which he attributes to the displacement of the collectivist discourse by a neo-liberal discourse. Economic globalisation has produced structural changes in the Israeli culture and economy with a liberal agenda of individualism, privatisation and competition undermines the status of the military. This erodes the traditional Israeli use of military service as the determinant of entitlement to social goods and justification for social dominion, and results in a drift of the socially dominant Ashkenazi groups away from military service. The concomitant growth of ethno-nationalism results in an over-representation of ethno-nationalists and marginal groups in the military producing an 'army of the peripheries'. This representation of the modern IDF accounts for the continued role of the military in social formation following the collapse of Ben Gurion's statist *mamlachtiyut* project.

³⁷ Yagil Levy, *The Other Army of Israel; Materialism Militarism in Israel*, (Tel-Aviv: Yedioth Ahronoth Books, 2003)

Levy develops this theme in *Israel's Materialist Militarism*³⁸ to explain why levels of militarism fluctuate in society. His approach is to analyse the relationship of the military with groups that supply its manpower and legitimise its activities. On the level of the individual recruit, his contribution is to use a model of individuals bargaining with the military to describe the benefits available to individuals in return for military service and how these change with fluctuations in military prestige and the social benefits of military service. Different groups are able to negotiate differing degrees of power within the military with relative material and symbolic reward. This then reinforces their status in civilian society so that, 'privileged groups are able to invoke their military status to legitimate their social status while marginal groups gain trust through military responsibility'. Levy charts a process that moves from mercenaries to republicanism, to materialist militarism, and finally to post-materialist militarism. In this latter stage the value of military sacrifice drops to the level that the military has to adopt strategies to improve its legitimacy.

This analysis arrives at the concept of a 'market army', which is very different from the traditional narrative of an IDF composed of citizens motivated by collective values and individual sacrifice. Levy argues that an understanding of the multiple rewards for the recruits and the social networks from which they come, is a better analytical tool to understand the problems of control of the military than an old-style institutional analysis. Levy's approach enables an analysis of the relationship between the army and elites as well as between the army and individual members of elites and between the army and members of marginal groups. Sacrifice becomes a negotiable commodity.

³⁸ Yagil Levy, *Israel's materialist militarism*, (Lanham, MD: Lexington Books, 2007).

In 'From "Obligatory Militarism" to "Contractual Militarism" - Competing Models of Citizenship'³⁹, Yagil Levy, Edna Lomsky-Feder and Noa Harel, writing in 2007, consider the 'motivational crisis' that has seen increasing avoidance of Israeli military service. The authors build on the conventional wisdom of Israel's shift from socialist collectivism to liberal individualism by research into the educational and pre-military sites of socialisation. Here Levy combines historical, rational choice and sociological/cultural institutionalism. The research indicates changes in school memorial ceremonies that reflect a growth of individualism, contrasting the publicly funded *Gadna* one-week youth preparation course with the exclusive private one-year *Yair* course to illustrate the growing acceptance of individualistic ambition rather than communal motivation. The thesis here is that the motivational crisis which has been brought about by the growth of liberal individualism finds expression in negotiations between recruits in the military concerning the role (combat, technical, administrative etc.) that the recruit will play in the army the unit (elite or otherwise) and even whether to serve at all. The research falls short of exploring the bargaining processes or their outcomes.

In *Alternative Politics and the Transformation of Society-Military Relations; the Israel Experience*, (2005)⁴⁰ Levy and Shlomo Mizrachi use contractual militarism to link Israel's growing individualism, unresponsive political processes and the reduced prestige of the military to explain alternative political action designed to influence the behaviour of the military. Sacrifice becomes unacceptable where the rewards are seen to be insufficient. The authors use the political participation model of quasi-exit strategy, which is itself grounded in economic theory, to argue that where bargaining fails to produce an acceptable equilibrium

³⁹ Yagil Levy, Edna Lomsky-Feder and Noa Harel, 'From "Obligatory Militarism" to "Contractual Militarism" - Competing Models of Citizenship', *Israel Studies*, Vol. 12, no.1, (2007), pp127-148.

⁴⁰ Yagil Levy and Shlomo Mizrachi, 'Alternative Politics and the Transformation of Society-Military Relations; the Israel Experience', *Administration and Society*, Vol.40, no.1, (March 2005), pp25-53.

between sacrifice and reward, and where conventional channels of political action are blocked or unresponsive, individuals and groups resort to quasi-exit strategies or alternative politics⁴¹. The form of the alternative political participation varies with the political culture. Here again Levy is combining rational choice with cultural investigation to understand political behaviour. Using a historical lens, the authors link the growth of disillusion among the liberal Ashkenazi elites to the development of various protest groups including *Yesh Gvul*, *Courage to Refuse*, and *Machsom Watch* (an organisation that monitors military behaviour at checkpoints). The point here is that Levy charts the fluctuating prestige of the military, and links it to the rise of individualism to predict exit/protest behaviour and negotiating strategies that are an expression of the relative power of the army and its recruits.

In his analysis of the Second Lebanon War of 2006⁴², 'The Second Lebanon War: Coping with the "Gap of Legitimacies" Syndrome' Levy describes a 'gap of legitimacies', with militarism producing a political legitimacy for the use of force while individualism, economic liberalism and social cleavages have eroded the legitimacy for sacrifice⁴³. Levy's sees the decline in the legitimacy of sacrifice as being behind the military strategies of force protection seen in Lebanon in 2006 and Gaza in 2009 and the reluctance to deploy ground forces⁴⁴. These strategies are reinforced by philosophical positions that prioritise the protection of Israeli soldiers ahead of enemy civilians⁴⁵ and result in military operations that

⁴¹ Albert Hirschman, *Exit, voice, and loyalty*, (Cambridge, MA: Harvard University Press, 1970).

⁴² Yagil Levy, 'The Second Lebanon War: Coping with the "Gap of Legitimacies" Syndrome', *Israel Studies Forum*, No. 23, 2009, pp.3-24.

⁴³ Ibid p.7, Levy avoids any real discussion of legitimacy and relies instead on Weber. For Levy 'Legitimacy is not based on the circumstances of a given time and place. Rather it reflects the deeply rooted values of society.'

⁴⁴The author's interview with Levi, 7 February 2009.

⁴⁵ Asa Kasher and Amos Yadin, 'Assassination and Preventative Killing', *SAIS Review*, Vol. XXV, no.1 (Winter-Spring 2005), pp.41-57. See also, Amos Harel, 'The philosopher who gave the IDF moral justification in Gaza', *Haaretz*, 9 February 2009 accessed at <http://www.haaretz.com/hasen/spages/1062127.html>. Last visited 24 March 2009.

can cause high levels of civilian casualties. Such operations are legally controversial and undermine the legitimacy of the military and its operations. This insight is particularly relevant to this thesis as it identifies an important element of Israeli civil-military relations that mandates a legal and ethical position for force protection. Connections will be made in the course of the thesis between force protection as a military strategy in conflicts between the IDF and non-state actors fighting from within their own civilian communities, force protection as an ethical philosophical Just War position promoted popularly and within the IDF by influential Israeli philosopher Asa Kasher⁴⁶ and force protection as a frame for rival constructions of international humanitarian law and the exercise of choice between them.

Returning to Barak and Sheffer, they explain the security network as,

a complex and fluid type of relationship between security and civilian actors, but one that is ultimately capable of shaping the policymaking process as well as determining concrete policies. The boundaries between these actors are utterly blurred, significant overlapping areas are created, and the civilian actors are neither equal in their power to the security actors nor able to exercise effective control of them or significantly reduce their impact on policymaking. In addition, movement between the defense establishment and each of the civilian spheres remains frequent, if not natural. Probably most importantly, actors from both types of realms who are members of the Network share values, interests, goals, discipline, and behavioral patterns⁴⁷.

The authors call for research into the connections and attitudes of the members of the network, and see value on the concepts of domestic communities of practice and epistemic communities. In common with, recent Israeli scholarship, the emphasis is on 'security' rather than 'military' or 'defence', enabling the inclusion of sociological and cultural insights.

⁴⁶ Kasher's work will be discussed in detail in chapter 4.

⁴⁷ Barak and Sheffer, 'The Study of Civil–Military Relations in Israel', p. 23.

3) Legal-military relations

Legal-military relations can be identified as a neglected sub-field of civil-military relations. It is not immediately apparent why this field of study should receive so little attention. The cognitive and behavioural revolution led to powerful criticism of institutional scholarship's use of legal regulation to analyse institutional arrangements. Formal legal arrangements are seen as a poor guide to the power relationships between civil and military actors. Perhaps as a consequence, modern Israeli civil-military scholarship steers clear of consideration of the constitutional normative regulation of the military. Where the law is considered, discussion draws on legal scholarship to consider the effects of Supreme Court rulings on military matters. This amounts to a historical consideration of whether the Supreme Court's application of international law to the Occupation constrains or merely validates military action⁴⁸. Such considerations merit no more than the occasional reference or short chapter in the civil-military literature. To be sure, the apparent competition between the military and the judiciary for the last word in security matters is of considerable importance, but concentration on the domestic impact of a regime of international law fails to capture the significance of recent changes in the wider legal environment. Currently, Israeli military and civil elites avoid travelling to many parts of the world for fear of arrest for war crimes under the Universal Jurisdiction. UN bodies and private NGOs produce a constant flow of reports and observation in the language of international humanitarian law condemning Israeli military operations. In this hardening legal environment the Israeli military faces testing challenges to combat non-state actors that fight among their own civilians. In these circumstances what is legal in war becomes subject to harsh political contestation. This politicisation of law and the role of IDF military lawyers in the processes cannot be understood without a deeper

⁴⁸ David Kretzmer, *The Occupation of Justice*, (Albany: State University Press, 2002) is often cited to conclude that the apparent legal regulation has a legitimising effect.

understanding of the legal environment than is currently offered separately by the civil-military literature of its legal counterpart. This thesis seeks to address this gap in the civil-legal scholarship by bringing together legal and IR scholarship to provide a framework for the examination of original research into the workings of the IDF International Law Department. The following chapter will draw on a wider scholarship and explore in greater depth the legal environment in which the IDF carries out its operations.

4) Conclusion

Israeli civil-military relations are best understood as a complex web of relationships that defies any model of clear separation between civil and military. Cultural and sociological scholarship reveals a pervasive cultural militarism that privileges military solutions to political problems. The context is one of an ethnically and religiously divided society where the democratic structures are inefficient and where opposition groups have found a partner in the Israeli Supreme Court in a process of juridification of military security issues. This involvement of the Court relies on the application of an Israeli construction of international humanitarian law that operates through the civil institution of the court and the law to set limits on the power of the Israeli military. The increasing use of an international legal regime of foreign courts, NGOs and UN fact finding missions, legal opinion all using a discourse of international humanitarian law adds an international dimension that has been ignored by the scholarship. Identifying the conferring and denial of the legitimacy of military operations as a key function of the regime reveals its importance to the Israeli state and military. As such, this is an important aspect of civil-military operations that has been overlooked by the scholarship. Examination of the processes involved will shed light on the role played by Israel's military lawyers in operational decision-making. To this end, this thesis is arranged by chapter as follows:

Chapter two considers the legal environment, both domestic and international, within which the military carries out its operations in order to show how and why judgments about the legality of military operations matter in practice. The material is divided between the domestic Israeli Supreme Court, the Universal Jurisdiction and the international courts. While all three merit separate discussion, the argument will be made that their importance and traction with the military and political elites can best be understood in terms of their impact on the legitimacy of Israeli military operations.

Having considered the legal environment, the discussion turns in chapter three to the law by which the military is held to account. This concerns several key provisions of International Humanitarian Law. There have been very few court decisions and the law relating to targeting decisions can be readily understood. The point to be emphasised here is the extent to which grey areas of imprecision require a balancing of humanitarian and military values that allows military lawyers and legal scholars a choice between contradictory legal constructions that each have a claim to legality.

International Humanitarian Law is an uneasy balancing of military and ethical values. Chapter three has identified 'grey areas' where legal judgment is understood to allow practice determined by contradictory ethical positions. Chapter four explores the extent to which the construction of legal advice on targeting is a matter of moral judgment. This involves critical review of Just War Doctrine and its relationship with law, realism, consequentialism and militarism. Just War Doctrine can be understood as a specialist area of the philosophy of law that frames the discussion of how law *ought* to regulate the conduct of war and as such is an important element of the regime of IHL. Adopting a methodology that understands the law of war as a regime that includes philosophical positions that seeks to influence the development

of law and frames the political development of law in philosophical terms allows a deeper insight into the processes of legal choice and legal development. The main point here is that modern Just War scholars from Walzer onwards are struggling to identify the extent to which soldiers should risk their lives to reduce harm to enemy civilians that have been deliberately endangered by non-state actors. Ethics is seen as both informing legal decision-making and as easing its acceptance. The argument is made that this does not make the exercise of choice in constructing legal advice any less political, rather ethics inform political decision making expressed by the military lawyers in legal terms. Israeli constructions of security, in the context of conducting military operations against non-state actors that do not respect the laws of war, have led to popular Just War positions that influence the political decision-making over the construction and use of International Humanitarian Law that tips the balance between civilian protection and force protection in favour of the military. The various Just War positions on the right way to fight a war against terrorists and insurgents provide the legal practitioner with ethical choice that precedes and informs legal choice.

Chapter five explores the plurality of International Humanitarian Law beyond the 'grey areas' and uses Reisman's legal realism to identify the law applied by elites and communities of purpose to make the point that, in approving an attack, the legal advisor is doing more than identifying the lawful and the unlawful; once the obviously illegal has been eliminated, legal advice on targeting is a political choice between different constructions of the legal. With this insight established, the way is open to consider how the IDF lawyers are making their choices.

Chapters six, seven, eight and nine present case studies of the Second Intifada, the 2006 Lebanon War, Cast Lead and the 2010 Turkish Flotilla to identify the growing involvement of military lawyers in targeting decision, analyse their advice and their role both before and after the fact. These chapters look at the role of the military lawyers in practice. Aspects of

the operational decision-making remain secret. However, the thesis makes use of extensive interviews with the key legal actors to establish their role in the operations and the fact that their advice was followed. Published reports provide detailed accounts of the operations and the legal criticisms and justifications of the IDF actions. This makes it possible to reconstruct the legal advice given to the military commanders and subject it to analysis to show the constructions that were applied and whether the advice was enabling or constraining.

Chapter ten tests the hypotheses to reveal the IDL as the focal point of both civil and military institutional power. The thesis adds to existing legal-military relations scholarship by identifying the growing importance of the IDL and linking it to the processes whereby International Humanitarian Law is being used and contested as a measure of international and domestic legitimacy. The argument is made that the IDF lawyers are developing legal positions designed to enable the IDF to fight non-state actors while engaging in strategies of force protection that endanger enemy civilians. This requires choices of International Humanitarian Law that are constrained by the demands of international and domestic legitimacy- choices that on the international level reflect the consensus positions of those communities of purpose most valued by the Israeli political elites. In short, the role of the IDF lawyers is understood within a wider civil-military context that reveals the political significance of the choices of their legal advice.

Chapter 2: the IDF's legal environment

1) Introduction

As was observed in the previous chapter, there has been a tendency to view the IDF's legal environment in purely domestic terms with an emphasis on the tension between the IDF and the Israeli Supreme Court. Clearly this is an important aspect of the legal environment, but as has already been argued, represents only a fragment of a larger picture. The proceedings of the Winograd Commission and their report are remembered for their apportionment of blame between the political and military echelons for the failings of the IDF in the Second Lebanon War. In fact, the disagreement between the Commission and the Israeli Attorney General and Military Advocate General sheds considerable light on IDF and Israeli government perceptions of the IDF's legal environment. This chapter begins by examining the Commission proceedings before discussing the legal environment in terms of the Israeli Supreme Court, the threat of foreign prosecutions under the Universal Jurisdiction and in the International Courts and the requirements of international and domestic legitimacy, in order to inform a more detailed methodology for the consideration of the role of military lawyers than is presently offered by civil-military relations scholarship.

2) The Winograd debate

The Winograd investigation of the contribution of the IDF's lawyers to the conduct of the war was based in a large part on the testimony of the Israeli Attorney General Menachem Mazuz and the Military advocate General Brigadier Avihai Mandelblit. The record of their evidence gives unprecedented access to the views of Israel's two top military and government lawyers on whether the IDF should be taking international law seriously and whether the military

lawyers should be involved in operational decision making. This material has not previously been the subject of academic attention. References are to the author's translation.

The sharp difference of opinion between the Commission members, particularly constitutional lawyer Ruth Gavison, and their principal legal witnesses about the proper role of military lawyers is obvious from the start. It is clear from the record of their testimony that both witnesses were relentlessly challenged to justify the involvement of lawyers in operational decision-making. It is worth examining the record of the proceedings in some detail because of the unique insight they present into the thinking of such senior legal and military figures when pressurised to justify their institutional roles in the face of such obvious disapproval.

The commission began taking evidence from Attorney General Mazuz on 14th January 2007 and got straight to the point by describing their interest as, 'The central question related to the campaign that we would like to discuss is the development of relations between legal consultation and military operations, as it manifested itself in this campaign and possibly also in previous campaigns, and in parallel campaigns'.

Mazuz responded by describing the Lebanon campaign as having the greatest involvement of lawyers of any war in the history of the State of Israel. The political and military echelons had required concrete answers concerning the application to specific targets of the key international humanitarian law principles of proportionality. The involvement of the military lawyers at both the strategic and the operational level was described as an 'unprecedented'. This was a legal presence in forums approving targets and legal answers were given 'on the spot'. Challenged by the Commission that he was taking international law too seriously, Mazuz argued that international law has a growing importance in relation to both state, 'in

order for the State of Israel not to be exposed to international criticism', and individual responsibility- 'a personal and important price tag'.

There was no longer any question that international law was irrelevant; Israel had to take it seriously. On the subject of personal liability, Mazuz alluded to the principle of complementarity, whereby the International Criminal Court (ICC) and foreign domestic courts, exercising a universal jurisdiction to try war crimes, give preference to recognised criminal procedures of the courts of the defendant's home country. For Mazuz this was good reason for Israeli law to take international law seriously and avoid facing allegations of war crimes 'in a forum outside of the State of Israel'.

Mazuz also emphasised the importance of the internal legal pressure from the Israeli Supreme Court determining petitions from the occupied territories according to international law. In his terms, 'there are petitions for everything to the High Court of Justice, and therefore in order to be able to give a better answer tomorrow to the High Court of Justice, we and the military system prefer to clarify things today before the operation'. Having explained his view of the need to comply with international law, Attorney General Mazuz spelt out that the military decision-makers did not want to be responsible for actions that breach international law and in any event could not be trusted to get it right without legal input.

The Commission saw MAG Mandelblit two days later on 16th January 2007 when they invited him to describe the involvement of his officers in military decision-making. As head of the IDF legal corps, Mandelblit confirmed that he and his officers were present in the Headquarters Forum, with the Chief of Staff, at the operations level and generally: 'we are in the home front, in the air force, in the navy, in the intelligence, we have a tight legal adviser to many of the questions that rise there'.

Mandelblit traced the increased involvement of military lawyers to 2000 when the military fought against the second intifada in circumstances where the residents of the occupied territories were able to petition the Israeli Supreme Court alleging breach of their rights. Here Mandelblit is referring to the Supreme Court's application of international humanitarian law to these cases and the necessity of defending those cases in order to maintain military legitimacy:

'[I]n light of the great involvement of the Supreme Court, which is very unusual on this matter, in many rulings. This simply puts us in a position where we had to give many answers to petitions, a lot of them- and there are patterns, as you know, that with some I can perhaps specifically disagree, but we must act accordingly'.

Mandelblit went on to describe how Israeli military lawyers advise on banks of targets and, within those banks, families of targets and indeed, individual targets. This related to the protracted air war against Hezbollah with targeting of villages in Southern Lebanon, regarded by the Israelis as legitimate targets of Hezbollah activity. The Commission was troubled by this degree of legal involvement in military decision-making and again suggested that the army should be left to internalise legal norms and get on with the fight without involving the lawyers. Commission member Major General Menachem Einan (rtd.) expressed this view in blunt terms: 'the question that bothers me the most, it's what you raised, your involvement in the goals, targets. You are a part of the decision-making. Actually, I think you turned into an operational echelon rather than a legal echelon'.

Mandelblit fought his corner denying that he and his corps of military lawyers had usurped the decision making function:

I am a part of the decision making. I am not an operational rank. What happens is that they present me with propositions of the operational rank, and I give my opinion whether it is within the reasonable and the legal. I do not suggest targets. I do not pretend to do it. I don't want to, and I warn myself and my people not to do so. I am a legal adviser. Now, the fact that I am involved in decision making is only on a consulting level. I do not replace them. I don't say attack here or there. I have never proposed anything and I insisted on it. Never. And

in the Headquarters forum's deliberations there are several possibilities, in different types of issues: we will do this, we will do that. I just forbid myself not to express an opinion on operational matters, because I am not an operational man.

The lawyers on the Commission were not going to let him off the hook so easily. They challenged the simplicity of this explanation by pointing to the breadth of interpretation available when considering principles of humanitarian law. There could be a wide or restrictive interpretation when applying concepts like proportionality. In response, Mandelblit was forced to accept that his lawyers had a wide discretion, but when push came to shove they were there to help the IDF win the war. His clear message to the Commission was that the legal restrictions were permissively interpreted and loyalty to the IDF was not in question: 'Now I need to help the IDF win, like any army officer. I want the IDF to win the war, and that's why I want to help the operational body to succeed as much as possible'.

While laying claim to a culture of support for the military, Mandelblit struggled to justify his role in operational decision making to a Commission that was making clear its own view that legal questions in operational decisions should be left to suitably trained commanders, whose internalisation of the rules of war would enable them to exercise their own judgment. Mandelblit responded to this by playing the legitimacy card. Legitimacy is a powerful word in Israeli discourse resonating with the challenges to the right to the state of Israel to exist and it is worth looking in some detail at its use by Mandelblit and the Commission. Mandelblit was making the case that the military needed his lawyers to retain its legitimacy and developed the point as follows:

The big change started in the year 2000 when we entered deeper into the field of legal advisory. Legal advisory and legal guidance And this is to say that *we actually need to support the army's actions with a front I call the front of legitimacy*. Giving back this legitimacy. Legitimacy is a term wider than the sentence but it actually contains four- what I truly agree with, at that time Boogie Ya'alon explained it- four fronts: military front, political front, conscious media front, and the internal and international legitimacy front. Now, our part is in all fronts, but naturally more focused on the matter of legitimacy. *You cannot win a war*

today, without simultaneously keeping legitimacy inside the country and around the world.
(my emphasis)

Mandelblit claimed credit for the decision to drop leaflets on the Lebanese villages warning non-combatants to leave, which in his view was not strictly required in law but was essential in order to maintain the legitimacy of the operation:

We could have reached this situation (no warning and large numbers of civilian casualties), and then we wouldn't have had any legitimacy for this type of operation after a few days, and the army wouldn't have had the means to operate..... There is a scope for some or I would say even dozens of legal advisers at the division level today. No western army works any differently. I believe the world made a progress on this matter. That all together, these are things that aim to keep the legitimacy of the forces working in the field, because if they don't work with legitimacy, their attack will be stopped very very quickly, I have no doubt.....

Mandelblit claimed that his involvement in decision making was necessary for the preservation of military legitimacy while carefully avoiding the trap of claiming that all things legal are therefore legitimate:

Dror: Is the legitimacy you refer to from the public perception or legal norms?

Mandelblit: Both. They are non-identical, definitely not, and the example of Qana shows this, because legally Qana¹ was fine in the legal perception. It did not pass the public legitimacy.

Despite this robust defence of the role of the military by both the MAG and the AG, the commission, perhaps predictably, maintained its own view of military lawyers and indeed international law. Their report has nothing good to say about the relationship between the military and their lawyers. While conceding that they had found no evidence of operations having been damaged by military reliance on legal advice, they recommended that commanders rely on their own judgment. Humanitarian concepts were to be internalised by the IDF and inform decision making without having to take legal advice. Their conclusions

¹ The attack on Qana had resulted in the death of refugees who had been sheltering in the UN compound.

accuse the military of paying too much attention to lawyers and holding international law in too high regard. The findings include:

Even the Military Advocate General (and respectively the Attorney General of Israel) was not satisfied with only writing down general guidance, but he also participated in the general staff meetings, and his representatives were present at the general headquarters, in some cases they advised in real time to the commanders of smaller units. As mentioned, sometimes the initiative to get legal approval before or during an operation came from the decision makers or the units themselves.

The natural tendency to be assisted by legal advisory is clear to us- from personal liability reasons- and perhaps even and especially in real time; all in all, we fear that the increasing leaning on legal advisors during military action can divert responsibility from the elected figures or commanders to the advisers, and can disrupt both the essential nature of the decisions and the military activity.

It seems to us, that it is appropriate that fighting forces, certainly at field ranks, concentrate on fighting and not consulting with legal advisers².

Having looked at this testimony and the Commission findings in some detail, several themes emerge. There is common ground between the Commission and its witnesses that the power of the lawyers in the military has been increasing to the extent that lawyers have become involved in operational decision making. The debate is about whether or not this should be welcomed or curtailed. On the one hand, there is the Commission saying that military efficiency is in danger of being compromised by unnecessary reliance on legal advice, and on the other there is the MAG maintaining that legal involvement in operational decision-making is essential to military efficiency in order to preserve military legitimacy at home and abroad. The AG, whose remit has a greater international element than that of the MAG, understands legal involvement in decision-making as being essential to the production of decisions that can be defended in international forums and that do not risk war crimes charges against military decision-makers travelling abroad. The argument that military legitimacy requires compliance with international law is not surprising, but it is the linking of the

² Winograd, Chapter 14: The Conduct of Israel in the Light of International Law. The Winograd Commission official site including the report and testimony (in Hebrew) can be accessed at <http://www.vaadatwino.org.il/statements.html#null>. (Last accessed 4 February 2011).

legitimacy of the IDF's operations in the occupied territories to the application of international law by the Supreme Court, coupled with the outbreak of the Al Aqsa intifada in 2000, that appears to both the MAG and the AG to have been the engine of change.

The following areas of the IDF's legal environment will now be examined in turn: the Israeli Supreme Court, the threat of foreign prosecutions of Israeli decision-makers for war crimes and international legitimacy.

3) The application of international law by the Israeli Supreme Court.

At the start of its occupation of Arab lands captured by Israel in the June 1967 war the IDF was given the job of administering the occupied territories. The territories were not annexed although the application of Israeli law to East Jerusalem and parts of the Golan Heights amounted to a de-facto annexation³. Annexation of the whole of the territories would have caused an international outcry and the incorporation into sovereign Israel of over one million mostly Palestinian Arabs would have soon put an end to Israel's claim to being both Jewish and democratic. Instead, Israel sought the best of both worlds: control without annexation. This was achieved by refraining from annexation while adopting an ambiguous position regarding the applicability of the laws of war and occupation (international humanitarian law). The major elements of this body of law comprise the Hague regulations and the Geneva Conventions⁴. The basic framework of the regulations is that the Hague regulations concern

³ Israel has not annexed East Jerusalem but by alteration of the city boundaries applying Israeli law to East Jerusalem and making 'United Jerusalem' there has been de facto annexation. See David Kretzmer, *The Occupation of Justice: the Supreme Court of Israel and the Occupied Territories*, (New York: SUNY Press, 2002), p.6.

⁴ The main treaties are the Hague Treaties, and especially the Fourth Hague Treaty and the annexed regulations of 1907, and the four Geneva Conventions of 1949, and their additional protocols (I and II) of 1977. [*Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Aug. 12, 1949, 75 U.N.T.S. 31; *Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, Aug. 12, 1949, 75 U.N.T.S. 85; *Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 75 U.N.T.S. 135; *Convention Relative to the Protection of Civilian Persons in Time of War*, Aug. 12, 1949, 75 U.N.T.S. 287. *Protocol I Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts*, Dec. 12, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391; *Protocol II Additional to the Geneva Conventions of 12 August*

sovereign rights of warring parties while the Geneva Conventions protect the civilians. The Israeli state developed the legal strategy of recognising The Hague regulations as customary international law while arguing that the Geneva Conventions were binding only on the signatories in the strict terms of the convention and that this was not an occupation to which the Geneva Conventions applied. As early as 1968 influential Israeli Professor Yehuda Zvi Blum advanced the argument that Article 2 of Geneva IV refers to sovereign territory belonging to warring contracting parties and since the Occupied Territories were never recognised as sovereign Jordanian territory the convention does not apply to the occupation.⁵ The Hague Regulations, which focus on the rights of the sovereign power in control of territory, were selectively applied to enable the IDF to enact the regulations it needed for strict military control of the territories. The point to be emphasised here is that without annexation Israeli law did not apply to the territories, this denial of the applicability of the Geneva Convention turned the territories into a space where only the IDF had rights.

While Jordanian law remained in place to regulate inter-personal Palestinian disputes and Israeli law was confined to Israel sovereign territory, settlements and Israeli citizens, the IDF, as the military governing authority, used Article 43 of the Hague Regulation to enact decrees establishing a military system of government in the territories⁶. Under this system of governance the normally separate administrative, legislative and judicial organs of state coalesced within the IDF. The military commander was the sole legislative authority and, in the absence of annexation, the Knesset was denied effective oversight of IDF legislation.

The IDF was no stranger to military government. Until 1966 it had been the governing authority over Israel's Arab population with a system of control relying on permits and

1949, *Relating to the Protection of Victims of Non-International Armed Conflicts*, Dec. 12, 1977, U.N. Doc. A/32/144, 1125 U.N.T.S. 513, 16 I.L.M. 1442 (1977).]

⁵ Yehuda Zvi Blum, 'The missing Revisioner, Reflections on the Status of Judea and Samaria', *Israel Law Review*, Vol.3, (1968), pp.279-301 at p.279.

⁶ The 1907 Hague Regulations give the military commander full legislative and administrative authority.

curfews⁷. This long standing political arrangement amounted to an administrative blue print for the occupation; it was a model whose longevity was not compromised by the assumption central to the Geneva framework that occupation is temporary.⁸ With strong prestige within Israel and little control by the Knesset or the government, the IDF assumed hegemonic powers in the occupied territories.

While denying the enforced applicability of the Geneva Conventions to the Occupied Territories the Israeli government heightened the legal ambiguity by adopting the reassuring position that it voluntarily applied the humanitarian provisions of the Fourth Geneva Convention⁹. This ambiguity was not just to provide legal cover for the IDF, but was the product of a profound failure of the Israeli polity to agree on what to do with its captured territories. Were they being held to be used as bargaining chips in peace negotiations or were the territories Israel's recaptured homeland- the miraculous deliverance of the missing portion of the Land of Israel? Was the territory to be settled or traded for peace? Many politicians referred to liberation rather than occupation. This debate charged the very term "occupation" with additional meaning and "administration" became the accepted parlance outside the court room¹⁰. The legal ambiguity was not limited to the applicability of the Geneva Conventions; there was also the matter of international human rights law (IHL) that seeks to universalise liberal values of individual freedom through a regime of human rights. The Israeli government and international human rights bodies have taken opposing positions

⁷ The British Mandate Defence Regulations 1949 had been left in place by the Israeli's and provided the IDF with the powers it needed to control suspect populations within Israel and indeed were Later used in the occupied territories on the basis that they had been part of Jordanian law.

⁸ See for instance, Idith Zertal and Akiva Eldar, *Lords of the Land: The Settlers and the State of Israel 1967-2004*, (New York: Nation Books, 2007)

⁹ Kretzmer, David. *The Occupation of Justice: the Supreme Court of Israel and the Occupied Territories*, (New York: SUNY Press, 2002), chapter 2.

¹⁰ This ambiguity is well illustrated by the rapid withdrawal of an initial proclamation that notified the population that the military courts would observe the provisions of the Geneva Convention 1949. The proclamation was replaced by a similar notice that omitted reference to the Convention. See, Zertal and Eldar, *Lords of the Land*, pp.133-134.

on the applicability of HRL and IHL to the Occupied Territories with massive consequences for the Palestinian communities living there.

IHL deals with the protection of individuals and groups against violations by governments of their internationally guaranteed rights. International Institutions have been created since World War II to safeguard and promote such rights that apply to all individuals. Enforcement is achieved by institutions empowered by treaty to monitor compliance, international courts and by domestic jurisdictions that have signed up to operate the framework. All human rights conventions recognise the right to life as the most important human right and one which cannot be derogated from even in a national emergency. This absolute right is accepted as a binding norm from which no state is permitted to deviate even if they are not signatories to the relevant conventions. Israel is a signatory to six international human rights conventions:

1. International Convention on Economic, Social and Cultural Rights (ICESCR)
2. International Convention on Civil and Political Rights (ICCPR)
3. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
4. Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
5. Convention on the Rights of the Child (CRC)
6. Convention for the Elimination of All Forms of Racial Discrimination (CERD)

The most important international instrument is the International Convention on Civil and Political Rights (ICESCR), which by Article 2(1) states:

Each State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised within the present Covenant, national or social origin, property, birth or other status.

The conventions operate within a framework of reporting and investigation. Compliance with the ICESCR is monitored by the UN Committee on Economic Social and Cultural Rights and the ICCPR by the UN Human Rights Committee.

The International Covenant on Civil and Political Rights 1966 formulates the right to life as: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life'. This prohibition against arbitrary killing effectively requires a judicial process and is designed to prevent extra-judicial use of lethal force by state agents and to require state agents to be accountable for the use of such force. Exceptions include action to prevent unlawful violence or self-defence.

Interpretation and international judicial enforcement of such rights has been seen in the cases brought to the European Court of Human Rights alleging breach of the European Convention of Human Rights. Here rulings have decided that self-defence requires the threat to life to be immediate and the lethal response to be proportionate. Further, there is a requirement for accountability that implies a need for some form of procedure for reviewing the lawfulness of the use of force. In addition to the prohibition of arbitrary killing there is the right to fair trial as guaranteed by Article 14 ICCPR. Consequently, international human rights law is unlikely to sanction Israel's policy of targeted killing.

However, despite signing up to the conventions and implementing their requirements within the Green Line, Israel traditionally maintained that the Convention obligations do not extend to the Occupied Territories because those areas are not Israeli sovereign territory or within its domestic jurisdiction and because the main civil powers and responsibilities have been transferred to the Palestinian Authority (PA). Consequently, the treaties should be interpreted as applying only to Israeli sovereign territory since Israel has passed the responsibility to the PA. The Israeli argument has been that Human Rights Law is founded on the social contract

between citizen and the state which does not apply in conflict and that Humanitarian Law is the specialist body of law for conflict which displaces the peacetime Human Rights Law.

This is not a position that is accepted by the various UN human rights treaty bodies. The position amounts to a standoff between Israel and the UN human rights establishment over the legal responsibility of Israel to respect the human rights of the citizens of the Occupied Territories with Israel refusing to cooperate with the UN human rights monitoring bodies and rejecting the legitimacy of their conclusions. By adopting this position Israel has attempted to resist the creeping universality of human rights in an effort to limit its obligations in the Occupied Territories to those imposed on an occupying force by Humanitarian Law in general and the Fourth Geneva Convention in particular.

However, there is no longer any doubt that human rights law applies during occupations.¹¹

This was confirmed in the Nuclear Weapons case¹² that concluded that the use of nuclear weapons was not automatically unlawful and was applied by the International Court of Justice (ICJ) in an advisory on the Legal Consequences of the Construction of a Wall in The Occupied Palestinian Territory.¹³ Here, the court had to determine the relevant law to be applied to the legality of the construction of the wall. The court confirmed that the Hague Convention and the Fourth Geneva Convention apply. The court analysed the human rights treaties entered into by Israel and reviewed Israel's long-standing argument that the treaties do not apply outside Israel's sovereign territory. Relying on the fact that the occupation was longstanding and that Israel occupies effective control and the need to protect occupied

¹¹ David Kretzmer, 'Targeted Killing of suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence', *EJIL*, 2005, pp.171-212.

Steven R. Ratner, 'Foreign Occupation and International Territorial Administration: The Challenges of Convergence', *European Journal of International Law*, (2005), 16/4 at p704.

¹² Legality of the Threat or Use of Nuclear Weapons[1996]ICJ Rep 66.

¹³ The Legal Consequences of the Construction of a Wall in The Occupied Palestinian Territory [2004]ICJ

population, the court found that the occupation did not preclude the parallel application of human rights law and humanitarian law. Human rights law applied to the territories because of Israel's effective jurisdiction. The court then applied the 1907 Hague Regulations, the Fourth Geneva Convention, the ICCPR, the ICESCR and the CRC finding Israel in breach of the humanitarian law and various human rights instruments. Specifically, the court found Israel in violation of:

Hague Regulations Articles 46 and 52 and Fourth Geneva Convention Article 53 by destruction and requisition of property, Fourth Geneva Convention Article 49(6) contributing to demographic change, ICCPR Article 12(1) by impeding Palestinian freedom of movement as well as various breaches of ICESCR and CRC by impeding the right of Palestinians to work, health, education and an adequate standard of living.

By ruling that the human rights instruments complement humanitarian law the court found that it was not enough for Israel to simply rely on compliance with the Laws of War. Human rights law is filling the gaps left by humanitarian law not displacing it but since IHL is the *lex specialis* it has primacy where there is a direct conflict. What is left unclear is how this convergence will work in practice. As a consequence, the ambiguity continues. In practice, Israel has continued its policy of not cooperating with human rights monitoring bodies.

Israel had chosen not to take part in the ICJ proceedings, whose judgment was strictly advisory rather than binding on the parties. Instead they chose to communicate the security imperatives of the separation barrier by parking outside the court the remains of a Jerusalem bus that had been blown apart in a suicide attack. At the same time as the ICJ ruled that the wall was illegal, the Israeli Supreme Court accepted the legality of the wall by applying IHL balancing tests of military necessity and proportionality to property disputes arising from the

routing of the Wall.¹⁴ The Supreme Court found that the security threat to the state was so severe that the harm done to the Palestinian population by constructing the wall was not excessive and, having found that there was no breach of IHL, what would otherwise be a breach of HRL became irrelevant. In other words, Israel's security needs meant that IHL displaced HRL in practice. To be sure, the ICJ had taken a different view of Israel's security and found a breach of both legal codes. Further legal analysis is not required in order to make the point that although the Supreme Court has pulled the rug out from underneath the Israeli state argument that HRL does not apply in the territories, the privileging of Israeli security suggests that Palestinian human rights will only be recognised where there is no threat to Israeli security. This amounts to a continuation in practice of Israel's refusal to recognise the application of HRL to the territories and the continuation of a policy of legal ambiguity. However, the points to be emphasised here are firstly, that although we are considering the domestic jurisdiction it is international law that is being applied by the Israeli Supreme Court and secondly, the court is effectively substituting its judgment of the right balance to be struck between the security needs of the state and the rights of the Palestinian residents of the West Bank. Significantly, the court has encouraged evidence from non-serving security experts and NGOs to second guess the security assessments submitted by the military. In these circumstances the view of the Supreme Court as the arbiter of the balance between the rights and obligations contained in the conflicting legal codes assumes added significance. In fact, the increased uncertainty adds to the power of the court as the ultimate arbiter of the legality of the exercise of power- assuming that it is prepared to take on the role. In fact, the mechanism whereby Palestinian citizens of the Occupied Territories access the Supreme Court to present legal grievances about the actions of the IDF was established without significant public comment some four years into the occupation.

¹⁴ Beit Sourik Village Council v the Government of Israel and The Commander of IDF Forces in the West Bank HCJ 2056/04. Also see, Yuval Yoaz, 'Court Orders West Bank fence re-routed at Bili'in', *Haaretz*, 04/09/07.

In the absence of effective legislative and executive control of the IDF,¹⁵ it is highly significant that the Israeli Supreme Court decided that residents of the occupied territories were entitled to directly petition the Supreme Court. After all, without popular access to the court, the judges are starved of opportunity to exercise their power. This decision of the court to accept petitions was not opposed by the AG who may have been motivated by the attraction of an appeal system that implied a Palestinian acceptance of the legitimacy of the Israeli court system in its relations with the occupied territories.¹⁶ In fact, it has been the flow of these petitions from the occupied territories to the Supreme Court that has provided the Court with the opportunity to use international law to regulate the IDF's rule¹⁷. Studies of the jurisprudence of the Supreme Court agree that it was not until the mid- 1980's that the court began to use international law to critically review the activities of the army¹⁸. Before that, the court used the state's voluntary adherence to the humanitarian aspects of the Geneva Convention to review the procedural aspects of the IDF's decision making while steering clear of examining the proportionality issues raised by security considerations.

The political significance of these developments have not been overlooked by Israeli legal scholarship. Writing in the *Israeli Law Review* in 2005, Amichai Cohen observed:

It would have made little sense for the court to strictly apply the international law of occupation, when everyone understood that this law was but an instrument for the IDF to implement its independent policies. The court considered its role to be quite different. Its task was to ensure that the IDF, as an administrative institution, was not abusing its powers. In effect, the court thus adopted much the same paradigm of supervision that it applied to

¹⁵ I will be discussing the weak civil control of the military later in this thesis.

¹⁶ When the first legal challenges to the legality of actions taken by the military in the Occupied Territories came to court in 1971, jurisdiction was assumed by the Court and not challenged by the state. For a comprehensive discussion see, David Kretzmer, *The Occupation of Justice: the Supreme Court of Israel and the Occupied Territories*, (New York: SUNY Press, 2002).

¹⁷ Aharon Barak, 'Human Rights in Israel', *Israel Law Review*, Vol. 39, No. 12 (2006) 19-21 and at p24, "Since 1967 the Supreme Court has heard thousands of petitions pertaining to the Occupied Territories. Most were brought by Arabs and a small number of them were brought by Israeli settlers."

¹⁸ See in particular, Menachem Mauter, *Law and Culture in Israel: The 1950's and the 1980's*, (Aldershot: Cass, 2002) and Kretzmer, *The Occupation of Justice*.

administrative agencies: it assumed that the agencies possessed the substantive expertise, and hence reviewed only their procedural conduct.

Hence, decisions of the Supreme Court (almost always sitting as a first and last instance of the High Court of Justice) followed, until the middle of the 1990s, quite a regular pattern: the court would accept jurisdiction in almost all cases of appeals by Palestinian residents of the territories, and would try to adjudicate them according to international law. However, the court limited itself to a procedural supervision of military action. Substantive decisions taken by the army were almost never overturned.¹⁹

Cohen's point is in the period up to the 1980's the Supreme Court paid only lip service to the substantive provisions of international law, preferring instead to base its review on procedural irregularity. Rather than rule demolitions, internment and deportations unlawful as breaches of the Geneva Convention, it compelled the army to change its decision making process to include hearings that allowed for representations by the victims of these procedures. This was not so much to give the Palestinians a voice as to demonstrate a balancing of security and humanitarian values required by IHL. However, while there is healthy disagreement among Israeli legal scholars about whether the Court was limiting or legitimating the IDF regime, it is beyond doubt that as the occupation continued the involvement of the Supreme Court increased. During the relaxed 1990's when the Oslo Accords seemed to be heralding peace and in the context of a growing individualism and rights based culture, Chief Justice Barak increasingly applied the principles of international law to the IDF's rule in the territories²⁰. This judicial intervention continued both during and after the Al Aqsa Intifada that broke out in 2000²¹. While it has been argued that the Supreme Court seldom found against the state and has refused to rule on the legal status of Israeli settlements in the occupied territories, it remains the case that there was a willingness to call the IDF to account over issues including

¹⁹Amichai Cohen, 'Administering The Territories: An Inquiry into the Application of International Humanitarian Law by the IDF in the Occupied Territories', *Israel Law Review*, Vol. 38, No. 3, (2005), p56 . See also Kretzmer, *Occupation of Justice*, p.56.

²⁰ This included international human rights law which Barak saw as applicable to the Territories in so far as it was not displaced by specific requirements of IHL. This position is at odds with Israel's international legal discourse that denies the applicability to non-sovereign Israel. See Orna Ben-Naftali and Yuval Shany, 'Living in Denial: The Application of Human Rights in the Occupied Territories', *Israel Law Review* Vol. 37, (2004), pp. 17-118.

²¹ This continuing process is illustrated by ongoing petitioning to the Supreme Court challenging the route of the wall. Barak refers to eighty outstanding petitions. Barak, 'Human Rights in Israel'.

seizing land for settlements, house demolitions, human shields, deportations, interrogation techniques, targeted assassinations and the route of the security barrier. Sometimes the court hears appeals while the fighting is going on, as was the case during the Israeli siege of the Nativity Church in Bethlehem, when the Supreme Court effectively ran the negotiations over the release of Palestinian fighters in a politically and religiously charged battlefield²². Irrespective of whether the Court has been a restraining of legitimizing influence, it is the growth of Supreme Court litigation concerning petitions based on international law alleging IDF wrongdoing that explains why Mandelblit would say that, 'This simply put us in a position where we had to give many answers to petitions'.

It is worth pausing to consider why this involvement of the Supreme Court has come about. David Kretzmer traces the growth of the court involvement from 1977 when Menachem Begin's right wing Herut party came to power. The new government's policy of establishing settlements in the occupied territories to tie the territories to Israel resulted in a spate of legal challenges²³. As Kretzmer put it, 'In the period soon after the Begin government came to power, petitioning the Supreme Court in an effort to curb government actions in the Territories began to gain wide acceptance'.²⁴

This development of petitioning the Supreme Court coincides with the shattering of the left wing collectivist consensus and increasing social cleavage in circumstances where those opposing government policy in the Territories were powerless to affect change²⁵. Israeli

²² H.C. 3436/02 *La Custodia Internazionale di Terra Santa v. The Commander of Israel* (2002).

²³ The most famous decision was the 1979 Elon Moreh case, reported as *Dawikat v. The State of Israel*, H.C.J. 390/79, when the Court overruled the seizure of private Palestinian land for settlement, rejecting the IDF security arguments. Thereafter, land expropriation was confined to public Palestinian land. Zertal and Eldar, *Lords of the Land*, ch.7 for a full discussion.

²⁴ Kretzmer, *Occupation of Justice*, p.8.

²⁵ See Dan Horowitz and Moshe Lissak, *Trouble in Utopia: The Overburdened Polity of Israel* (New York: SUNY Press, 1989).

sociologists of this period describe an 'overburdened' political system unable to meet the demands of a society increasingly divided between Ashkenazi/Mizrachi, secular/religious, rich/poor, greater Israel and those who regarded the return of the occupied territories as essential to peace. Israeli scholars Shlomo Mizrahi and Assaf Meydani link the fragmentation of the political system, the growth of Israel's civil society and the development of a policy among NGO's who, finding the Knesset and the Government unresponsive to their concerns, resorted to the Supreme Court. Mizrahi and Meydani import from the study of economics the concept of quasi-exit behavior²⁶ and apply it to Israeli political engagement so that, 'people who are dissatisfied with various policies, and are unable to conduct, or have no faith in the efficiency of democratic forms of protest such as petitions, demonstrations and strikes, or are unable to exit from the society, create an alternative supply of a certain public good.'²⁷

Cohen identifies a number of complementary developments: loss of political power by the left, increased settlement in the Territories, a growing culture of rights within Israel, and a questioning of the methods used during the first intifada²⁸.

Menachem Mauter²⁹ sees the Western democratic values of the Supreme Court and its Chief Justice Barak³⁰ as being increasingly at odds with the policies of the Government. Barak, unlike Shamgar³¹ his predecessor, had no military background and espoused liberal democratic constitutional notions, at least within sovereign Israel. He was responsible for the 'constitutional revolution' which, in the absence of an Israeli constitution, elevated Israel's

²⁶ Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States*, (Cambridge, MA: Harvard University Press, 1970) and Samuel N. Lehman-Wilzig, 'Loyalty, voice and quasi-exit', *Comparative Politics*, Vol.24, pp.97-108 (1991).

²⁷ Shlomo Mizrahi and Assaf Meydani, 'Political Participation through the Judicial System: Exit Voice and Quasi-Exit in Israeli Society', *Israel studies*, Vol.8, No.2, (2003), p.128.

²⁸ Cohen, 'Administering The Territories', pp.60-63.

²⁹ Menachem Mauter, *Law and Culture in Israel: The 1950's and the 1980's* (Aldershot : Cass, 2002) pp.175-217.

³⁰ President of the Supreme Court from 1995 till 2007.

³¹ Meir Shamgar was MAG from 1961 until 1968 when he became AG .He became a justice of the Supreme Court in 1975 and became President of the Supreme Court in 1983 until his retirement in 1995.

Basic Laws to constitutional status thereby enshrining Israeli human rights.³² Mauter's argument is that the court's values were shared by a powerful liberal elite that enabled the Court to exercise its institutional power to challenge the power of the IDF. Thus the Supreme Court functioned both to promote its own institutional power as a major political actor and to act as a venue for civil groups and individuals seeking to challenge the power of the IDF³³. This can be understood as a process of judicialisation whereby the judiciary takes over from the legislature and the executive in democratic states where the democratic decision making processes have become paralysed.³⁴

Writing from an American perspective David Kennedy observes a dynamic process whereby humanitarians use law to infiltrate into the military rules and procedures to 'regulate swords into ploughshares'. Whether, within the Israeli context, this is a process of 'regulating swords into ploughshares' or a struggle for control over the use of the swords there is certainly a deployment of a regulatory framework. On this analysis, liberal critics of the IDF found a willing ally in the Supreme Court at times when there was sufficient support from sympathetic sectors of Israeli society³⁵. Clearly, the power of the Court to legislate for change is limited by the constraints on its legitimacy occasioned by the need for public approval of

³² See Aharon Barak, 'Human Rights in Israel', *Israel Law Review*, Vol.39, No.2, (2006), p.12 for Barak's description of his 1992 constitutional revolution.

³³ Ibid. p.32, Barak denies that the court is seeking to promote its own power and argues that the increase in judicial power is incidental to the role of the judiciary protecting human rights in a democracy: "Judicial protection of democracy, in general and of human rights in particular, characterizes the development of most modern democracies. The phenomenon is general, the result of the events that occurred during World War II and the Holocaust. Legal scholars often explain this phenomenon as an increase in judicial power relative to other powers in society. This change, however, is merely a side effect. The purpose of this modern development is not to increase the power of the court in a democracy, but rather to increase the protection of democracy and human rights. An increase in judicial power is an inevitable result, because judicial power is one of many factors in the democratic balance."

³⁴ See: Kenneth Holland (Ed.), *Judicial Activism in a Comparative Perspective*, (London: Macmillan, 1991). The best example in Israel is the torture case *The Public Committee against Torture in Israel and Others v. The Israeli Government*, HCJ 4054/95 5100/94, where the court ruled that certain interrogation techniques were illegal in circumstances where the Government had failed to enact legislation recommended by the Landau Commission. See Kretzmer, *The Occupation of Justice*, pp.135-143.

³⁵ For an analysis of the fluctuating prestige and power of the IDF, see Yagil Levy, *Israel's Materialist Militarism* (Lexington: Lexington Books, 2007).

its decisions. Recent opposition to the Court has shown that this is a sophisticated political judgment and that the social divisions that paralyze Israeli policy-making also act to limit the power of the court³⁶. To be sure, there is a complicated dynamic at work here whereby widespread public support for civil control of the military has to be matched by an elevated prestige of the Supreme Court before the court can effectively assume the role of controller of the military. Of course, as with most things Israeli security remains the key variable when assessing the vulnerability of the military to judicial intervention.

Returning to Amichai Cohen, Cohen adopts an institutional analysis that understands the Supreme Court as being involved in a struggle with the IDF as an institution which has struggled to retain its control over the occupied territories. His focus is on the question of when and why has the IDF been taking notice of international law but this approach can equally be employed to understand when and how the IDF deploys its lawyers. He argues that one crucial factor is the extent to which international law accords with the IDF's institutional culture: 'its traditions, dominant professions and main objectives'. The other main variable is the external environment of political, social and judicial pressure to comply. Consequently,

From this it follows that in order to understand the actual legal regime in the territories we should search not for constitutions, legislation or judicial precedent, but for administrative action, behavior and design. We ought also to appreciate that the attempt to impose administrative control over the territories (which in this case is in effect military control) has not gone unchallenged by the other traditional domestic institutions. Hence, the story of the implementation of international law can be viewed as a struggle between two camps. One consists of the army and its political allies, whose aim is to retain the army's autonomy over the exercise of its authority in the territories. The other is made up of other domestic forces, external to the military, such as the judiciary, politicians, and societal institutions (e.g. the media and NGOs)³⁷.

³⁶ See for example, Tomer Zarchin, 'Justice Minister Blasts Publicity Hungry High Court', Ha'aretz, 25 July 2008, for a report of Friedman's comments. Barak's scholarship since retiring from the bench can be seen in this context as his defence of his legacy.

³⁷ Cohen, 'Administering The Territories, p.25.

Cohen argues in favour of Koh's internalization model ³⁸ whereby international law becomes incorporated into domestic law through a process of socialisation, albeit adapted to include the military:

However, what Koh seems not to have included in his model, is that domestic institutions, their autonomy threatened by international law, will take steps to recover their autonomy, and in that process might cause international law to be rejected. In the Israeli experience, the IDF used the security crisis generated by the renewed outbreak of violence in September 2000 to overturn many of the policies that had earlier been adopted in more peaceful times. However, the process of internalization was not halted because of these moves. After a short period of judicial hesitation, the Israeli Supreme Court started adjudicating actions of the army even in the midst of fighting and, moreover, did so with reference to international law.³⁹

Cohen's methodological conclusion is interesting:

Analysts who seek to study Israel's human rights record in the territories have really been looking in the wrong place. Precisely because the territories are "administered," we have to study the internal institutional culture of the administrators-in this case the IDF. Only when we analyze what this body's motives and interests are can we find ways in which it can perhaps be pressured and/or motivated to change its behavior. Further research should be undertaken into the exact place of the Military's Advocate's unit; the strategies and impact of INGOs; the role of the media; and the influence that transnational judicial networks exert on the Supreme Court. Only thereafter might we really understand the process by which international law becomes part of domestic law.⁴⁰

The point to be emphasised here is that legal scholarship examining the jurisprudence of the Israeli Supreme Court goes further than simply identifying a process of development of judicial review of the executive. Examination of the cases shows an increasing willingness of the Supreme Court Judges to become involved in security matters. The scholarship reveals a political dynamic whereby law and the courts are an essential element of a liberal attempt to impose civil control of the military in its administration of the occupied Territories. This legal scholarship has to some limited extent been incorporated into an embryonic legal-military scholarship but of itself reveals only a small part of the larger legal environment in which the

³⁸ See, Koh, Harold. 'Why Do Nations Obey International Law?' *Yale Law Journal*, Vol. 106 (1997), pp. 2599-2656. Koh, Harold. "Transnational Legal Process", *Nebraska Law Review*, Vol.75 (1996), pp181-207. Koh, Harold. "Bringing International Law Home" (1998) 35 *Houston Law Review*, Vol. 35 (1998), p p. 623-681.

³⁹ Cohen, 'Administering The Territories, p.78.

⁴⁰ Amichai Cohen, 'Administering The Territories , p.29.

Israeli military carries out its operations. The domestic perspective is too narrow to reveal the political contestation over the law to be applied to Israeli military actions or the processes whereby an international legal regime impacts on Israeli civil-military relations. Nevertheless, the Supreme Court is clearly a key feature of the IDF's external environment. Looking at the Supreme Court, both as an institution with its own institutional interests at variance with those of the IDF and as a channel available to other civil actors seeking to change IDF policy, is essential to an understanding of the response of the IDF and the role of its lawyers. Viewed in this way, the IDF's use of its resources, in this case its lawyers, can be analysed in terms of an institution defending its interests from civil encroachment- primarily its semi-monopoly of policy making and its implementation in the Territories. This dynamic process of judicial regulation of the military and the defence by the military of its institutional power lends support for the first hypothesis, which will be further tested in case studies: that the increased involvement of lawyers in Israeli military decision-making described by the MAG and the AG is a reaction to the application of international law by the Israeli Supreme Court.

4) The threat of foreign prosecutions of Israeli decision-makers for war crimes.

The globalisation of human rights and humanitarian law in the last twenty years has seen an increasing involvement of international courts exercising an international jurisdiction and foreign courts exercising a universal jurisdiction that Israel has been unable to ignore. This is the gradual strengthening of international criminal law as an adjunct to humanitarianism.

The main development has been the Rome Statute of the International Criminal Court 1998 (ICC statute) establishing the International Criminal Court (ICC) for the prosecution of war crimes. This was the culmination of a long process with which Israel was closely involved on

both a diplomatic and technical level.⁴¹ Israel's experience of legislating for and actually conducting war crimes trials of both Nazis and Jewish collaborators had given the Israeli jurists both prestige and expertise in the field⁴². The ICC has jurisdiction for prosecutions of specified war crimes which have been referred to the court for prosecution either by resolution of the UN Security Council, by a state that is a party to the statute or by the prosecutor. The prosecutor can only refer for prosecution if the state where the crime is alleged to have been committed, or the state of which the alleged perpetrator is a citizen, is either a party to the statute or has given consent to the prosecution. In effect, in the absence of a Security Council resolution, only citizens of states that have ratified are at risk of prosecution. Even then, the principle of complementarity whereby the ICC complements rather than replaces the local state jurisdiction, means that the ICC will not prosecute where the domestic state judiciary is itself prosecuting. Indeed, the court is required to prompt the state authorities by giving the state notice if the court finds that there are reasonable grounds to commence an investigation. Having been so involved in the legitimisation of war crime prosecutions and the drafting of the ICC statute, Israel, like America, has signed but not ratified the statute and in the absence of Security Council referral remains free of the threat of prosecution of her citizens. Protected by the US veto, Jerusalem sees the ICC as a troubling indication of the growing influence of international humanitarian law than as a direct threat. The Supreme Court finds it useful from time to time to refer to the ICC to justify its own readiness to rule in cases involving security matters⁴³.

⁴¹ Author's interview with Irit Kahn, formerly Head of the International Law, Department of the Justice, Tel Aviv, 8 September 2007.

⁴² See, *Attorney General v. Eichmann*, 36 ILR (1968) 18, 26 (Isr. Dist. Ct.), *Demjanjuk v. Isarel*, 47(4) P.D. 221, and Israel's Nazi and Nazi Collaborators (Punishment) Law, 1950.

⁴³ See for example Orna Ben-Naftali, 'A judgment in the shadow of International Criminal Law', *Journal of International Criminal Justice*, Vol.5, No.2 (2007), p.322 for an argument that by setting out guidelines for targeted killings, the Supreme Court is inviting prosecutions within Israel to avoid prosecutions abroad.

In fact, it is the highly politicised universal jurisdiction that is much more of a threat to Israel's military. This jurisdiction arises from the obligation imposed by Article 146⁴⁴ Geneva IV which requires states to amend their penal code to allow prosecution of war crimes committed anywhere in the world. As far as Israel is concerned, the most dramatic use of the universal jurisdiction took place in Belgium. In 1993 Belgium had amended its criminal code, allowing prosecution of certain serious breaches of the 1949 Geneva Conventions and the 1977 Additional Protocols⁴⁵, including war crimes committed abroad that did not involve Belgian perpetrators or Belgian victims. This was an unusually pure form of universal jurisdiction and amounted to a power to prosecute any individual for a war crime committed against anyone anywhere. Moreover, since the Belgian system allows prosecutions to be initiated by private citizens, the Belgian courts were thrown open to homemade war crimes prosecutions⁴⁶. In June 2001 NGO's representing Palestinian victims of Sabra and Shatillah launched a prosecution in Belgium of Israel's Prime Minister Ariel Sharon and Amos Yaron for war crimes allegedly committed in 1982 in Lebanon when Sharon had been Defence Minister and Yaron had been the commanding officer of the Beirut sector.

Following Sharon's indictment, the Belgian courts found themselves host to cases against Yasser Arafat, Saddam Hussain, Abduldaye Yerudia and Rafsanjani. Then in 2003 there were charges against Bush senior, Cheney, Powell and Schwarzkopf for 1991 Gulf War actions.

⁴⁴ Article 146, 'The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present convention defined in the following article'.

⁴⁵ Steven Ratner, 'Editorial comment', *American Journal of International Law*, Vol. 97 (2003), p.888, and Sean Murphy, 'Contemporary Practice of the United States Relating to International Law', *American Journal of International Law*, Vol. 97 (2003), p.962.

⁴⁶It has been widely suggested that this embrace of the universal jurisdiction was motivated by Belgian guilt about its failure to prevent the Rwanda genocide, Belgium being the former colonial power. In fact the Belgian state expressed no enthusiasm for war trials and it was left to a Belgian NGO to mount a prosecution which was eventually taken over by the state resulting in 2001 in the conviction and imprisonment of four Rwandans, including two nuns involved in genocide.

After two years of legal manoeuvring, in 2003 the Belgian courts threw out the case against Sharon on the grounds that customary international law prevented proceedings against heads of state and government while in office. Israel, unhappy with the prospect of the action being revived after Sharon left office, withdrew its ambassador. Meanwhile, the American diplomatic offensive got into full swing. The main thrust was to threaten to remove NATO from Belgium⁴⁷. This diplomatic arm twisting was thinly disguised as concern for visiting delegates at risk of arrest. The Belgians rapidly caved in and amended their law so that only the federal prosecutor could bring proceedings. Israel returned its ambassador but the US demanded and got further amendments to the law to limit proceedings to cases with a direct link to Belgium. Visitors and serving ministers and heads of state were given immunity from prosecution. Even if these requirements were met, the case would not proceed if the state where the act occurred had a functioning independent judicial system. Consequently, all pending cases were dropped. This requirement introduced into Belgian law whereby charges are not laid if there is a functioning legal system in the jurisdiction of the offender clearly demonstrates the need for Israel to be seen to have a functioning independent judicial system.

The fact that the case was brought against Sharon at all was damaging to both Israel's and Sharon's international prestige. That the case was only dropped years later after heavy American pressure on the Belgians, rather than as a result of a legal defect in the procedure, must have been alarming. Meanwhile politically motivated lawyers and their NGO clients were busy examining their Geneva Convention inspired legislation. From a UK perspective, The 1957 Geneva Conventions Act allows for prosecution in the UK of war crimes committed by non-UK citizens abroad. It is this legislation that has enabled Palestinians living in the West Bank and Gaza to dissuade members of the Israeli military and political

⁴⁷ Author's interview with Irit Kahn.

elite from visiting Britain. In 2005 Sharon was widely reported as refusing invitations issued by Tony Blair with playful comments about jail conditions⁴⁸.

The UK legal procedure is not complex. The Geneva Conventions Act combined with the Magistrates Courts Act has the effect that, notwithstanding that any prosecution cannot be started without the direction or consent of the Attorney General, an arrest warrant can be issued by a magistrate at the request of a private individual. The arrest is to enable a criminal investigation not a prosecution and thus the very emotive step of arrest can be taken without recourse to the Government. This was the procedure used by Daniel Machover, ex-patriot Israeli citizen and UK solicitor, acting in conjunction with the Gaza based Palestinian Centre for Human Rights on behalf of residents of Gaza, when on 9 September 2005 at Bow Street Magistrates Court in London Machover persuaded District Judge Timothy Workman to issue an arrest warrant for Major General Doron Almog (retired) for suspected war crimes⁴⁹.

Presumably unbeknown to Almog, Machover and his staff had helped assemble evidence files relating to alleged Israeli human rights abuses in Gaza and these files had been presented to the anti-terrorist and war-crimes unit of the Metropolitan police on 26 August 2005. The files contained detailed allegations of war crimes against an unknown number of Israeli individuals including Almog who had been GOC Southern Command of the IDF from 8 December 2000 till 7 July 2003. The allegations filed by Machover concerned Almog's command role in the Shehadeh killing, demolition of 59 houses in Rafah on 10 January 2002 and two other killings. This process of having lodged evidence with the police enabled Machover to lay in wait for any of his targets to arrive on UK soil. Machover had learned that

⁴⁸ Sam Knight, 'Sharon Snubs Blair Over War Crime Warrants', *Times Online*, available at <http://www.timesonline.co.uk/tol/news/uk/article567323.ece>., "I would really like to visit Britain," the *Yediot Aharonot* newspaper quoted Sharon as replying, jokingly. "The trouble is that I, like General Almog, also served in the IDF for many years. I too am a general. I have heard that the prisons in Britain are very tough. I wouldn't like to find myself in one."

⁴⁹ Author's interview with Machover, London 17 August 2007.

Almog was due to speak at a children's charity function at a synagogue in Solihull in Birmingham on 11 September 2005. Machover first tried unsuccessfully to get the police to act and then used his evidence file to persuade the District Judge to issue the warrant. The outcome is well known. While the police waited at the Heathrow immigration gate the Israeli military attaché spoke to Almog by mobile phone and instructed him to stay on the El Al plane until it returned to Israel. Machover accused the police and the British government of tipping off the Israelis.

Had Almog been arrested he would have been brought to court and released on bail pending the outcome of police enquiries. Unlike the Sharon case in Belgium, charges against Almog in the UK could only have been brought with the consent of the Attorney General. Machover had no expectation of a prosecution. His post-arrest strategy was going to be to pressurise the Attorney General to authorise the police to charge Almog and take them to court by way of judicial review proceedings if they failed to do so. According to Irwin Cutler,⁵⁰ who was Canadian Minister of Justice at the time, Cutler contacted the UK Attorney General and the Lord Chancellor and was told that the Government would not have authorised a prosecution and it therefore seems likely that this refusal would then have triggered Machover's judicial review application to the High Court. In the event, this legal strategy came to naught when the El Al plane took off back to Israel with Almog still on board.

The Israeli response to these legal maneuvers has been to warn its military and political elites against foreign travel where there is a risk of arrest. On Mandelblit's advice Brigadier-General Aviv Kochavi cancelled his place on a security course in London. Moshe Ya'alon was reported to have cancelled a trip to England on hearing that a Yesh G'vul spokesman had

⁵⁰ Interview with Irwin Cutler, Jerusalem 2 August 2007.

announced that Ya'alon was among eight Israeli's subject to war crimes files lodged with the police in London.⁵¹

Machover is not the only UK lawyer promoting Universal Jurisdiction cases in the UK. UK human rights lawyer Imran Khan caused Sharon's Defence Minister Shaul Mofaz to leave London in a hurry in 2002 by presenting a legal dossier to the Crown Prosecution Service alleging war crimes. This cat and mouse game came to a head after a warrant for Tzipi Livni's arrest was issued in December 2009. The Labour government promised reform but made no real effort to change the law before losing the 2010 election. In November 2010, William Hague, on his first official visit to Israel as Foreign Secretary, promised that his government would amend the UK law to enable Israelis to visit the UK without fear of arrest for war crimes. This followed the cancellation in the preceding week of a planned trip to the UK by Israeli Deputy Prime Minister Dan Meridor who had been warned of the threat of arrest in the UK over his role in the interception of the Mavi Marmara in May of that year. At the time of writing, it is likely that legislation will be passed to require the approval of the Attorney General before the issue of proceedings, including the issue of arrest warrants, which would give government control of the process.

The proceedings in Belgium and England are not isolated incidents but part of a coordinated politicised legal process aimed at senior Israeli military officers travelling abroad. There is a network of political lawyers and NGO's sharing evidence across Europe and Commonwealth countries. This became evident when former IDF Chief of General Staff Moshe Ya'alon visited New Zealand in 2005. During his stay a warrant was issued for his arrest on "suspicion of committing a grave breach of the Fourth Geneva Convention 1949," a criminal

⁵¹ Caroline Glick, 'Gaza's Long Shadow', *Jerusalem Post*, 15 September 2005.

offense in New Zealand under the Geneva Conventions Act 1958. However, diplomatic pressure resulted in the warrant being withdrawn at the direction of the direction of the attorney General⁵². In fact, Human Rights Watch is operating a resource centre and newsletter from their Brussels office aimed at coordinating and encouraging war crimes trials under the Universal jurisdiction⁵³. It remains the position that senior Israeli military and political figures are advised by the Israeli government not to travel to the UK. This theme was explored by the Committee when taking evidence from the AG:

M. Mazuz: Again and again, before all of the echelons of decision making in various forums, [we] return and point out that beyond all of the other considerations, [we] need to know that also for war criminals this is not just politics and condemnation in the UN. Today there is also a personal and important price tag to be aware of.

Y. Dror: On this point, did you advise about the psychological contradiction between officers' sensitization to the fear that they could not enter England, and the demand that they will risk their lives in battle?

M. Mazuz: Yes. My sense is that risk seems to be natural for every human in the realm of their occupation, and there are risks that are unnatural. An officer takes, obviously by himself, every soldier, obviously by himself takes risks that stem from his military operations. In contrast to that, the fear that he travels for the weekend to London in order to see a play, and he is arrested, this is something that is much scarier to him, the fear of the unknown.

Mazuz is actually suggesting that because of the universal jurisdiction an Israeli officer may find a weekend in London 'scarier' than battle! This is a fear of personal liability for military actions that a foreign court may find to constitute a war crime. In his view this risk of prosecution is reduced if the Israeli judicial system, including the military courts, is seen to prosecute actions that may be characterised as war crimes. In this way NGOs acting on behalf

⁵² Talia Dekel, 'Ya'alon Adamant After Arrest Warrant', *Jerusalem Post*, 30 November 2006.

⁵³ Palestinian Centre for Human Rights, *The Principle and Practice of Universal Jurisdiction: PCHR's work in the occupied Palestinian Territory*, 2010, p.31 'PCHR and our international partners continue to prepare files, and have established a *comprehensive network of lawyers in numerous jurisdictions* throughout the world. Significant progress was made in 2009'. (emphasis added), available at, http://pchr.org/files/Reports/English/pdf_spec/PCHR-UJ-BOOK.pdf. [Last accessed 12 March 2011].

of victims of IDF actions use the threat of judicial proceedings abroad to force the Israeli courts and the IDF to take seriously allegations of breaches of international humanitarian law. This argument has frequently been made by the Supreme Court justices to defend, in patriotic terms, their application of humanitarian law to regulate the IDF.⁵⁴

The point to be emphasised is not just that Israeli civil and military elites are fearful of surprise arrest abroad but also that Israeli and Palestinian groups opposed to Israeli military actions take their case to foreign courts under the universal jurisdiction. This means that Mizrahi and Maydani's thesis can be extended, to recognise that sections of Israeli and Palestinian society, opposed to the power of the IDF, are using a political exit strategy that takes them not just to the Supreme Court but also to courts abroad willing to apply the international jurisdiction. In fact, there is a neat congruency in the argument that an inefficient political system in Israel leads activists to the Israeli Supreme Court and an inefficient international system, where the ICC is ineffectual, leads them to foreign courts. This trend accounts for an increased concern by military decision makers about their personal liability under international law which goes a long way to explaining why military commanders taking operational decisions are seeking legal advice.

This review of the scholarship and recent legal developments has shown that the Universal Jurisdiction and its impact on Israeli elites and their policy decisions is completely under-researched. Legal scholarship pays little attention to the jurisdiction because it only rarely produces legal precedent. Political manoeuvres that seldom reach court are of little interest to mainstream legal scholarship. Civil-military scholarship, locked into a domestic level of analysis misses the impact of the international on the domestic and pays little heed to the Universal Jurisdiction. In fact, it is having a much greater impact than the International Criminal Court whose jurisdiction Israel continues to circumvent. If the Israeli Deputy Prime

⁵⁴ Orna Ben-Naftali, 'A judgment in the shadow of International Criminal Law'

Minister cannot visit London because of the military tactics employed in maintaining the Gaza blockade, it surely follows that choice of international humanitarian law has when taking military operational decisions matters. Equally, it matters to the Israeli military lawyers. Original research, to be presented in the course of this thesis, confirms that the IDF military lawyers also fear prosecution abroad over their advice to the military.

The above analysis clearly suggests that there is significant support for the second hypothesis: that the increased involvement of lawyers in Israeli military decision-making described by the MAG and the AG is an institutional reaction to the threat of foreign prosecution of Israeli decision-makers for war crimes.

5) The increased use of international humanitarian law as a measure of legitimacy of military action

Mandelblit's words bear repetition here: 'You cannot win a war today, without simultaneously keeping legitimacy inside the country and around the world'. Notice, that legitimacy is seen as important both domestically and internationally. His concept of the IDF's domestic and international 'front of legitimacy' invokes a powerful image of military lawyers battling on the front line protecting the IDF's essential interests- a development that has not been analysed as impacting on Israel's civil-military relations.

While the involvement of the lawyers may at first sight be surprising, the existence of the 'front' should be anticipated by social scientists. After all, Weber famously observed 'Every power seeks to establish and cultivate a belief in its legitimacy'⁵⁵. Nevertheless, this raises a number of questions, particularly: What is the IDF's legitimacy? Why and how and in relation to whom, does it need defending? Clearly the legitimacy of IDF military operations impact on the legitimacy of the state and vice versa so that judgments of the importance of

⁵⁵ Max Weber, *Economy and Society*, (California: University of California Press, 1968), p213.

legitimacy affect and reflect political positions and military objectives. In more general terms political assessments of the importance of international legitimacy are reflected in globalised and anti-globalised responses to external judgments of Israel's military actions. As will be discussed in relation to the legal fallout from Cast Lead, the outcome of these debates are clearly seen in Israel's current tentative moves towards co-operation with UN fact-finding missions following the failure of the policy of non-cooperation with the Goldstone Mission. The link between legitimacy and law is complicated by the hegemonic status of a legal discourse in the expression of approval or disapproval of Israeli operations⁵⁶. Given the apparent weakness of international law, it is not immediately apparent why this should be the case. After all, these are political, moral and economic judgments about the resort to force and its use by a sovereign state. Nevertheless, UN missions, private NGOs and governments compile lengthily reports in legal terms as though a legal discourse raises the debate above the political and Israel responds in similar terms. It will be a continuing theme of this thesis that there is a false separation between the legal and the political in this context that must be understood before the role of the lawyers in the military can be analysed. As Mandelblit argues, legitimacy is important but the nature of legitimacy and its relationship with law require clarification before legitimacy can be used as an organising principle linking the international and domestic legal and political environments.

Legitimacy takes on different meanings within different academic disciplines, most notably those of legal scholars, philosophers and social scientists⁵⁷. In simple terms, legitimacy is seen as a tool to analyse power relationships and explain why the dominant claim power over

⁵⁶ See, David Kennedy, *Of Law and war*, (Princeton University Press: New Jersey, 2006) for a discussion of law as the language of political legitimation of war.

⁵⁷ See Jean-Marc Coicaud, *Legitimacy and Politics*, (Cambridge: Cambridge University Press, 2002) who argues that legitimacy, as the right to govern, is based on consent and an ethical basis for the power of the state.

the subservient and why the subservient obeys⁵⁸. Legal scholarship tends to think in terms of formal rule compliance as the source of legal legitimacy and, since most law legal theory is grounded in domestic law, the enquiry seldom ventures beyond the municipal constitutional framework. However, a focus on the domestic level of analysis misses the role of legitimacy in international relations, where legitimacy is a measure of acceptance of state actions and the conferring or withholding of legitimacy is itself a form of coercion and reward. Viewed from this perspective it is less a question of why the subservient obey than why other actors, who are not necessarily subservient, see the exercise of power in question as appropriate. This is a much bigger picture.

While it is commonly accepted that legality is a pre-requisite of legitimacy, there is no consensus about the moral and ethical content. Political philosophers argue that there must be some element of consent by the subservient to legitimise the power relationship, and that the rules (or laws) by which power is exercised must accord with the widely held beliefs of the particular society under investigation, but there is disagreement about the ethical universality or culturally specific moral basis to the concept⁵⁹. Weber preferred instead to rely on the *belief* in legitimacy as a measure of the rightness of power relations⁶⁰. Among legal scholars the domination of legal positivism requires that the rules that govern power relations, which for optimal results are enacted as laws, are brought into being in accordance with constitutional legal process and that the dominant act in accordance with those laws. Failure by the dominant to act in accordance with the law will thus result in a degradation of legitimacy. However, those promoting the inclusion of shared values in the definition of legitimacy point to the paucity of legality alone as a measure of legitimacy. They argue that

⁵⁸ See Dennis Wrong, *Power: Its Forms Bases and Uses*, (Chicago: University of Chicago Press, 1988) for a discussion of the exercise of power by societies,

⁵⁹ David Beetham, *The Legitimation of Power*, (Basingstoke: Palgrave, 1991), p.16 rejecting Webber, defines legitimacy as comprising three levels of established rules, shared beliefs and consent.

⁶⁰ Max Weber, *Economy and Society*, p.213.

failure to act lawfully may not result in degradation of legitimacy if the law does not reflect shared values. Equally, the argument runs, compliance of the dominant with a law that does not represent shared values serves to delegitimise the power relationship. One has only to compare the mixed response to an EU-wide ban on smoking in restaurants to see the contextual variations in legitimacy reliant on shared values.

What exactly those shared values are is an investigation of legitimacy in context. From the point of view of the IDF, its own institutional legitimacy and that of its operations are interdependent. The context of its operations during the occupation and when at war give rise to judgments about its legitimacy by a number of possible actors. In the absence of universally held values, legitimacy like beauty is in the eye of the beholder and, depending on context, may or may not need to be defended. Take for instance a decision by the IDF to block a road connecting a Palestinian village to the highway. The villagers' beliefs about the occupation in general and the power of the IDF to close the road in particular, will doubtless be totally at variance with those of the IDF. For the villagers, the military order will not be legitimate. From their perspective, the fact that the military order has been issued according to the proper procedure mandated by the Hague Convention, and that the decision can be defended on grounds of military necessity, is not of itself enough to confer legitimacy. However, the majority of Israeli society would most likely believe the operation to be legal and necessary on grounds of security. For them the operation would be legitimate. Indeed, those on the Israeli right may believe that security needs, as constructed by the IDF, legitimate the operation even if it were to be illegal. On the other hand, sections of Israeli society, including those who espouse liberal views and oppose the continuation of the occupation, may not be convinced that the IDF is correctly balancing security needs with the harm done to village life by blocking the road in this particular instance. They may draw their opposition from a belief that road closures are part of a political strategy designed to weaken

a Palestinian administration. These views challenge the legitimacy of the IDF operation and the legitimacy of a key element of the IDF's administration of the territories. Here legitimacy is contested and the IDF will defend its legitimacy by defending both its values and its lawfulness. While it is easy to see that the IDF would use security as a shared value on which to base its claim to legitimacy, for this claim to succeed among all but its ardent supporters, the IDF must also persuade its critics of the legality of the operation. This process would have to be repeated wherever the IDF sought to defend the legitimacy of its operation, whether at home or abroad where differing strategies of legitimization will be employed in differing forums.

With the IDF defending its legitimacy on security grounds, its critics are in the position of having to challenge the IDF's construction of Israel's security needs. This is a formidable task since, as Michael Kobi has observed, the IDF has the status of an epistemic authority in matters of security⁶¹. Here, the wider civil-military scholarship suggests that the military will be assisted in arguing their case by the militarized nature of Israeli society. It will be recalled that sociologists have persuasively argued that military ideology imbues Israeli culture.

Baruch Kimmerling observed that:

Israel has developed as a culturally and materially recruited militaristic society in which the component of national security has shaped its culture values and ideologies and which has needed an extensive construction of a convenient social reality. In turn the ideologies, politics and culture interfere with the 'professional' military and national security considerations until it is almost impossible to differentiate between them⁶².

⁶¹ Michael Kobi, 'Military Knowledge and Weak Civilian Control in the Reality of Low Intensity Conflict -- The Israeli Case', *Israel Studies*, Vol.12, No. 1, Spring 2007. Kobi, drawing heavily on interviews with former Chief of General Staff CGS Ya'alon, finds weakness in civil control of the military, with the military having a hegemonic role in Israel's security discourse. He uses the sociological concept of 'epistemic authority' to account for the reliance on the military as suppliers of truth. According to Kobi, the protracted low intensity conflict has enabled the military to create a body of knowledge unmatched by the political echelon, which has resulted in a progressive weakening of political control. As an epistemic authority, the Israeli military is able to appeal directly to the Israeli public and shape political opinion.

⁶² Baruch Kimmerling, *Political Subcultures and Civilian Militarism in a Settler-Immigrant Society* (1998) p244.

This 'cognitive militarism', based on a shared construction of security, provides the common values that constitute the IDF's legitimacy and accounts for its high level of institutional legitimacy within Israel. However, this is not to say that the IDF's construction of security is inviolate. Yagil Levi has charted an erosion of the IDF's prestige which he attributes to the rise of individualist materialism in place of the earlier collectivism that privileged national service and the institution of the army⁶³. Israel's burgeoning civil society with its vociferous NGOs successfully challenged the IDF's policy of maintaining a security zone in Southern Lebanon thereby precipitating the withdrawal from Lebanon in March 2000⁶⁴. Israeli civil rights groups monitor the behavior of troops at checkpoints and retired Generals publicly challenge the IDF's security justifications for the root of the security barrier. Nevertheless, Israel remains a securitized society where all aspects of personal security, but particularly personal and state security from terrorist attack inform all aspects of policy assessment. With compulsory military service and permeable boundaries between the military and civil society, the IDF remains well placed to defend the constructions of shared values necessary for the legitimation of its operations⁶⁵. How these shared values inform IDF constructions of

⁶³ Yagil Levy, *Israel's Materialist Militarism*, (Madison, MD: Rowman & Littlefield/ Lexington Books, 2007).

⁶⁴ Avram Sela, 'Civil Society, the Military, and National Security: The Case of Israel's Security Zone in South Lebanon', *Israel Studies*, Vol. 12, no.1, (2007), pp.53-78. Sela examines Israeli civil opposition to the security discourse in the context of the withdrawal from Lebanon in March 2000 which was undertaken despite the apparent conviction on the part of the military that in the absence of an agreement with Syria the security zone on South Lebanon was essential to the security of Northern Israel. Defining civil society as 'those individuals, social groups, voluntary associations, and institutions located in an independent space beyond the close control of, and largely in contrast to, the state', Sela contrasts the largely compliant civil society of the first two decades of the state with Israeli civil society since 1970. The social cleavages and decline of collectivism saw the growth of protest movements after 1970, with the emergence by the 1990s of an active and diverse open and critical public discourse. It was into this environment that the growing protest against the continued occupation of Southern Lebanon emerged. Using a detailed chronology of Israel's involvement in Lebanon, and noting the very public opposition of CGS Moffaz to Prime Minister Barak's commitment to withdrawal, Sela argues that Israeli civil society led by the Four Mothers Movement forced a change in the perception of the value of the security zone in the face of opposition by the military to any withdrawal without an agreement with Syria.

⁶⁵ As is discussed in chapter 1, Israeli scholars favour a model of exchange of influence that allowed for a militarization of civil society and a civilianisation of military society. This was conceptualised in terms of various forms of permeability or fusion allowing gradual or interrupted exchange. Among the most prominent of this school are Kimmerling, Horowitz, Lissak, Maman, Peri, Ben-Eliezer and Perlmutter.

international humanitarian law and affect the legitimacy of operational decisions will be the subject of detailed consideration throughout this thesis.

How taxing is it to defend military legitimacy on legal grounds? As with any legal defense this is a function of the action complained of and the law to be applied. Legality will depend on the interpretation given to the imprecise formulations of humanitarian law by those whose judgment of legitimacy is being examined. This will include both domestic and foreign constituencies or to adapt Mandelblit's formulation, the domestic and international fronts of legitimacy. On the domestic front, we have seen that the Supreme Court has imported international humanitarian law to regulate the activities of the IDF. The Court has made full use of the imprecision of the humanitarian concepts behind humanitarian law to negotiate its own domestic version of international law that demands at least procedural accountability of the IDF. In this process the Court has engaged in a struggle with the IDF setting its own legitimacy against that of the army in order to create law that has become the domestic yardstick of the legitimacy of the IDF. This legal and political process suggests that the legal defense of legitimacy requires the IDF to take the position of the Supreme Court seriously when considering the legality of proposed operations. However, law and legitimacy that are informed by a securitized society and a reasonably compliant Supreme Court cannot be viewed in isolation. To do so would create the false impression that the state's external legal environment fails to influence power relations internally. The role of law in these processes can only be understood by examining the nature and dynamics of external legitimacy.

On the international front, an analysis of legitimacy that is based on the willingness of individuals to follow rules fails to provide a framework that enables a clear understanding of :

a) What international legitimacy does, and

b) The strategies that states adopt to promote and defend their legitimacy and the legitimacy of their actions.

c) What is the relationship between legitimacy and law?

Those who seek to equate legitimacy with compliance with international law have a problem explaining the 1999 NATO Kosovo campaign against Serbia, which many commentators regard as unlawful but legitimate⁶⁶. The conflict between law and legitimacy is evident at both the level of the legality of the campaign (*ad bellum*) and at the level of the legality of the individual military operations (*in bello*). Russian opposition to military intervention had stood in the way of UN authorisation of the use of force against Serbia to end the Serbian campaign of ethnic cleansing. The NATO four month bombing campaign proceeded without UN authorisation based on tenuous legal arguments of self defence and humanitarian assistance. In the absence of a ground invasion, NATO flew more than 38,000 sorties at a minimum height of 15,000 feet with the inevitable mistakes resulting in the death of civilians as well as controversial targeting of civilian infrastructure. Many legal commentators have suggested that NATO breached international law by failing to take adequate measures to distinguish between civilian and military targets, and that there was adequate evidence of criminal involvement that was not perused because the campaign was widely regarded as a legitimate use of force irrespective of the legal position. To be sure, there are many who regard the campaign legitimate and legal, although Robert Sloane, writing in the *Yale Journal of International Law*, makes a strong argument that it is because the war aims were regarded as legitimate that a favourable legal interpretation was applied⁶⁷. In any event, there is a wide body of opinion that the NATO Kosovo campaign was unlawful but legitimate. In short, there

⁶⁷ Robert D. Sloane, 'The Cost of Conflation: Preserving the Dualism of *Jus ad Bellum* and *Jus in Bello* in the Contemporary Law of War', *The Yale Journal of International Law*, 2009, Vol. 34, p. 93-96. This was made possible by the imprecision of the key provisions of IHL and will be further discussed in chapter 4.

is weighty academic support for the view that the action was legitimate despite being unlawful and for the rather more nuanced view that the operation was judged to be legal because it was legitimate. The former position separates the legal judgment from the legitimacy of the operation, while the latter has the law contingent on a judgment of legitimacy.

Conversely, military action can be viewed as lawful but illegitimate- a position adopted in relation to the Israeli interception of the Turkish Flotilla on 31 May 2010 by those who accept the legal form of the blockade but not its morality. The Flotilla interception will be considered in greater detail in chapter six, but for the purposes of the present discussion it is sufficient to recall that in May 2010 six ships sailed from Turkey to demonstrate solidarity with the people of Gaza by delivering humanitarian aid by sea direct to Gaza in contravention of the Israeli blockade. Five ships were intercepted by the Israeli navy and diverted to the Israeli port of Ashdod without injury. However, Israeli commandos killed nine activists during the interception of the Mavi Marmara. Israel has defended its actions in terms of the legality of the maritime blockade, compliance with the laws of the sea and, once on board, the legal right of self defence. Nevertheless, there is a tacit understanding that good legal arguments are not going to deliver legitimacy among those whose sympathies are with the suffering people of Gaza. Equally, those who accept the Israeli narrative that the Turkish NGO that organised the flotilla, the Human Relief Foundation (IHH), is a front organisation for supporters of a Hamas, are unlikely to be deterred by legal argument from their belief in the legitimacy of the Israeli navy interception. In practice, those who are in favour of the interception characterise it as legal, while those who are against regard it as illegal. The point to be emphasised here is that, either the law (whether the interception was legal) is constructed through a political process of choice informed by notions of legitimacy or it is actually displaced by legitimacy. This means in practice that parties, whether combatants or

those sitting in judgment of them, can insist on an exception where the law fail to deliver what they regard as a legitimate outcome. If this is the case, it might be wondered whether law matters. In fact, it is the understanding that a disconnection between law and legitimacy is the exception that proves the rule that we expect a connection between the two and that law does matter.

It follows that, when looking at legitimacy as a feature of Israel's external environment, an allowance must be made for the potential disconnection between law and legitimacy. In support of this position, I propose to adopt, with minor adaption, Ian Clark's persuasive analysis of legitimacy as argued in his *Legitimacy in International Society*⁶⁸. Clark's thesis, simply stated, is that international legitimacy is in a hierarchical relationship with the norms of law, morality and constitutionality whereby legitimacy incorporates all three but is greater than their sum. Clarke sees legitimacy as a politically mediated expression of law, morality and constitutionality intended to convey a judgment of the entitlement to exercise power and/or the entitlement to exercise power in a particular way. The hierarchical positioning of legitimacy recognises the political space in which a consensus judgment is formed. This identification of a political space allows for political contestation, which attributes relative importance to considerations of law, morality and constitutionality as well as mediating differing conceptions of each. The process of political contestation allows considerations of law to be taken into account along with moral positions and the informal rules of political interaction that produces a position that is different from the sum of all three. In this way legitimacy may reflect a moral position that differs from the legal. This is not because legitimacy has a normative measure of its own that can be applied to legality; rather it reflects the result of political contestation whereby normative positions are mediated and greater weight may be given to other considerations.

⁶⁸ Ian Clark, *Legitimacy in International Society*, (Oxford University Press: Oxford, 2003).

To be sure, the particular normative positions of law, morality and constitutionality are also the subject of political contestation informed by the perceived political preferences of the actors involved. To arrive at a position on the legitimacy of military action requires consideration of the legality of the action, which is itself based on a particular view of IHL. It will be an ongoing theme of this thesis that IHL requires the balancing of the requirements of military efficiency and civilian protection that produces grey areas of legal imprecision that allow for pluralistic interpretations of IHL to particular facts- in other words a choice of law. The core international law principles of distinction, proportionality and military necessity are subject to the pushes and pulls of actors with differing views of what the law allows in war. Consequently, legal positions on the same events differ and are themselves subject to political contestation in the process of arriving at a consensus position on the legitimacy of the acts in question. As will be seen in later chapters, in Israel the conduct of military operations is regulated by a particular view of what the law allows when fighting non state actors who conceal themselves among their civilians. This legal position is both informed by, and consistent with, an ethical position on the limits of the IDF's duty to protect such civilians from harm.

Of course, the moral position itself is the subject of contestation both in Israel and abroad. Just War theory is the specialist area of the moral consideration of acts of war and, as will be explored in greater detail later in this thesis, there are divergent opinions between traditional and modern strands of the discipline on crucial issues such as the degree of personal risk that soldiers should assume in order to reduce the risk of harm to enemy civilians and, even more fundamentally, whether the obligations of combatants should vary according to the justice of their cause.

Clark's category of constitutionality is a catch all for expectations of the organisation of behaviour that lack normative force; expectations of behaviour in war, such as a preference

for multilateralism over unilateralism are influential in constructing a consensus for legitimacy. The fact that action was taken against Serbia by NATO rather than as unilateral state action went a long way towards compensating for the lack of a UN resolution authorising force. Similarly the construction of a coalition against Iraq that included Arab states helped compensate for the failure to secure a second UN resolution. This assumes that an importance is given to multilateral action as an expected mode of behaviour, which is then fed into the normative mix that produces the consensus on the legitimacy of the campaign. An alternative constitutionality view can be found in US constructions of legitimacy that attach less importance to the views of international institutions on the grounds that international input lacks democratic credentials and expectations of behaviour are modified accordingly. To be sure, expectations of behaviour change and are constantly being negotiated and re-negotiated so that, as with law and morality, the aspects of constitutionality that helps form the consensus position on legitimacy is subject to continuing political contestation.

The importance of the foregoing analysis is that it identifies the political space for actors to engage in the processes of the construction of consensus legitimacy through the adoption of strategies of legitimisation. Clark's analysis links legitimacy to conceptions of international society to capture the dual role of legitimacy as a measure of entitlement of state actors to join a wider society of states and of legitimacy as a judgment of the entitlement to exercise power in a particular way. Seeing legitimacy in the role of gatekeeper enables an understanding of state legitimacy in international terms that allows a discussion of the legitimacy of the Israeli state as setting benchmarks for admission to international society rather than Israel's right to exist. This raises the strategic questions of: whose society does Israel want to be a member of, what strategies of legitimisation are employed and where does the political contestation take place?

This thesis adopts the position that international society is composed of a number of centres of power with differing institutional arrangements and adopting differing consensus positions on the legitimacy of the behaviour of states. In communitarian terms, this is seen by Emanuel Adler as overlapping international and transnational communities of shared values and expectations of behaviour⁶⁹. Communities exercise power through exclusion and inclusion with legitimacy as a measure of acceptability. As Adler puts it, 'Knowledge is rarely value-neutral, but frequently enters into the creation and reproduction of a particular social order that benefits some at the expense of others. In this reading, power is primarily the institutional power to include and exclude, to legitimise and authorise'⁷⁰.

Legal scholarship, missing legitimacy as an organising principle, can only identify a major fault line running between military legal practitioners and humanitarian lawyers in their legal critiques of military conflict. Observing strategies in defence of legitimacy reveals the dynamics whereby institutions and actors form consensus positions on the legitimacy of particular actions in response to the pushes and pulls of political interaction. Institutions and communities differ so that the EU, the US, the Arab League, the Organisation of African States and NGOs of differing persuasions, to name but a few, have differing consensus views of the legitimacy of state actions. The policy implication of this analysis is that the question is not so much whether Israel values its international legitimacy, so much as whose legitimacy judgment counts and how is it influenced.

Put simply, although law cannot be equated with legitimacy, law matters to the promotion and defence of legitimacy and has become the dominant discourse for the expression of the legitimacy of military conflict. It is this interaction between law and legitimacy that gives law the coercive power so often missed by the legal scholars. There are policy implications to

⁶⁹ Emanuel Adler, *Communitarian International Relations: The Epistemic Foundations of International Relations*, (London and New York: Routledge, 2005).

⁷⁰ Ibid, p.194

how to respond. Where international legitimacy is seen as important, law and lawyers are mobilised in support and choices made about whose law matters. As will be observed in the course of this thesis, UN fact finding missions are becoming a major factor. The Goldstone Mission can be understood to be a site of political contestation that is important to the construction of consensus views of Israeli legitimacy. To be sure there is a long history of Israeli distrust of the UN and its humanitarian agencies but Israel's decision not to cooperate with the Goldstone Mission's investigation of compliance with IHL during the 2009 war in Gaza is now regarded by most Israeli commentators as having been a mistake. This is not a reversal of Israel's oft stated position on the bias of UN involvement in the region, but rather a growing awareness that the Mission's findings of Israeli breaches of IHL have been very damaging to Israel's international legitimacy⁷¹. Those Israelis who care about the outside world worry about Israel's declining legitimacy. As Tony Blair put it in 2009, 'This leads me to my final point. It is our collective duty – yours and mine – to argue vigorously against the de-legitimisation of Israel. It is also our collective duty to arm ourselves with an argument and a narrative we can defend and with which we can answer the case against Israel, with pride and confidence'. Increasingly, the argument is a legal one and the narrative is international humanitarian law.

The Goldstone Mission's findings, and the Israeli responses to them, will be closely examined in the course of this thesis to test the third hypothesis: that the growing involvement of military lawyers in IDF operational decision-making is in response to the demands of internal and external legitimacy and the strategic defence of legitimacy by the Israeli state.

⁷¹ See, 'Tony Blair welcomes re-start of direct peace talks during Herzliya speech', *the Office of Tony Blair*, available at, <http://www.tonyblairoffice.org/news/entry/tony-blair-welcomes-re-start-of-direct-peace-talks-during-herzliya-speech/>. Last accessed 3/2/2010.

The foregoing analysis supports the hypothesis that the increased involvement of lawyers in military decision-making is, in part, an institutional reaction to the increased use of humanitarian law as a measure of the legitimacy of military action.

6) Conclusion

Any meaningful examination of the role of the IDF military lawyers requires an understanding of the legal environment and its political significance. The foregoing analysis has considered a municipal legal environment dominated by the Israeli Supreme Court and an international environment featuring strengthening, but largely inefficient, legal institutions that are given added traction by activist employment of the universal jurisdiction and the legal reports of the UN and private NGOs. Examination of each of these aspects of the legal environment provides support for the hypotheses to be tested in this thesis concerning changes to the IDF's external environment: that the increased involvement of lawyers in Israeli military decision-making is an institutional reaction by the IDF to the following changes in its external environment:

- a) The application of international law by the Israeli Supreme Court.
- b) The threat of foreign prosecutions of Israeli decision-makers for war crimes.
- c) The increased use of humanitarian law as a measure of the legitimacy of military actions.

However, to view these as separate legal environments is to miss the dynamic relationship between domestic political actors, including the courts and those who use them, and the international, whereby political judgments about Israeli military actions are informed by and determine legal opinion. Neither Israeli Supreme Court, not Israeli civil and military actors, is remote from the international legal environment. Law matters to the military throughout the

legal environment and it matters because of the relationship between law and legitimacy, without which the IDF cannot win its wars. This makes the strategies in defence of legitimacy important; not least the legal defence of military operations and the choice of law with which to seek mount the defence. It follows that a clearer picture of what IHL actually requires of the military is needed before these processes can be subjected to empirical examination.

The next chapter will examine the key provisions of IHL that seek simultaneously to allow the efficient conduct of warfare and the protection of civilians. It is this balance that is at the core of the legality of the IDF's operations and meat and drink to the military lawyers. If, as is argued throughout this thesis, the lawyers and communities of practice are exercising choice in their distinction between the lawful and the unlawful, it can only be understood and measured by first stripping the legal provisions of their mystery. The following chapter will expose the 'grey areas' of legal provisions that attempt to regulate military targeting and which are conventionally seen as the source of legal disagreement.

Chapter 3: Advising in the Grey Area.

1) Introduction

This chapter examines the extent to which military legal advisers exercise choice in the construction of their advice on what is legal and what is illegal in war. With the legitimacy of warfare increasingly contingent upon the extent of civilian suffering in war, the chapter focuses on the legal restraints on targeting civilians. The investigation takes the form of a separate consideration of the principles of distinction and proportionality that inform IHL regulation of targeting.

There is a tension at the heart of IHL between enabling the business of war (military necessity) while seeking to protect civilians (humanity) that produces an imprecision, which generates contradictory understandings of the legality of military operations. A brief review of the legal opinions expressed in relation to NATO's 1999 air campaign against Serbia and Israel's 2009 military conflict in Gaza illustrates the plurality of legal positions. An understanding of the law relating to targeting reveals an area of legal uncertainty that is sometimes called the 'grey area' between the obviously legal and the obviously illegal. This chapter focuses on the grey areas of proportionality and distinction in targeting decisions to illustrate the extent and nature of the grey area and to consider the latitude available to military lawyers in deciding what is legal and what is illegal when presented with details of a planned attack.

It will be argued that the interpretation of legal provisions that require a balancing of the value of civilian life against that of military objects demands a moral and ethical judgment by the legal advisor in deciding what is legally permissible. A clear understanding of the interplay of law and morality in war is therefore essential if the adoption of a legal discourse

of legitimacy in relation to acts of war is not to obscure the essential role of morality and ethics in military decision-making and inhibit a proper understanding of the role of military lawyers. While legal commentators are quick to recognise the moral and ethical content of decisions made by military commanders, lawyers are reluctant to recognise the moral and ethical influences on their own decision-making in the course of their construction of their legal advice. The argument will be developed to assert that the legal advisers themselves, in formulating their targeting advice, are in practice making the ethical choices identified and discussed by Just War theorists and that the process of ethical evaluation is concealed within a legal discourse. The contribution of Just War scholarship will be examined in the following chapter in order to create a synthesis of legal and Just War scholarship that will aid the understanding of the process of construction of military legal advice.

This recognition of the ethical choices inherent in the construction of legal advice on targeting then raises questions, which will be addressed later on in the thesis, concerning how these moral and ethical choices are made and what institutional influences shape and constrain them. Further, the investigation leads to an understanding that by relying on IHL and the lawyers to confer, defend and challenge the legitimacy of military decision-making, the essential moral and ethical debate remains unexplored, undeveloped and dangerously ignored. These issues, the instrumental reasoning behind confining the debate to a legal discourse and the dangers inherent in such an approach, will be explored in later chapters.

In short, the point to be emphasised here is that the legal investigation reveals grey areas of IHL, particularly as they apply to targeting decisions, which creates space for the exercise of choice by the IDF lawyers in the construction of their legal advice to the military. How this

choice is exercised in practice is the subject matter of this thesis and will be explored in later chapters.

2) The legal principles of distinction and proportionality

As was discussed in chapter 1, the legitimacy of going to war, and indeed continuing the war, is increasingly conditional on defending the legality of civilian suffering. Until the twentieth century war was usually fought by armies against armies in areas remote from civilian populations. With the advent of total war civilians became caught up in the killing with increasing frequency. This trend has gathered pace with modern warfare often conducted in centres of population where combatants mingle with civilians. This style of warfare increases the likelihood of death and injury to civilians and devastation of civilian property and infrastructures. These developments, coupled with the exposure of war to twenty four hour news media, make the legality of targeting decisions a key judgment in war.

Legal advisors brought in by the military to advise on the legality of targeting decisions are applying the *jus in bello* principles of distinction and proportionality. The traditional distinction between *jus ad bellum* and *jus in bello* is between the law concerning going to war and laws concerning the way wars are conducted. When *jus ad bellum* fails to prevent war, *jus in bello* seeks to minimise its brutality¹. IHL *jus in bello*, principles of distinction and proportionality are central to the legal assessment of targeting decisions. Distinction separates civilians and civilian objects, that cannot be intentionally targeted, from combatants and military objectives that can. Having decided that the target is a military objective then, and only then, the proportionality test comes into play, allowing the incidental unintended killing

¹ The structure of IHL and the extent to which this separation between the two legal codes is a legal fiction is discussed in chapter 5.

of civilians and destruction of civilian objects unless it is excessive in relation to the anticipated military advantage. The civilian victims of the proportionality calculus are popularly referred to as collateral damage- a term far too crude to be included in the legal discourse. Distinction and proportionality will now be considered in greater detail to understand how these principles work in practice.

2.1) Distinction

The legal codification of the requirement to avoid civilian injury² can be traced back to the Lieber Code prepared at Lincoln's request as a guide for the conduct of the Union forces during the American Civil War³, and appeared in the 1899 and 1907 Hague Regulations⁴, the 1947 Geneva Conventions⁵ and in its modern form in Article 48 of Additional Protocol I of 1977⁶. The articles referring to distinction are accepted by non-signatories as an expression of customary international law and are therefore binding on all states, not just the treaty signatories. Customary international law is a general practice accepted as law by states and respected legal commentators so that key provisions of treaty obligations such as the 1977 Additional Protocol I are accepted as law by states such as the US and Israel who are not signatories.⁷ Article 48 provides that,

² I use 'civilian injury' to include death and injury to civilians and damage and destruction to civilian property.

³ War Department, Adjutant General's Office, Instructions for the Government of Armies of the United States in the Field, General Orders No 100, Lieber Code, 24 April 1863, Art 22.

⁴ Convention [No II] with Respect to the Laws and Customs of War on Land, with annex of regulations, Art 22, 29 July 1899, 32 Stat 1803, 1 Bevans 247; Regulations Respecting the Laws and Customs of War on Land, annex to Convention (No IV) Respecting the Laws and Customs of War on Land, 18 Oct 1907, Art 22, 36 Stat 2277, 1 Bevans 631.

⁵ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 Aug 1949) 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (12 Aug 1949) 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (12 Aug 1949) 75 UNTS 135; and Geneva Convention

⁶ 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Armed Conflict usually abbreviated to AP1.

⁷ Customary international law is "a general practice accepted as law". Statute of the International Court of Justice, 1945, Art. 38(1)(b), 59 Stat. 1055. See also Jean-Marie Henckaerts, 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict', *International Review of the Red Cross*, 87(857), 2005, 175-212.

In order to ensure respect for and protection of the civilian population and civilian objects, the parties to the conflict at all times shall distinguish between civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

Further, Article 51(2) provides that, 'The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited'.

The same article goes on to provide that, 'attacks shall be limited strictly to military objectives'. Civilian objects are defined by Article 52(1) as 'all objects which are not military objectives'. Questions then arise in relation to who exactly is a civilian and what are civilian objects and military objectives. As will be seen, the answers are far from clear.

Modern asymmetric warfare with its blurring of distinction between irregular forces and civilians leading to confusion over who can be targeted, and the fact that war is increasingly conducted in cities rather than remote battlefields, brings added urgency to the need for an agreed measure of distinction. Civilians are defined as persons other than combatants and are protected from attack so long as they are not taking a direct part in hostilities. Combatants are defined by Article 4(a) Geneva Convention (III) of 1949 as only those:

1. Commanded by a person responsible for his subordinates,
2. Displaying a fixed distinguished emblem recognisable at a distance,
3. Carrying arms openly
4. Conducting operations in accordance with the laws and customs of war.

On customary international law generally, see Yoram Dinstein, "The Interplay between Customary International Law and Treaties", 322 *Recueil des Cours* 246 (2006) and Michael J Matheson 'The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions', (1987), 2, *American University Journal of International Law and Policy*, p.419

It is very difficult for a guerrilla group to meet these requirements. The position was radically altered by Additional Protocol 1 of 1977 (AP 1) which reduces the requirements to be met by irregular forces in order to be treated as combatants. The requirement is reduced to that of carrying arms openly during hostilities. However, the protocol was not ratified by, among others, the US and Israel who objected to a redefinition that conferred combatant status and privileges to groups that many saw as terrorists. Consequently, the reduced requirements for irregular forces are not seen as part of customary international law. This leaves a degree of uncertainty about the status of irregular combatants that do not comply with the Geneva formula. This raises the question of the status of people engaged in hostilities who do not meet the combatant criteria. In particular, how do you differentiate them from civilians and when can they be intentionally targeted?

The US concept of 'unlawful combatant' is absent from the Conventions. Instead, the status is determined by loss of protection from attack normally accorded to civilians. Article 51.3 AP I provides that civilians shall enjoy protection against the dangers arising from military operations '*unless and for such time as they take a direct part in hostilities*'. There is no clear consensus on the correct legal definition of direct participation in hostilities so that, again the status of irregulars remains uncertain. When can a supporter of Hamas be targeted by the military? What amounts to 'direct participation' and how long is 'for such time'? The Israel High Court of Justice, the only Supreme Court of international standing that has examined the issue⁸, found that the provision covered all persons that performed the functions of combatants, including,

a civilian bearing arms (open or concealed) who is on his way to the place where he will use them against the army, at such a place, or on his way back from it' as well as 'a person who collected intelligence on the army, whether on issues regarding the hostilities ... or beyond those issues...; a person who transports unlawful combatants to or from the place where the

⁸ The Public Committee against Torture in Israel v. The Government of Israel, HCJ 769/02, pp.34-35.

hostilities are taking place; a person who operated weapons which unlawful combatants use, or supervises their operation or provided services to them, be the distance from the battlefield as it may.

This definition, although adopted by the Israeli Supreme Court, has not been universally endorsed and is wider and more permissive than the practice of some other jurisdictions. Notice in particular the breadth of 'provided services to them, be the distance from the battlefield as it may'. The Court had been in particular pains to interpret 'for such time as' the provision in such a way that there was no protection for civilians who were in between combat operations. This wide interpretation of the circumstances in which civilians lose their privileged status is particularly relevant to targeting decisions where organisations such as Hamas make no clear distinction between their combatants and civilians and the practical consequences will be examined in greater detail in the case studies. Suffice to say, at this stage, that the IDF lawyer has a large degree of choice about where to draw the line between the legal and the illegal targeting of civilians who are in some way associated with military attacks on Israel.

The loss of civilian protection from attack through participation in hostilities enables a distinction to be made between voluntary human shields who are civilians participating in hostilities and involuntary human shields who are not⁹. Having established who can be targeted, the distinction tends to create rather than resolve confusion in the case of detention.

While there is a general understanding that civilians who have lost their privileged status can be killed as combatants, there is a widespread reluctance to allow them the 'privileges' of combatants in the event of their capture¹⁰. This leads to differing standards of detention on a case by case basis that has required domestic legislation by the detaining state. In Israel,

⁹ See, Michael N. Schmitt, 'Human Shields in International Humanitarian Law', available at, <http://www.marshallcenter.org/mcpublicweb/MCDocs/files/College/HShlds-Schmitt.pdf> . (Last accessed 1/12/09).

¹⁰ See Kenneth Watkin, 'Warriors Without Rights? Combatants, Unprivileged Belligerents, And The Struggle Over Legitimacy', 2 *Occasional Paper Series* (Program on Humanitarian Policy and Conflict Research, Harvard University, Winter 2005), at: <http://www.hpcr.org/pdfs/OccasionalPaper2.pdf>. (Last accessed 1/12/09).

relevant law is the Incarceration of Unlawful Combatants Law, 5762-2002, which allows for the detention of civilians that have taken direct or indirect part in hostilities¹¹. However, the legal controversy over the US treatment of detainees has tended to overshadow the import of the interpretation of the provision for the prior crucial decision of whether or not civilians have lost their privilege of immunity from attack. The point to be emphasised is that the imprecision of the provision means that despite the contribution of the Israeli Supreme Court, such targeting decisions are made in a grey area of legal imprecision.

In order for state practice and international law to keep up with the changing demands of warfare, in 2003 the International Commission of the Red Cross (ICRC) convened forty experts in international law to consider changes to the law relating to combatants. According to Professor Michael Schmitt who participated in the study, the conclusions, published in the form of Interpretive Guidance by the ICRC in 2009¹² after six years of discussion, represent the view of the ICRC but not all of the participants and is unlikely to be adopted by sufficient states to become an accepted statement of international law¹³. In fact none of the experts would put their name to the finished document! The problem was that there was no agreement on the correct balance to be struck between the humanitarian values championed by the ICRC and the interests of states in the efficient conduct of their military operations. The document itself states that the guidance cannot be an expression of law until it is written into treaty or becomes the accepted practice of states and lack of endorsement by its consulting experts does not bode well for a rapid transition of the recommendations into law. Nevertheless, the opinions of the ICRC are important guides to state conduct and will be

¹¹ The full text is available at, <http://www.jewishvirtuallibrary.org/jsource/Politics/IncarcerationLaw.pdf>. (Last accessed 12/1/10).

¹² 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law', ICRC, May 2009, available at, http://www.icrc.org/eng/assets/files/other/icrc_002_0990.pdf. (Last accessed 1/12/09).

¹³ This view was expressed by Professor Michael Schmitt at a conference on 'Operationalizing the Geneva Conventions' at the British Institute of International and Comparative Law on 13 October 2009 attended by the author.

influential on at least some operational decision-making. The Guidance addresses the problems of identifying combatants and the circumstances in which civilians lose their protected status, becoming unlawful combatants or unprivileged civilians. The key provision under review is the condition of protection of civilians, ‘unless and for such time as they take a direct part in hostilities’.

In considering combatant status the Guidance distinguishes between international armed conflict and non-international armed conflict. It adopts the position that in international armed conflict the well known four requirements of regular armed forces of, (a) responsible command; (b) fixed distinctive sign recognizable at a distance; (c) carrying arms openly; and (d) operating in accordance with the laws and customs of war do not apply to irregular forces for the purpose of distinguishing combatants from civilians¹⁴. For this purpose, ‘all armed actors showing a sufficient degree of military organization and belonging to a party to the conflict must be regarded as part of the armed forces of that party’¹⁵.

The Guidance also addresses the issue of how to regard armed groups in non-international armed conflicts. Here the Guidance intends to limit the loss of civilian status by distinguishing members of non-state parties to hostilities from civilians that take occasional part in the fighting. This is achieved by applying the requirement that combatant status only applies to those members of a non-state party armed group who are part of its military wing

¹⁴ These requirements being relevant to entitlement to certain privileges after capture such as prisoner of war status but are not required for combatant status itself.

See Michael N. Schmitt, ‘The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis’, *Harvard National Security Journal* 1: 5-44, ‘The concept of civilian status is the greatest source of controversy, albeit principally with respect to the IHL governing detention. Reduced to basics, the issue, which surfaces only in international armed conflict, is whether civilians who take up arms qualify for treatment as: 1) prisoners of war under the 1949 Third Geneva Convention; 2) civilians under the 1949 Fourth Geneva Convention; or 3) “unlawful combatants” who enjoy only basic protection, such as that set forth in Common Article 3 to the 1949 Geneva Conventions and Article 75 of Additional Protocol I.’ Available at, http://www.harvardnsj.com/wp-content/uploads/2010/05/Vol.-1_Schmitt_Final.pdf. (Last accessed 2/12/09).

¹⁵ Interpretive Guidance, p22.

and whose *'continuous function is to take a direct part in hostilities'*. Controversially, membership is not enough, and members in a reserve capacity who await the call to duty do not qualify. It can readily be seen that the intent of the guidance is to resolve uncertainty over combat status of non-state actors in non-international armed conflicts by increasing the entitlement to protected civilian status. A similar approach is taken to the circumstances in which civilian protection from attack is lost. This turns on the interpretation of 'for such time as they take a direct part in hostilities' and the Guidance expressly records that there is no international consensus on the correct interpretation of this requirement:

*'Treaty IHL does not define direct participation in hostilities, nor does a clear interpretation of the concept emerge from State practice or international jurisprudence. The notion of direct participation in hostilities must therefore be interpreted in good faith in accordance with the ordinary meaning to be given to its constituent terms in their context and in light of the object and purpose of IHL'*¹⁶.(emphasis added)

As we have seen, the ICRC is the first to admit that there is no accepted ruling on where the boundaries lie between 'support for and assistance to an armed group' and 'direct part in hostilities', nor is there any consensus on when the involvement can be said to have ended. If the ordinary meaning of the words of the provision were clear there would be no uncertainty. Since they are not, the legal advisor is directed to 'good faith' and 'the objects and purposes of IHL'. The Guidance lists examples of possible involvement that would reach the threshold criteria and seeks to maintain protection from attack for civilians whose involvement is seen as removed from involvement by time or causation. The Guidance concludes by applying the principles of military necessity and humanity to require that civilians are given the benefit of any doubt and protected from no more suffering than is 'actually necessary to accomplish a legitimate military purpose in the prevailing circumstances'.

¹⁶ Interpretive Guidance, p.41.

The Guidance seeks to justify the ‘revolving door’ of repeated civilian participation in hostilities without loss of civilian protection by defending the distinction between belonging to an armed group and infrequent involvement¹⁷. This immunity from attack during ‘rest and recreation’ is unlikely to find universal acceptance. There is a widespread distaste for the idea that civilians can repeatedly take part in armed conflict without loss of civilian status. The guidance that the smuggling and hiding of weapons¹⁸ is not taking a direct part in hostilities and the requirement that the involvement in hostilities has to reach a threshold of harm, are equally controversial. The guidance concludes by considering the degree of force to be used against a civilian that has lost protection from attack. In these circumstances the degree of force should be no more than ‘actually necessary to accomplish a legitimate military purpose in the prevailing circumstances’¹⁹. In arriving at this conclusion the Guidance relies on the IHL general principles of humanity and military necessity to extend a presumption in favour of protection. This was clearly a step too far for many of the experts. Nevertheless, the fact that there are divergent views on whether such an approach is required by law shows the breadth of legal choice to be exercised by the lawyers when constructing their legal opinions.

This review of the 2009 ICRC Guidance shows that, despite the ICRC’s best efforts and those of its forty experts, there remains imprecision and uncertainty at the heart of the principle of distinction when applied to the crucial issues of civilian immunity from attack. Perhaps the point to be emphasised is that the level of disagreement between the experts was such that the Guidance has been published without any record of their identity lest they be construed as agreeing with the contents. Michael N. Schmitt, who was one of the experts, has published detailed criticisms of the content and regards the framework as being so skewed towards

¹⁷ Interpretive Guidance, p.70.

¹⁸ Interpretive Guidance, p.66.

¹⁹ Interpretive Guidance, p82.

humanitarian principles as to be impractical²⁰. Schmitt identifies a 'grey area' where there is no precision about what constitutes 'direct participation',

But what of doubt as to whether *conduct* being engaged in by a civilian (or one presumed to be a civilian when status is unclear) amounts to direct participation? As should be apparent from the disagreement surrounding the various particular examples cited earlier, many activities fall into a grey area where reasonable observers differ.²¹

If reasonable observers differ on whether a civilian can be legally targeted, there is a choice to be made by the military lawyers in constructing their legal advice. This is advising in the grey area. As will be discussed throughout this thesis, and particularly in the case studies, these issues are central to the legality of Israel's conduct of its military operations against groups such as Hamas in Gaza and Hezbollah in Lebanon who fight without uniforms and conceal their fighters and their military equipment among their civilians.

There are similar problems in the other key area of distinction, that of identifying military objectives and distinguishing them from civilian objects. In other words, not who but what can be legally attacked? When, for example, is a Hamas government building or a Lebanese power station a lawful military target?²²

Additional Protocol 1, Article 52 (2) describes military objectives as, 'those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage'.

²⁰ Michael N. Schmitt, 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements. *New York University Journal of International Law and Politics*', 2010, 42: 697-739, available at, http://www.law.nyu.edu/ccm_dlv3/groups/public/@nyu_law_website_journals_journal_of_international_law_and_politics/documents/documents/ccm_pro_065931.pdf. Last accessed 3/12/09.

²¹ Ibid. p.737.

²² These specific operations will be analysed in the case studies.

It can be seen that an object can be regarded as military object by reference to its nature, purpose or use. This definition begins with those objects whose very nature is military. Discussing nature, Dinstein lists sixteen categories of military object which he regards as non-exhaustive, including power plants that serve the military and mainline railways and motorways²³. 'Purpose' denotes an established intention to use an object for military purposes. Finally, there is actual use. This latter category brings in what would otherwise be civilian objects that have been shared with or taken over by the military and are usually referred to as 'dual use' targets. These dual use objects have a capacity to expose civilians to harm.

Article 52(3) is intended to provide some protection to civilians by requiring that if there is doubt about the military use of civilian objects, the presumption must be in favour of civilian use. The provision is further limited by the requirement that the object must 'make an effective contribution to military action' and its destruction must offer a 'definite military advantage'.

Dinstein discusses a list of problem areas including: retreating troops such as those targeted during the Gulf War, targeting individuals, police, industrial plants, oil and other minerals, electricity grids, airports, trains, trucks and bridges, civilian TV and radio stations, government offices and political leadership. Dinstein argues that *in certain circumstances* all the foregoing can be deemed military targets²⁴. This means that targeting decisions become less about a list of types of object than they are about looking at the use to which the object is being put. This militates from the general to the specific and there are few if any objects that have not been at one time or another used for military purposes.

²³ Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conduct*, (Cambridge: Cambridge University Press, 2004), pp.88-89.

²⁴ *Ibid*, p 94-99.

As Fenwick observes,

‘There has been relatively little discussion in the relevant literature of what constitutes a military objective and why, since the adoption of Protocol I in 1977. To the extent that a debate has occurred, it has tended to consist of quoting the Protocol I definition, listing the target categories, and affirming that the objects within the categories are or are not military objectives’²⁵.

In Fact, although there is little discussion in the literature, these issues are continuously discussed in another strand of the legal discourse, NGO reports, including those of UN mandated missions and state responses to them. This was certainly the case in the aftermath of the NATO bombing campaign against Serbia, which took place between 24 March 1999 till 9 June 1999, when bodies, including Human Rights Watch²⁶ and Amnesty²⁷, that had reported that NATO had committed clear war crimes, petitioned the Prosecutor for the International Criminal Tribunal for the Former Yugoslavia to investigate allegations of NATO war crimes. With a court and prosecutor in place, this was an opportunity to demonstrate the strength of IHL. The Prosecutor established a committee to review the allegations but to the outrage many commentators the Review Committee reported that there were no grounds for an investigation, let alone prepare charges²⁸.

The aim of the military operation had been to demonstrate NATO’s opposition to Serbian aggression, deter Serbian attacks on civilians and damage Serbia’s capacity to wage war²⁹.

The NATO bombing campaign, Operation Allied Force, which was conducted without

²⁵ W.J. Fenrick, ‘Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia’, *European Journal of International Law*, (2001), vol. 12 No.3, 489-502.

²⁶ Human Rights Watch, *Civilian Deaths in the NATO Air Campaign*, (2000).

²⁷ Amnesty International, *Collateral Damage’ or Unlawful Killings? Violations of the Laws of War by NATO During Operation Allied Force*, (2000).

²⁸ ‘International Criminal Tribunal for the Former Yugoslavia, Final Report to the Prosecutor for the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia’, 8 June 2000, 39 *International Legal Materials*, (2000), p.1257.

²⁹ Cohen and Shelton, ‘Joint Statement on Kosovo after Action Review in the US Mission to NATO’, *Security Issue Digest*, 14 October 1999.

NATO loss of life, was criticised by Amnesty and Human Rights Watch both in terms of choice of target and the height at which the air force operated. The target list comprised: military forces, security forces, command and control facilities, integrated air defence system, military-industrial infrastructure, the media and broadcasting system, supply routes, lines of communications, bridges, government ministries and refineries³⁰.

Michael Schmitt links the strategy to the development of 'effects based' targeting and its influence on US targeting doctrine³¹. This is largely derived from Colonel John A. Warden, USAF (ret.)'s 'Five Strategic Rings Theory' which advocates skipping over the armies in the field and attacking the enemy 'inside out'³². This targeting of political leadership, economic systems, and supporting infrastructure as well as military forces seeks to degrade both the ability and the political will to fight. Provided that civilians are not the target, degrading popular support for war is a legitimate military object. While there is nothing new in targeting infrastructure, the important point here is the doctrinal shift of emphasis away from degrading military assets. Inevitably, according to Schmitt, this type of warfare amounts to an indirect targeting of the civilian infrastructure from a distance.

The legal disagreements concerning the deliberate NATO targeting of RTS, the Serbian state television headquarters and studios on 23 April 1999 illustrate the value judgments implicit in the application of the distinction principle. As in all areas of IHL legal dispute, the argument is between those legal commentators who attach greater importance to the humanitarian principles and those who lean towards the achievement of military objectives. The attack was condemned by Amnesty International and Human Rights Watch on the grounds that RTS had

³⁰ Cohen and Shelton, 'Joint Statement of Kosovo Air Action Review in the US Mission to NATO', *Security Issues Digest*, 14 October 1999. Quoted by W.J. Fenrick, 'Targeting and Proportionality', at p.495.

³¹ Michael N. Schmitt, 'Targeting and Humanitarian Law: Current Issues', *Israel Yearbook on Human Rights*, 33, pp.59-104, 2003. See also, Michael N. Schmitt, 'Effects Based Operations and the Law of Aerial Warfare', *Washington University Global Studies Law Review*, 2006, 5: 265-293.

³² J. W. Crawford, 'The Law of Non-combatant Immunity and the Targeting of National Electrical Power Systems', *Fletcher Forum of World Affairs*, vol. 21, (Summer-Fall, 1997), p.101.

been targeted as a source of propaganda. While the Committee accepted the NATO position that the broadcasting system was capable of use as part of the Serbian command and control network and therefore a military object, the Committee went on to consider the position were the broadcasting station only to have been involved in the dissemination of Serbian propaganda directed towards its own people. Their conclusion that such an attack 'might well be questioned by some experts in the field of IHL' itself stands as a measure of the uncertainty that attaches to the status of dual use targets³³.

The fact that RTS was state controlled and used to bolster civilian support for Serbian war aims shows the difficulty of protecting the media from attack on grounds of dual purpose. Clearly, there is no consensus that targeting civilian media engaged in the dissemination of propaganda would amount to a war crime³⁴. That Amnesty lawyers take the view that it is a war crime and the Committee did not, serves to illustrate the plurality of interpretation. This legal imprecision is neatly captured by Fenwick while a Senior Legal Advisor to the Office of the Prosecutor of the ICTY, who observes, 'It is, to say the least, highly debatable that the media in the FRY, which was state controlled to a degree, constituted a legitimate military objective even if it was relabelled as a propaganda source'³⁵. It should be noted that if it is accepted that the media is a lawful military target, the legal requirement that the attack is intended to 'result in substantial military benefit' fails to prevent the operation since it is clearly right that actions that undermining civilian support for war are of substantial military benefit. As Michael N. Schmitt puts it, 'Whether media facilities constitute military objectives remains unsettled.'³⁶ The fact that the legality of the attack is 'highly debatable' is of little comfort to the 16 injured and 16 dead in the attack. Nevertheless, it is necessary to be

³³ Committee Report para76, quoted by Benvenuti, *The ICTYT Prosecutor*, at p.522.

³⁴ Amnesty International, *Collateral Damage*, pp.41-48.

³⁵ Fenrick, *Targeting and Proportionality*, p.495.

³⁶ Michael N. Schmitt, 'Fault lines in the law of attack', in Susan Breau and Agnieszka Jachec-Neale, (Eds.) *Testing the Boundaries of International Humanitarian Law*, (British Institute of International and Comparative Law, 2006) pp. 277-307, Available at SSRN: <http://ssrn.com/abstract=1610016>, p283 (last accessed 7/3/10).

aware of the political, ethical and legal nature of the legal debate. This is a discussion that will be continued in the course of this thesis with regard to the Israeli targeting of media outlets during the 2006 Second Lebanon war.

Michael N. Schmitt stresses the pressure for a more expansive definition of military objective³⁷. This arises from a number of factors including the technological advances in precision guided weaponry that enable technically superior forces to target at will. Given that there is the capacity to disrupt essential systems that support both civil and military activity, the collateral affect of degrading civil support for war is attractive to some practitioners. This is referred to by the US military as effects based targeting (EBS) which stresses the longer term and cascading effects of destroying the target. Typical examples of this approach are infrastructure and command targets which affects essential systems without necessarily hitting them directly. The relevance of this thinking to the present discussion is the increased concentration on dual use targets. As will be discussed later in this thesis, Israeli Chief of Staff Dan Halutz was a powerful advocate of this style of warfare in Lebanon in 2006. There is a potential for this type of operation to be used as a coercive tool. In modern asymmetric warfare the aims of the technically superior party are frequently coercive, designed to persuade the other side to act in a particular way or desist from particular actions. Here, degrading the support of the civilian population for their government's war aims becomes a very real military advantage. The often quoted words of Lieutenant General Michael Short, Air Component Commander for Operation Allied Force, 'I felt that on the first night the power should have gone off, and major bridges around Belgrade should have gone into the Danube, and the water should be cut off so the next morning the leading citizens of Belgrade

³⁷ Michael N. Schmitt, Targeting and Humanitarian Law: Current Issues, 34 *Israel Yearbook on Human Rights* (2004) at 59 - 104

would have got up and asked ‘Why are we doing this?’ and asked Milosevic the same question.’³⁸.

This approach comes perilously near to direct targeting of civilian objects and indeed collective punishment of a population for failing to oppose its leadership. A charge levelled at the Israeli government by the Goldstone Mission.³⁹ As will be discussed in greater detail in the Cast Lead case study, the Goldstone fact finding report finds that Israel breached the requirements of discrimination, conducting unlawful attacks on Gaza’s civilian population and its civilian infrastructure. The attacks on the Parliament building and Ministry of Justice are seen by Goldstone as unlawful attacks on civilian objects while Israeli Government report, *The Operation in Gaza Factual and Legal Aspects*⁴⁰ (hereafter called the Israeli Government Report), on the legality of the operation came to opposite conclusions on similar facts. As the Israeli Government Report puts it, ‘With respect to each particular target, IDF made the determination that the attacks were lawful under international law.’⁴¹ Nevertheless, the legality of the targeting of the Gaza police on the first day of the operation is also the subject of major disagreement between Goldstone and the Israeli Government Report. These specific targeting issues will be explored in greater detail later in this thesis, but for the purposes of the present discussion they serve to illustrate the point that the legal imprecision identified in the IHL prohibition on targeting civilians and civilian infrastructure enables lawyers to take diametrically different positions on the legality of military operations.

³⁸ C.R. Whitney, “The Commander; Air Wars Won’t Stay Risk-Free, General Says”, *New York Times*, June 18, 1999, quoted by Schmitt, *Targeting and Humanitarian Law*, at p65.

³⁹ Report of the United Nations Fact Finding Mission on the Gaza Conflict, 15 September 2009, p.252 available at, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf>. (Last accessed 4/3/10)

⁴⁰ Israel Ministry of Foreign Affairs, ‘The Operation in Gaza Factual and Legal Aspects’, available at: http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Israel_strikes_back_against_Hamas_terror_infrastructure_Gaza_27-Dec-2008.htm. (Last accessed 4/3/10)

⁴¹ *The Operation in Gaza*, p.89, paragraph. 236.

For the sake of completeness, it should be mentioned at this point that the limiting principles of military advantage are equally negotiable. Objects that ‘make an effective contribution’ to military action and whose destruction ‘offers a definite military advantage’ can be extended to almost all aspects of a nation’s infrastructure and certainly include dual-use objects such as power stations.

2.2) Proportionality

As we have seen, IHL uses the principle of distinction to prohibit the intentional targeting of civilians and their property. However, IHL does not prohibit the foreseeable injury to civilians and their property arising from targeting military objectives providing that it is proportionate. Proportionality refers explicitly to a relationship between civilian injury⁴² and the anticipated ‘concrete and direct military advantage’. This is not to be confused with notions of proportionality between injury to the attacker’s civilians or even their soldiers. The fact that Israel lost few soldiers in Cast Lead while Hamas lost many has no direct bearing on IHL *in bello* proportionality.

AP 1, article 57 requires all parties to exercise constant care to spare the civilian population and civilian objectives.

AP1 Article 57 (2) provides that,

‘(a) those who plan or decide upon an attack:

(1) do everything feasible to verify that the objectives to be attacked are neither civilian nor civilian objects...

(ii) Take all feasible precautions in the choice of means and method of attack with a view to avoiding, and in any event to minimize incidental loss of civilian life, injury to civilians and damage to civilian objects;

(iii) refrain from launching any attack that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

⁴² Civilian injury is used here to refer to loss of civilian life, civilian injury, damage and destruction of civilian property.

(b) An attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(c) Effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit'.

Having established the distinction between civilian and combatant, it can readily be seen that the whole edifice of civilian protection rests on a proper understanding and application of the proportionality test of 'loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'. After all, there is little to be gained from protection from deliberate attack if there is no proper protection from 'collateral damage'! However, the extent of this protection is contested and turns on a judgment of what is excessive in the particular circumstances under review. Although the word proportionality is nowhere to be found in the treaties and conventions of IHL, this judgment is nonetheless recognised at the proportionality test.

Governments, NGOs and international institutions constantly publish legal opinions on the legality of military operations with diametrically opposing positions. More often than not the argument turns on differing judgments of proportionality. This is not surprising since the test requires a comparative evaluation of two completely differing concepts whose value is incapable of objective determination. As J Holland puts it:

The major practical and conceptual difficulty with this rule is that it requires that two very unlike values be weighed and balanced and a judgment rendered as to which of them is to be preferred. The first value is the composite of the loss of civilian life, civilian injury and damage to civilian objects expected from the attack. The second value is the concrete and direct military advantage anticipated from the target's destruction. There simply is no

objective method to compare the two such disparate notions. Obviously, any such weighing has to be extremely subjective.....⁴³

The fact that IHL requires an evaluation that imports a high degree of subjective judgment makes it very difficult to say when an action is illegal. Clearly, there are obvious examples of disproportionate attack but, short of those, it becomes very difficult to criminalise targeting decisions. While some operations can readily be seen as either legal or illegal, there are others that inhabit the grey area between the two. The limitations on criminalising such attacks are recognised in the construction of the criminal offence in the Rome Statute.

Art. 8(2) (b) (iv) Rome Statute of the International Criminal Court 1998 provides that a war crime is committed during an international armed conflict by intentionally launching an attack that will cause incidental civilian casualties, damage to civilian objects or widespread, long-term and severe damage to the natural environment, ‘which would be *clearly* excessive in relation to the concrete and direct overall military advantage anticipated’ (italics added).

The addition of ‘clearly’ recognises the difficulty of applying an objective measure of excess and is intended to avoid the court substituting its own proportionality judgment for that of the military commander in all but the most obvious cases. While AP1 prohibits disproportionate attacks, the International Criminal Court can only prosecute the ‘clearly’ disproportionate. To be sure the recognition by the drafters of the Rome Statute of a need to limit the role of the International Criminal Court in prosecuting military commanders in all but the most clear cases does not relieve the commanders and their legal advisors of the need to comply with the proportionality rule in difficult or ‘gray’ areas, it just makes prosecution less likely. The military legal advisor is not relieved of his duty to advise on the illegality of proposed actions simply because prosecution is unlikely. After all, whether an action is illegal and the

⁴³ Joseph Holland, *Military Objective and Collateral Damage: Their Relationship and Dynamics*, Yearbook of International Humanitarian Law, Vol. 7, 2004, pp. 35-78.

likelihood of prosecution are two different questions. The question is one of how to construct the advice in these circumstances.

The International Criminal Tribunal for the former Yugoslavia (ICTY) in the Kupreskic case⁴⁴ specifically refers to the grey area of proportionality as ‘the grey area between indisputable legality and unlawfulness’ and discusses how decisions should be made in this area. The court used the Martens Clause for guidance. The Martens Clause, which was written into the Hague Convention and which is repeated in slightly more modern terms in the Geneva Convention prescribes that in cases not covered by treaties and traditional customary international law, ‘civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience’⁴⁵. As Nuemenn observes, ‘The Marten’s Clause acts as an embedded moral code in the law of armed conflict’⁴⁶. The ICTY in the Kupreskic case recognised the limitations of the Marten’s Clause but nevertheless felt able to use it to give some guidance to applying the law in the grey area:

‘True, this Clause may not be taken to mean that the “principles of humanity” and the “dictates of public conscience” have been elevated to the rank of independent sources of international law, for this conclusion is belied by international practice. However, this Clause enjoins, as a minimum, reference to those principles and dictates any time a rule of international humanitarian law is not sufficiently rigorous or precise: in those instances the scope and purport of the rule must be defined with reference to those principles and dictates. In the case under discussion, this would entail that the prescriptions of Articles 57 and 58 (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.’⁴⁷

⁴⁴ *Prosecutor v. Kupreskic et al. (Appeal Judgement)*, IT-95-16-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 23 October 2001, available at: <http://www.unhcr.org/refworld/docid/40276b7e7.html>. (Last accessed 4/12/09).

⁴⁵ Additional Protocol I Art.1 (2). The clause is recognised as binding on non-signatories as it is seen as customary international law and has been held to apply to nuclear weapons, see, *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, *ICJ Reports*, 1996, at p. 259, paragraph 84.

⁴⁶ Noam Neuman, ‘Applying the Rule of Proportionality: Force Protection and Cumulative Assessment in International Law and Morality’, *Yearbook of International Humanitarian Law*, Vol. 7, 2004, p.95.

⁴⁷ Kupreskic, p.256, paragraph 525.

However, this approach has not been followed elsewhere and cannot be used to criminalise methods of war except in the most extreme cases⁴⁸. It may be that the Marten's Clause can be used to shrink the grey area but reference to the 'principles of humanity' and 'dictates of public conscience' do little more than remind the decision-maker of the moral content of decisions in war. As such, Kupreskic can be read as a plea to the military lawyer to err on the side of civilian protection. This expression of embedded values sits well with the ICRC's position of interpreting the provisions of IHL 'in good faith in accordance with the ordinary meaning to be given to its constituent terms in their context and in light of the object and purpose of IHL'. However, it must be remembered that one of the purposes of IHL is to enable the parties to military conflict to achieve their military objects and recourse to the 'object and purpose of IHL' does not immediately assist the effort to discover the correct balance between civilian injury and military advantage. The difficulties in agreeing an appropriate balance are well illustrated by debates on the place of force protection in the proportionality test.

As has frequently been observed, modern warfare is ever more likely to take place on an urban battlefield among civilians with increased risk to civilians. Equally, such a complex environment produces increased risk to soldiers with potentially lethal threats contained in buildings, alleyways and the detritus of close human habitation accumulating at a time of eroded civil services. In parallel with the changes to the battlefield there has been the Revolution in Military Affairs whereby technological advances have enabled the attacking forces to inflict death and destruction from a distance. Drones are used for both surveillance and to launch missile attacks. Laser guided weapons systems provide previously

⁴⁸ Theodor Meron, 'The Martens Clause, principles of humanity, and dictates of public conscience', 94 *American Journal of International Law*, (2000), pp.78-89, at p.88, 'nevertheless, the Martens Clause does not allow one to build castles of sand. Except in extreme cases, its references to principles of humanity and dictates of public conscience cannot, alone, delegitimize weapons and methods of war, especially in contested cases'

unimaginable accuracy. Nevertheless, these systems rely on accurate intelligence and remote decision-making with little opportunity for those in the firing line to explain their behaviour.

Take for example the situation of a prominent building offering opportunities to defending forces to fire on enemy lines of communication through the built environment. There may be a choice of either using soldiers to clear the building room by room and in the process distinguishing civilians from combatants, or alternatively destroying the building by missile attack before sending soldiers to the vicinity. In either case the building is first identified as a military objective and an assessment made of the expected injury to civilians and military advantage to be gained by destroying or securing it. If it is accepted that expected civilian injuries are not excessive in either cases, the military planners then have a choice between alternative methods of proportionate attack and must choose the method that causes the least harm to the civilians. Clearly, the remote option carries a greater risk to civilians. However, if it is recognised that the stand-off attack is likely to reduce casualties among the attacking force, the military planners have a choice between reducing the risks to the soldiers while increasing the risk to civilians or exposing their soldiers to greater risk to reduce the danger of injury to civilians. In short, there is a choice between force protection and civilian protection. Force protection has come in for a great deal of discussion. As was noted in the previous chapter, in Israel, Yagil Levy links Israeli force protection to an accelerating erosion of the legitimacy of sacrifice in Israeli society⁴⁹. He traces a trend from the First Lebanon War through the Second Lebanon War to Operation Cast Lead that has seen an increasing concentration on force protection to the detriment of enemy civilians.

⁴⁹ See for example, Yagil Levy, *The Second Lebanon War: Coping with the "Gap of Legitimacies" Syndrome*, *Israel Studies Forum*, No. 23, 2009, pp.3-24.

It can be seen that the legality of operations predicated on force protection raise two legal issues. First, is there a legal requirement to choose the method of attack that is least harmful to civilians where the alternatives expose the attacking forces to greater risk? Second, how much value should be given to force protection as a military objective when weighed against civilian injury?

At first sight, the IHL requirement to choose the method of attack that is least damaging to civilians should privilege civilians ahead of the attacking force, but this is to misread the provision. The obligation only applies where each method produces the same military advantage. Force protection is a legitimate military advantage and, as Dinstein puts it, 'victory without loss of soldiers' lives would be perfect providing that the attack is proportionate.'⁵⁰ It follows that since force protection is a legitimate military objective and the proposed attack is discriminatory and proportionate, there is no legal obligation to choose an alternative proportionate method of attack that exposes the soldiers to greater risk. A requirement to do so would not be comparing like with like. But that is not the end of the discussion since the harm to civilians must not be disproportionate to the benefit of reduced risk to the attacking forces.

This second question of how to weigh force protection against civilian harm has no certain answer, but this should come as no surprise since all weighing of civilian harm against military advantage is fraught with difficulty. Soldiers are seen as military objects whose preservation is a direct military advantage. As Michael Schmitt observes, it is not so much the life of the pilot so much as the ability to conduct future attacks⁵¹. Proportionality can be seen as deciding whether an attack is expected to cause collateral civilian damage that would

⁵⁰ Interview with the author 26 May 2009.

⁵¹ Michael N. Schmitt, *Fault Lines in the Law of Attack*.

be excessive in relation to the direct military advantage (including protection to the attacking forces) anticipated⁵². As will be discussed in the next chapter, ethicists disagree about whether there is a moral duty to risk the lives of one's own troops to reduce the danger to enemy civilians and, indeed, there are very influential voices in Israel arguing for increased weight to be given to the military side of the equation.

Returning to our example of the prominent building that needs to be secured to protect an essential line of communication, suppose a ground infantry operation to clear the building is likely to result in the death of ten enemy combatants, two civilians and two of our soldiers, while a missile attack is likely to kill ten enemy combatants, eight civilians including two children and none of our soldiers. There is certainly an ethical argument in favour of the ground attack but lawyers would probably agree that both attacks are proportionate to the military objective of securing the building and that there is no obligation to choose the ground attack. If securing the building is worth the collateral deaths of eight civilians including two children then the attack is proportionate and legal, there is no obligation to risk the lives of the soldiers even if it seems right to do so. Looked at from this perspective, the proportionality rule provides no answer to the question of how to weigh force protection against civilian harm and thus how to choose between the two methods of attack. Nevertheless, the fact that proportionality does not provide a guide to how to measure the relative values, should not obscure the fact that force protection is part of the proportionality matrix or, as Michael Schmitt puts it, 'The extent of [own-military] casualties is simply one of several military advantage components weighed in the proportionality balance'⁵³.

⁵² This formulation is not universally accepted with some commentators such as Fenrick seeing force protection as a separate value but the above analysis adopted by Schmitt is clearer and more persuasive.

⁵³ Michael N. Schmitt, 'Ethics and Military Force: The Jus in Bello', *Edited transcript of remarks, January 2002 Carnegie Council workshop on European and North American perspectives on ethics and the use of force*, 7 January 2002, available at <http://www.carnegiecouncil.org/resources/transcripts/98.html#>. (Last accessed 6/3/11).

The British Manual of the Law of Armed Conflict deals with these questions as follows,

'[T]he application of the proportionality principle is not always straight-forward. Sometimes a method of attack that would minimize the risk to civilians may involve increased risk to the attacking forces. The law is not clear as to the degree of risk that the attacker must accept. The proportionality principle does not itself require the attacker to accept increased risk. Rather, it requires him to refrain from attacks that may be expected to cause excessive collateral damage.'⁵⁴

The legitimacy of force protection at the expense of civilian harm was raised in the aftermath of NATO's 1999 Operation Allied Force bombing of Belgrade⁵⁵ when NATO's was criticised for bombing from above 15,000 feet and apparently valuing its own forces above Serbian civilians. The criticism was that bombing from such a height increased the risk to civilians such as when a convoy of farm vehicles was mistaken for military vehicles and a bridge was bombed when a train was crossing. The committee established by the ICTY to review the NATO bombing campaign did not uphold these criticisms and maintained the position that there is no obligation to endanger one's own forces providing that the operation meets the requirements of distinction and proportionality. In the particular instances discussed there was an increased risk to civilians but not disproportionate to the value of the military objectives.

Whether or not force protection is an issue, there remains the problem of applying the proportionality test in practice. The Goldstone Mission report on the 2009 war in Gaza considered allegations that Israeli forces had carried out disproportionate attacks. Goldstone also considers the attack on 6 January 2006 that caused the death of at least 24 people in al-Fakhura Street. The Mission finds that even if the Israeli position is correct that they were

⁵⁴ UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, paragraph 2.7.1 (Oxford: Oxford University Press, 2004)

⁵⁵ See for instance, *Human Rights Watch, Civilian Deaths in the NATO Air Campaign*, (2005) and Amnesty International, '*Collateral Damage or Unlawful Killings? Violations of the laws of War by NATO during Operation Allied Force*', (2000).

responding to mortar fire, the use of mortars in response in a heavily populated area 'cannot meet the test of what a reasonable commander would have determined to be an acceptable loss of civilian life for the military advantage sought'⁵⁶. The Israeli position as expressed in the report is that their troops came under repeated mortar attack and they responded with precise munitions. Civilians were not targeted and the anticipated risk to civilians was not excessive.

The fact that the same law is applied to differing legal effect is well illustrated by the fact that both Goldstone and the Israelis quote the ICTY Committee report in support of their legal position:

'It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and injury to noncombatants. Further, it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases. It is suggested that the determination of relative values must be that of the reasonable military commander'⁵⁷.

In fact Goldstone and the Israeli lawyers cannot even agree whether or not the 6 January attack was a close case or not. It is perhaps indicative of the Israeli position that the report goes on to quote W. Hays Park, '[un]intentional injury is not a violation of the principle of non-combatant immunity unless, through *wilful and wanton neglect*, a commander's actions result in excessive civilian casualties that are tantamount to an intentional attack.'⁵⁸ This position is close to saying that the proportionality rule is irrelevant since it fails to catch operational behaviour that stops short of breaching the principle of discrimination. In other words, provided that the intended target is military, collateral damage can be ignored. This amounts to a very permissive ethical position. If proportionality is negotiable, the decision whether or not to attack in circumstances where civilians will be endangered becomes a

⁵⁶ Goldstone p198.

⁵⁷ Report to the Prosecutor paragraphs 47-50.

⁵⁸ W. Hays Parks, 'Book Review', 28 *George Washington Journal of International Law and Economy*, 207, 218 (1995), quoted with added emphasis at p.46 para. 124.

moral one. As Holland puts it, 'This means that military commanders making targeting and other law of war decisions must be moral human beings. Many of the most difficult targeting decisions, i.e., proportionality, will require a decision that is in essence a moral one'.

Holland is suggesting a moral and legal disconnection where morality and not law is carrying the burden of invalidating a decision that may be legal. However, lawyers who seek to maintain the connection between law and morality would argue that morality informs the humanitarian/military balancing in IHL and morality points to what is and what is not legal, so that there is no disconnection. That may be the case, but it does not stop lawyers for NGOs proclaiming the illegality of the same military operations that the IDF legal officers regard as legal. The fact that a decision has a moral content does not strip it of its legal significance.

The point to be emphasised here is that, as with distinction, proportionality generates a grey area of imprecision where IDF lawyers construct differing constructions of what is legal under international humanitarian law, whether or not they recognise the role of morality in what they are doing.

3) Conclusion: plurality and choice

The fundamental problem with IHL in practice is that there is no clear line between the lawful and the unlawful; separating the two demands a balancing of humanitarian protection of civilians with military the requirements of military efficiency. The grey areas of distinction, which separate civilian objects from military objects and civilians from combatants, and the grey area of proportionality that seeks to place a value on unintended but anticipated civilian harm, each result in a plurality of legal positions. This creates a space for the exercise of power by the IDF military lawyers who hold a veto over IDF targeting

decisions, which may or may not be constrained by the relationship between law and morality.

When looking at the grey area it can be seen that Holland's observation operates on two levels: deciding whether an attack is legal and deciding whether to carry out a legal attack. The ICTY Committee observation that, 'It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and injury to non-combatants', compares human rights lawyers with military commanders to expose the plurality of legal positions. In investigating the role of military legal advisers a similar point can be made: it is unlikely that a human rights lawyer and a military legal adviser would assign the same values to military advantage and injury to non-combatants. It follows that they would arrive at differing views of what is legal and offer differing advice to the military commander. As Holland puts it, 'proportionality will require a decision that is a moral one'. As we have seen, the legal uncertainty of dual use targets and the status of civilians engaged in combat means that distinction like proportionality becomes a negotiable legal concept when applied on the battlefield. There are legal decisions that require a moral judgment in deciding what is legal. These are not legal or moral decisions; they are both, and the legal is inseparable from the moral.

Acknowledging the role of ethics and morality in framing legal advice raises questions of whose ethics and whose morality and the nature of the constraints on legal advisors when constructing the moral elements of their advice. As has been observed, IHL makes reference to the Martens clause to direct the practitioner that, 'civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience'. This

direction to the 'principles of humanity' and the 'dictates of public conscience' while acknowledging the role of morality in the construction of legal advice offers little guidance in the absence of universally accepted ethical principles. To consider the extent to which there is agreement on the principles of humanity, and how ethical positions both inform and assist in the application of IHL, requires an exploration of a field that is entirely alien to international lawyers- Just War Theory. The next chapter shows how Just War theory assists an understanding of IHL and the ethical choices that military legal advisers make in constructing their legal advice to the military. A synthesis of the legal and Just War disciplines is then be used to throw new light on the role and the political significance of military lawyers both in operational decision-making and legitimating military actions.

Chapter 4: Ethics

1) Introduction

As was shown in the previous chapter, constructing legal advice concerning issues of proportionality and distinction requires ethical choice- whether or not it is recognised as such by the legal advisor. It follows that the construction of legal advice is not just a matter of law but also of moral judgment⁵⁹. What guidance then, has moral philosophy for the legal advisor? Asking philosophical questions about war has a long tradition that has produced a body of scholarship usually referred to as Just War theory, which pre-dates and produced international humanitarian law (IHL); this body of scholarship prides itself on its practical application and can be understood as constituting an important element of a regime of legal regulation of warfare. International lawyers recognise the historical contribution of just war theory to the creation of IHL but often fail to recognise its contemporary relevance. In fact, the Just War tradition informs a discipline of practical ethics that addresses the real problems of modern warfare. As such, knowledge of just war theory is essential to understanding the principles that inform IHL and account for its basic structure. Indeed, it should be of no

⁵⁹ This chapter does not seek to explore the full range of philosophical principles or issues. The focus is on ethics in practice and military ethics in particular. I distinguish between ethics and morality only to the extent that ethics tends to be used in relation to the morality that is associated with a role or organisation. Hence, we have medical ethics and military ethics rather than medical morality and military morality. Nevertheless, there is a clear overlap between the moral and ethical positions of military lawyers as individuals and as individuals performing a role or holding an official position. While it would be possible to explore at length the significance of distinguishing between the personal morality and ethical positions of military lawyers, this is not the place to do it. These issues will be addressed when considering the constraints of moral cultures on the individual in the decision-making process.

surprise that the IDF consulted moral philosophers as well as lawyers when revising its military code⁶⁰.

The historical context for the development of just war theory from the Middle Ages to the modern period is the strengthening of sovereign state power and the move from natural ecclesiastic law to secular positive law. Philosophical debate within the tradition sought a moral basis for the use of force and universal principles that would enable the construction of rules of war. Just war theory developed ways of thinking about just grounds for resorting to war (*jus ad bellum*) and the conduct of war (*jus in bello*) that coalesced into principles of just cause, necessity, proportionality and distinction. These principles, which were formulated to provide advice to the sovereign, became the basis of IHL providing law and ethics with a common vocabulary and a common analytical structure, which separates judgments about the morality/ legality of resorting to war from judgments about the morality/legality of the conduct of war.

This chapter begins with an investigation of traditional just war theory, before considering modern philosophical positions that challenge the traditional view. Reference will be made to recent conflicts to show how the conduct of armed combat by states against non-state actors, who conceal themselves among their civilians, is raising difficult philosophical questions that have yet to be answered with any degree of consensus. This ethical debate within just war scholarship informs wider moral attitudes to and behaviour in war that demands legal positions of military lawyers advising in the grey areas of distinction, proportionality and military necessity. The chapter distinguishes just war thinking from realism, consequentialism and militarism while recognising elements of all three in just war arguments. The discussion concludes with an assessment of the theoretical relevance of just war thinking to military decision-making. The point that will be emphasised in this chapter is

⁶⁰ Author's interview with Israeli philosopher Moshe Halbertal in Jerusalem, 5 February 2009.

that just war theory has a contemporary relevance so that the influence of just war theory on current legal practice and the development of IHL as it adapts to the challenges of modern styles of armed combat, will be a recurring theme of this thesis. The last chapter revealed the extent of choice in the exercise of deciding what is legal in war. The aim of the chapter is to examine the role of ethics in the process.

2) Traditional Just War Theory

While it is certainly true that philosophers have always debated the morality of killing, traditional just war theory has its origins in the demands of the Catholic Church to tailor Christian morality to the requirements of the exercise of power unfettered by pacifism. As such, the theory is closely associated with the evolution of Western Christian thought designed firstly to serve the Christian sovereign and latterly the needs of the secular state⁶¹.

Scholars in the Middle Ages and the early modern period developed the fifth century ideas of Augustine to counter Christian pacifist theology⁶². Just war theory is seen as rooted in Augustinian thought as developed by Thomas Aquinas in the thirteenth century to emphasise the importance of intention rather than action. Viewed in this way, Christian doctrine is more about the internal good intention- the desire for peace rather than revenge or domination- than it is about the outward act of killing. Hence, war for good reason, or just war, was acceptable to the mainstream Christian theologians who based their thinking on Aquinas. Having edged pacifism to the theological sidelines, the demand for a philosophical justification for the wars waged by sovereigns led to the gradual development of a consensus about the requirements of a just war. This process was given greater urgency following the Peace of Westphalia in 1648 with the development of ideas of the legal equality of states and non-interference in the

⁶¹ For a concise history, see Paul Christopher, *The Ethics of War and Peace: An Introduction to Legal and Moral Issues*, (New Jersey: Pearson Prentice Hall, 2004).

⁶² For a commentary on Augustine, see Herbert A. Dean, *The Political and social ideas of St. Augustine*, (New York: Columbia University Press, 1963).

sovereign territory of other states. In ethical and juridical terms, state monopoly of violence came to mean state monopoly of war within a doctrine of just cause.

The need for the secular legal ordering of relations between sovereigns found expression in the seventeenth century writings of Hugo Grotius (1583-1645)⁶³ with natural law giving force to just war doctrine. The 'good' of the just cause was no longer war in furtherance of religious aims but rather a response to prior harm. By secularising the concept of just cause, states were no longer to be vulnerable to attack because of religious heresy and some degree of equality of states could be maintained. From a legal perspective, just war theory informed the understanding of natural law with its recourse to universal norms.

Early just war thinkers, particularly Grotius and Francesco de Vitoria (1492-1546), listed legitimate grounds for going to war. These were considered in terms of self-defence, including preventative and pre-emptive action, which was to be proportionate to the harm suffered. Law was less about violence in service of God than a defensive reaction to wrongs suffered; as Vitoria put it, 'Difference of religion cannot be a cause of just war'⁶⁴. These formulations were organised around the idea of violation of collective rights, including defence, recovery of stolen property and punishment. In this way aggressive war was acceptable only in response to specific wrongs. It can readily be seen that this secularisation of the concept of the just war enabled the same *jus ad bellum* test to be applied to sovereigns of differing complexions and met the needs of an international society organised in terms of sovereign equality. In limiting Augustine's right intention to self-defence, the tradition is accepting of the world as it finds it. Since the religious and political organisation of the state is irrelevant to the justice of its cause, traditional Just War theory can be seen to underpin the norm of national self-determination and the Westphalian ordering of sovereign states. In the

⁶³ Hugo Grotius, *The Law of War and Peace*, (New York: Bobbs-Merrill Co., 1962).

⁶⁴ Quoted by Michael Walzer, *Arguing about War*, (Newhaven: Yale University Press, 2004), p.4.

traditional Just War conceptualisation of *jus ad bellum* stability has become the modern morality⁶⁵.

As the concept of defensive warfare has become the modern conventional wisdom, finding expression in IHL, it is easy to forget that the just war theory of *jus ad bellum* makes additional demands. To be sure, the Just War tradition encompasses centuries' long philosophical debates and any generalised account is necessarily partial, but it is generally recognised that the further conditions necessary for a legitimate defensive war are: legitimate authority, last resort, right intention, probability of success and proportionality. These principles are not extra moral considerations that have been left behind by the modern legal conflation of self-defence with just cause. Rather, they should be understood as informing a correct understanding of the nature of defensive war and who may invoke it. As such, they are essential to a proper moral and legal understanding of the very nature of self-defence. Examination of the principles shows that they are a much more useful guide for the international lawyer than the all too frequent recourse to domestic legal analogy of the homeowner's defence of life and property⁶⁶.

The principle of legitimate authority confers the right to resort to war to the sovereign. Aquinas was concerned with the authority of the head of state and due process. While it is tempting to regard the requirement of legitimate authority as a formality, the anti-Iraq war demonstrations with their chants of 'not in our name' give contemporary meaning to the principle. That said, we are now comfortable discussing the concept in terms of the constitutional requirements of representative government and for just war theorists to talk in

⁶⁵ There are obvious exceptions to these historical generalisations. Triumphalist just war theorists regard traditional just war principles as universal norms. Behaviour that does not meet just war criteria is seen as norm violation rather than an alternative moral position. This leads to a tendency to overlook the historical prevalence of religious wars and to reinterpret them in terms of self defence. Nevertheless, the tradition rightly lays claim to the evolution of moral principles that have displaced overt religious justifications for war and it is the just war principles that have been given the force of law.

⁶⁶ Discussion of self-defence by international lawyers is replete with analogy with domestic criminal codes and the domestic legal treatment of citizens defending their selves, their loved ones and their property.

terms of legitimate authority appears self-evident. However, by applying the principle to the status of the parties to the conflict rather than to the authority of the sovereign, A. J. Coates demonstrates the importance of the principle to modern warfare⁶⁷. Legitimate authority is what first distinguishes a party to war from a party to murder; if terrorists commit crimes, rather than acts of war, just war doctrine holds them to a different and more rigorous standard of behaviour than parties to a military conflict. Legitimate authority, when viewed in this way, is less about sovereign approval than status; the state is to have the monopoly of violence. For Coates this is not the basic realist conception of sovereign power, but rather the legal source of lawful violence in war and the subjection of power to international laws and conventions. Violating this principle leads to all sorts of conceptual difficulties, obvious illustration being the US confusion over the status of Al Qaeda detainees. As we shall see, the traditional approach is not above criticism; this concentration on the authority of states has no place for non-state actors. How does the position change when a terrorist group gains control of territory? If Hamas is a non-state terrorist entity in control of Gaza, can it ever meet the *jus ad bellum* requirements of a just war? We will return to this discussion when considering modern critiques of the theory.

Traditional just war theorists resolved that non-violent political strategies should be exhausted before force could be met by force. This is understood as the principle of last resort. This is not to deny the right to self defence but rather to exhaust the peaceful alternatives first. Having established the moral framework, any consideration of whether there is just cause requires a political judgment of the likely effects of non-violent responses. These are not easy judgments since, as Walzer observes, wars undoubtedly have long political and moral pre-histories and it is not at all clear which time frame to use when

⁶⁷ A. J. Coates, *The Ethics of War*, (Manchester: Manchester University Press, 1997),p.123.

assessing them⁶⁸. A *jus ad bellum* assessment of Cast Lead in terms of last resort requires consideration of whether negotiations could have ended Hamas rocket fire. Of course, this is where Goldstone and his critics part company. The Goldstone Report finds that Israel should have been negotiating to ease the living conditions of the residents of Gaza as a response to rocket attacks rather than embark on Operation Cast Lead. The Israeli position is that alternative responses of third party negotiation, tit for tat retaliation and general restraint had failed and Operation Cast Lead was the last resort. While the positions of the parties are poles apart, it is clear that the *jus ad bellum* principles of just war theory inform the debate.

Proportionality in *jus ad bellum* is sometimes seen as macro-proportionality to distinguish the principle from its micro-proportionality *jus in bello* equivalent. The principle rests on the understanding that there is a level of response to violence beyond which it ceases to be defensive and becomes aggressive. The principle is linked to the idea of necessity; a disproportionate response must logically go beyond what is needed to resist the aggressor. It is accepted, though, that the violence can rightly be calibrated so as to deter future attack. Clearly, it is not easy to decide when deterrence becomes aggression. For just war theorists, whether a deterrent response to an attack becomes disproportionate is determined by the application of moral principles informed by political and military assessments of the threat to be deterred. Article 5 of the Rome Statute creates the offence of aggressive war without clear legal guidance of when self-defence becomes aggression⁶⁹. The Goldstone Mission had no difficulty in finding that Israel had employed disproportionate force in Gaza but stopped short of alleging criminal aggressive war within the meaning of the Rome Statute. The *jus ad bellum* requirement of proportionality is sometimes popularly misinterpreted as a device to ensure that combatants are playing on a level playing field. While a sense of fair play may be

⁶⁸ Michael Walzer, *Just and Unjust Wars*, (New York: Basic Books, 1997), p60.

⁶⁹ For a discussion of the criminality of war of aggression, see, Yoram Dinstein, *War Aggression and Self-Defence*, (Cambridge: Cambridge University Press, 2001), pp. 106-133.

offended by the unchallenged deployment of air power, proportionality does not require the abandonment of a military advantage, only its proportional use. Traditional Just War theory recognises the right to use deterrent force but the dividing line between deterrence and disproportionate response is difficult to discern in practice.

As we have seen, early just war philosophers relied on good intention to counter the pacifist argument. Without good intention there could be no war at all. Self-defence suggests good intention but self defence is not enough if the intention is to exact revenge. Indeed, there are many consequences of war that if intended would deny just cause- not least shoring up the popularity of an unpopular government shortly before an election⁷⁰! The Just War solution is to deploy the Doctrine of Double Effect. The bad consequences of war do not make a war unjust, provided that the bad consequences are not intended. This is because the Doctrine of Double Effect operates to make the unintended consequences count for less than the intended. Consequently, claims to self-defence must be able to withstand an inquiry into intention and each side the struggles to promote its own narrative understanding of conflict and displace the opposing narratives. Those looking for contemporary relevance have only to turn to Goldstone's most damning finding at para.1884, 'In this respect, the operations were in furtherance of an overall policy aimed at punishing the Gaza population for its resilience and for its apparent support for Hamas, and possibly with the intent of forcing a change in such support'. The Israeli response is to locate the purpose of the operation firmly within the concept of self-defence to deter Hamas rocket attacks. Clearly, this perceived intention of the parties is crucial to moral judgments about the Operation and the influence of Just War principles is plain to see.

⁷⁰ The fact that the ruling Kadima party was facing a difficult election cannot be ignored when looking at Israel's decision to launch a major military operation in response to Hamas rocket fire.

The final *jus ad bellum* principle, probability of success, concerns the morality of conducting a hopeless defence. If the defensive aims of the war cannot be achieved, how can the horrors of war be justified? If Israel cannot stop rocket fire from Gaza or Lebanon, is military action justified? In practice, this principle is linked to proportionality and can usefully be read as providing that if success cannot be achieved without the use of disproportionate force the defensive action cannot be just.

Returning to the principle of just cause, it can be seen that self-defence has been refined within the Just War tradition to limit the circumstances in which an apparent defensive response to aggression can constitute a just cause. It is clear from the public discourse on the UK decision to join the invasion of Iraq in 2003 that the morality of the decision is viewed almost exclusively in terms of whether Iraq posed a real threat to the security of the UK. The weakness of the case for viewing the invasion in terms of self-defence undermines both the legal and the moral claims in support of war. The structure of these debates shows that just war doctrine supplies the language and the principles for a moral assessment of the decision to go to war.

Having considered the philosophical *jus ad bellum* positions we now turn to just war discussion of *jus in bello* or behaviour in war- a discussion that traditional theory isolates from the justice of the decision to go to war in the first place. Traditional theory sought to determine the appropriate standards for the conduct of war. A key facet of the debate concerns whether all parties to the conflict should be held to the same standards. The problem, of course, was that if war could only be justified in terms of a response to a wrong, there were necessarily just and unjust combatants. If both sides were to be held to the same standards, the *jus in bello* determinations of just cause somehow needed to be isolated from *jus ad bellum* considerations of rightful conduct. Exploring this dilemma, Francisco de Vitoria (1492-1546) and his later followers, the Salamander School, looked to concepts of

innocent mistake and doubtful cases to argue that in some circumstances both sides may be just. Since human intelligence may not be up to the task of determining the justice of the matter, it behoves those fighting the war to do so with appropriate restraint. The problem with this approach is that it is devaluing *jus ad bellum* to enable a universalist approach to *jus in bello*.

Later thinkers placed greater emphasis on the assumption that soldiers are not privy to the affairs of state and developed Vitoria's principle of invincible ignorance. If soldiers were ignorant of the reasons for the war, their treatment in war should not vary with the justice of their cause. A code of conduct could be formulated for warfare that would be applicable to just and unjust combatants alike. *Jus in bello* now became the focus of attention and later thinkers developed this approach to separate *jus ad bellum* from *jus in bello* and clear the way for universal standards of conduct in war- a duality that remains the bedrock of modern IHL. This separation is the defining principle of traditional Just War theory⁷¹. As we shall see, this defining principle is under attack from modern just war thinkers. Since it is also a key feature of IHL, the debate also influences legal thinking and, it will be argued, legal practice.

The development of traditional *jus in bello* was intended to control the evils of war and protect the innocent. This was achieved in the first instance by identifying various classes of innocent non-combatant who were to benefit from restraint in war; they are usually understood as civilians, prisoners and hors de combat. This led to the development of principles of distinction and necessity. Distinction separates civilians and other innocents who cannot be killed from combatants who can, while necessity puts some break on the degree of force to be employed.

⁷¹ For a concise history of the duality see, Nicholas Rengger, 'The Jus in Bello in Historical and Philosophical Perspective', in Larry May (ed.), *War Essays in Political Philosophy*, (New York: Cambridge University Press 2008), pp. 30-49.

As was observed in the previous chapter, the principle of distinction is well known to international lawyers as the organising principle that enables combatants and non-combatants to be separated and treated differently in the allocation of rights and responsibilities in IHL. The principle, as developed in just war theory, is grounded in the notion that innocents get caught up in war and need to be distinguished from combatants for their own protection. There has been a great deal of debate within the tradition about how to correctly understand innocence. While there have been influential voices in the development of just war theory that have seen innocence in terms of lacking guilt, the current consensus of the traditional position rejects an understanding of innocence that requires freedom from moral blame. Moral blame carries with it a discussion of responsibility for wars that the citizen may have no say in and is unhelpful in understanding the limits of innocent involvement in the conduct of warfare. For these reasons, the traditional position is now seen as defining innocents in terms of threat. Innocents are generally understood as: those who do not pose a threat for the time that they are not a threat.

The vexed question of what is a threat produces much debated problems in just war scholarship, which explore the blurred boundary between civilian and military enterprise in times of war. The tradition aims to protect civilians from attack while retaining its practical application. Defining innocents as all civilians or defining innocents as civilians who do not make a contribution to the conduct of war are equally unattractive to a tradition that prides itself in being rooted in practice. Nagel's view⁷² is that civilian contributions to military arms and logistics are contributions to military activities while contributions to their mere existence as men are not. How direct the contribution has to be to result in the loss of innocence is, of course, the problem. This is well illustrated by the debates over the Israeli targeting of the Hamas police force in the opening hours of Cast Lead. The Israeli argument

⁷² Quoted by Jeff McMahan, *Killing in War*, (Oxford: Clarendon Press, 2009), p.13.

is that the police were part of the armed militia. The counter argument is that they carried out only civilian functions. The fact that the police were armed suggests that while the argument is ostensibly about status, the real issue is one the extent to which they pose a threat to the Israeli forces.

The traditional concept of innocence underpins the understanding of the distinction between legitimate military targets and civilian targets. In IHL the question is one of the use to which the target is put- leading to a permissive legal regime of dual use targets. The Just War concept of innocence as threat forces the attention away from the status of the target to the actual threat it poses attacking military. When is a bridge a threat? Is the whole transport system a legitimate target in war or only when it is about to be used by the military? The Just War approach militates against the targeting of infrastructure and provides a frame of reference both for our revulsion by the scale of destruction in war and for the practical limitation of that destruction.

However, it would be wrong to see just war theory as ignoring military practicalities. Innocents are killed in war and the philosophical challenge for the traditional just war theorists was how to justify this, while at the same time keeping it to a minimum and without denying the parties the opportunity to successfully bring the war to an end. In traditional Just War theory of *jus in bello* this is achieved by again relying on the moral distinction between intended harm and expected harm.

The dilemma of how to construct a philosophical position that prevents the killing of civilians while at the same time allowing it was resolved by traditional Just War thinkers with the development of the Doctrine of Double Effect. Thomas Aquinas developed the Doctrine of Double Effect to counter Christian positions prohibiting self-defence. His formulation can be summarised as: acts that have both a good and bad effect are permissible, provided that the

bad effect is an unintended side effect that is proportional to the objectively good effect, and that there is no alternative way of achieving the good effect⁷³. The doctrine was originally intended to counter pacifist arguments against going to war and therefore part of *jus ad bellum*. Later thinkers, and in particular Francisco De Vitoria in the 16th Century, incorporated the doctrine into *jus in bello* thinking to resolve the problem of what we now term collateral damage.

Michael Walzer describes the traditional doctrine as,

- 1) The action contemplated should be in itself either morally good or morally indifferent, which means, for our purposes, that it is a legitimate act of war;
- 2) The direct effect is morally acceptable – the destruction of military supplies, for example, or the killing of enemy soldiers;
- 3) The intention of the actor is good, that is, he aims narrowly at the acceptable effect; the evil is not one of his ends, nor is it a means to his ends; and
- 4) The good effect is sufficiently good to compensate for allowing the evil effect⁷⁴.

It must be borne in mind that the Doctrine of Double Effect is only employed where the principle of distinction has been complied with: in other words, where the intended target is a permitted military target necessary for the effective prosecution of the war. This is a situation where the outcome of a worthy military operation is likely to conflict with the norm of non-combatant immunity.

The operation of distinction and Double Effect in practice is often explained in terms of a bombing operation where an armaments factory is located in a residential area. Suppose that to bomb the factory would result in the destruction of the factory and the foreseeable but unintended deaths of 100 civilians. Equally, an operation to bomb the civilians to undermine civilian morale would result in the death of 100 civilians and the incidental destruction of the

⁷³ Christopher, *The Ethics of War and Peace*, p.52.

⁷⁴ Walzer, *Just and Unjust Wars*, p193

factory. The result of each operation is identical but the second contravenes Just War doctrine because the intent is to attack the innocents, which contravenes the principle of distinction. The first meets the requirements of distinction since the intent is to attack a military object, but the attack is only just war compliant if the good of the destruction of the factory outweighs the evil of the killing of the 100 civilians. In this way the Doctrine of Double Effect can operate to give moral approval to the foreseeable killing of innocents in war.

In philosophical terms, the Doctrine of Double Effect can be seen as an uneasy compromise between a subjectivist approach that privileges intention over outcome and a consequentialist approach that applies a cost/benefit calculation to the outcome. The doctrine works better at the *jus ad bellum* level of analysis. Here, the evils of war are compared with the justice of the cause for war to measure whether the decision to go to war is a proportionate response. There is some consensus about the obligation of states to protect their citizens and what sort of actions can reasonably lead to war. At the *jus in bello* level, where judgments are made about individual military actions, understanding the correct balance between civilian deaths and the attainment of military objectives is far more difficult.

The question of whether there is a moral duty to choose the less harmful strategy from among a range of proportionate responses can lead to a confused understanding of proportionality. In fact traditional just war theory uses the principle of necessity to resolve the issue. It is not a question of which method of attack is more or less proportionate, but rather a matter of causing no more harm than is necessary. In practice necessity and Double Effect cannot be separated since the 'good' of the Doctrine of Doctrine of Double Effect ceases to be good if the desired effect is not necessary. Viewed in this way necessity is an implicit rather than an additional to the doctrine.

From a political science perspective, the Doctrine and indeed Just War theory itself, can be seen today as an uneasy balancing of a liberal approach that seeks to promote the civilian right to life on the one hand and, on the other, a realist appreciation of the need to allow states to optimise their military outcomes. The growing influence of human rights norms and a perceived failure of traditional just war theory to limit civilian suffering in modern warfare, has led to sustained criticism by modern just war theorists of both proportionality and distinction and indeed the very organising principle of the separation between *jus ad bellum* and *jus in bello*.

3) Modern critiques of Just War Theory

With the rapid development of IHL in the twentieth century, the focus of enquiry became juridical rather than philosophical. International lawyers schooled in legal positivism sought legal answers to moral problems without regard to natural law or Just War theory⁷⁵. If philosophical principles had become legal principles that could be refined within a closed logical system of law, the just war theorists had become obsolete. It took the Vietnam War to provide the impetus for a revival of a just war scholarship that challenged the juridical claim to exclusivity. International lawyers were in no position to explain the excesses of an unpopular war that had been fought and lost with little concern for civilian harm. Rejecting the dominant realist thinking of the time, post-Vietnam War scholars, looking for a critical theory to understand the My Lai massacre and engage in moral analysis of war, turned to Just War theory⁷⁶. Michael Walzer's publication in 1977 of his seminal *Just and Unjust Wars; A*

⁷⁵ I will be considering the tensions between natural law and legal positivism in greater detail later in the thesis in the context of a discussion of the extent to which lawyers are influenced of Just War considerations when constructing their legal advice.

⁷⁶ For an account of the revival of just war theory as the language of opposition to the Vietnam War, see Walzer, *Arguing About War*, pp. 6-10.

*Moral Argument with Historical Illustrations*⁷⁷ is generally acknowledged to have revived just war scholarship.

Walzer challenged the realist view of war with its language of self-interest, necessity and cost-benefit with a moral analysis that focused on the rights of civilians in war. This approach emphasised the right of the civilian not to be harmed rather than the restriction on the attacker⁷⁸. In common with the traditionalists, Walzer's concern was to reduce the horrors of war and his approach had to work on the battlefield. His major contribution was to direct modern criticism of traditional just war theory towards the failure of the Doctrine of Double Effect to protect civilians and to suggest a small but radical revision.

Walzer argued that the Doctrine of Double Effect is 'darkly permissive' and that there must be a duty to reduce harm to enemy civilians⁷⁹. His discussion of the Doctrine of Double Effect⁸⁰ recognises that the traditional formulation of the proportionality rule is a weak constraint; the fact that foreseeable deaths are unintended provides little comfort. Instead, Walzer set out to construct a moral position on the unintended killing of civilians that would go beyond unintended harm and would demand an intention to reduce the foreseeable harmful consequences of the intended action. As Walzer put it, 'Whenever there is likely to be a second effect, a second intention is morally required'. Walzer's reformulation of the Doctrine of Double Effect adds an additional element to intention. Expressing the traditional formulation of:

- 1) The action contemplated should be in itself either morally good or morally indifferent, which means, for our purposes, that it is a legitimate act of war;

⁷⁷ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, (New York: Basic Books, 1997); Walzer not only revived the discipline but has also remained the leading contemporary exponent of just war theory.

⁷⁸ Walzer argues that 'some degree of care be taken not to harm civilians- which means, very simply, that we recognise their rights as best we can within the context of war'. Walzer, *Just and Unjust Wars*, p.152.

⁷⁹ Michael Walzer, 'Responsibility and Proportionality in State and Nonstate Wars', *Parameters*, Spring, 2009, pp. 40-52, p.1.

⁸⁰ Walzer, *Just and Unjust Wars*, p.153.

- 2) The direct effect is morally acceptable – the destruction of military supplies, for example, or the killing of enemy soldiers;
- 3) The intention of the actor is good, that is, he aims narrowly at the acceptable effect; the evil is not one of his ends, nor is it a means to his ends; and
- 4) The good effect is sufficiently good to compensate for allowing the evil effect⁸¹,

Walzer's addition to requirement 3 is that, 'aware of the evil involved, he seeks to minimise it, *accepting costs to himself*'⁸². The big question thus becomes the degree of risk that the attacker must take to reduce harm to civilians. Are we expecting heroic war or 'fighting well'? Building on a discussion of the sabotage by Norwegian members of the British SOE on the heavy water plant at Vermork, Norway during World War II, Walzer reaches the position that, 'The limits of risk are fixed, then, roughly at the point where any further risk-taking would almost certainly doom the military venture or make it so costly that it could not be repeated.' This is certainly asking a lot of the military.

Walzer is concerned not just with the morality of actions in war but also with their consequences. Moral acts that have bad consequences need to be avoided. His revision of the Doctrine of Double Effect to produce a Doctrine of Double Intention is designed to strengthen the principle of civilian immunity without turning the principle into an absolute rule that would make the conduct of war impossible. Writing in 1977, Walzer was ahead of his time in offering an analysis based on the rights of the individual civilians and combatants, although his thinking was in tune with the growing influence of liberal conceptions of human rights in international law.

Walzer's revision has been immensely influential and few contemporary just war thinkers accept the traditional version. The pressing question has become the extent to which armies should sacrifice military gains to reduce the risk of harming civilians, and in particular risk

⁸¹Walzer, *Just and Unjust Wars*, p193.

⁸²Walzer, *Just and Unjust Wars*, p155, emphasis added.

the lives of their soldiers in the process. It is one thing to accept a sub-optimal military strategy but quite another to risk the lives of one's troops. In 1977 Walzer was writing about Vietnam; in 2009 his focus was on Gaza and the degree to which Israeli soldiers engaging Hamas combatants, who were fighting without uniforms among civilians, should be expected to assume greater personal risk to reduce harm to enemy civilians. In military terms, this is a matter of force protection.

Influential Israeli philosopher Asa Kasher and Major General Amos Yadlin (formerly head of *Agaf Modiin*, the Israeli military Intelligence Directorate) have analysed the relative weight to be given to civilian harm and force protection⁸³. Using social contract theory, Kasher argues that the state owes a greater duty to its own citizens than it does to enemy citizens; since soldiers are citizens of the state, their protection ranks above that of enemy citizens who are not. From this perspective, there is nothing wrong with giving greater weight to force protection than civilian harm. Moreover, the force that endangers the civilians in the first place is responsible for their harm. This position would tend to lead commanders to avoid risking soldiers' lives to reduce the risk of harming enemy civilians while holding the enemy responsible for the harm done to their own civilians. Kasher has worked on the IDF military code and his views are seen as influential⁸⁴. Indeed, it has been argued that it is this ethical position that provided the Israeli moral justification for the tactics employed in Gaza and the legal constructions of IHL that permitted. The Israeli conduct of Cast Lead is analysed in detail in case study 3, but for the purposes of the present discussion it can reasonably be argued that the IDF relied on warnings and precision weapons as the basis for a strategy that gave a high priority to force protection. The suggestion is that Kasher's ethical Just War

⁸³ Asa Kasher and Amos Yadlin, 'Military Ethics of Fighting Terror: An Israeli Perspective', *Journal of Military Ethics*, Vol. 4, 2005, pp. 3-32. Also Asa Kasher and Amos Yadin, 'Military Ethics of Fighting Terror: Principles', *Philosophia*, Vol. 34, 2006, pp.75-84.

⁸⁴ Amos Harel, 'The Philosopher who Gave the IDF Moral Justification in Gaza', *Ha'aretz*, 6 February 2009.

position influenced Israeli thinking and behaviour through the adoption of force protection strategies.

Walzer has taken issue with Kasher and Yadlin in the columns of the *New York Review of Books*⁸⁵. Walzer argues that the state does not owe a greater duty to its soldiers than to enemy civilians and that soldiers are rightly expected to risk their lives to reduce civilian harm. Walzer's Doctrine of Double Intention places a positive duty on the military whose soldiers can properly be required to risk their lives for others. Soldiers are, indeed, citizens but ones whose relationship with the state requires self-risk if not self-harm. Thus, for Walzer the question is not whether to risk soldiers' lives to protect enemy civilians, but rather how much risk should these soldiers be required to take. Kasher's response to this position is to accept Walzer's positive duty to minimise civilian losses even at the cost of reduced military advantage, but crucially for Kasher the cost stops short of physical danger: 'In our understanding of double effect "cost" does not require jeopardy'⁸⁶. While the Israeli military code requires its forces to 'do all in their power to avoid causing harm to the lives, bodies, dignity, and property [of non-combatants]'⁸⁷, Cast Lead raises the question of what this now means in practice. Kasher seems to suggest that warning civilians of impending attack, which sacrifices the military advantage of surprise, can suffice. Certainly, the IDF made unprecedented use of warnings to the citizens of Gaza, dropping many thousands of leaflets, making telephone calls and adopting a new 'knock on the roof' tactic of firing dummy rounds before launching the real attack. Depending on the just war position adopted, this effort at discrimination is seen either as a very real effort to meet the requirements of discrimination and protect enemy civilians from harm or as a poor alternative to risking ground troops.

⁸⁵ Avishai Margalit and Michael Walzer, 'Israel: Civilians and Combatants', *New York Review of Books*, May 14, 2009.

⁸⁶ Asa Kasher and Amos Yadin, 'Israel and the Rules of War: An Exchange', *New York Review of Books*, June 11, 2009.

⁸⁷ Quoted approvingly by Asa Kasher, 'The Gaza Campaign and the Ethics of Just War', *Azure*, 2009, p.79.

It would be wrong to suggest that Kasher is the only influential moral philosopher in Israel advising the IDF or that his position is unchallenged in Israel. Moshe Halbertal⁸⁸ also advises the IDF and lectures at the military training schools. His position is that Kasher and Walzer are both wrong. Walzer is wrong to have us behave towards enemy civilians as if they were our own. Halbertal believes that this is too high a standard. On the other hand, by placing the value of protecting the lives of enemy civilians below the value of our soldiers' lives, Kasher relieves soldiers of the duty to take risks to protect enemy civilians. Halbertal believes that the correct position is somewhere between the two so that soldiers should be taking risks to prevent harm to enemy civilians⁸⁹.

Another view of the ethics of force protection is promoted by Thomas Hurka⁹⁰, who accepts that a state is entitled to favour its own citizens over those of the enemy but finds that he cannot justify the same for soldiers. While there is a quasi-familial relationship, soldiers are 'legitimate targets of military force and their deaths are an expected consequence of war as civilians' deaths are not'⁹¹. Hurka argues in favour of placing an equal value on the lives of soldiers and enemy civilians. Written before Gaza, Hurka's position seems prescient: 'This is not to say that an act that kills 101 civilians as a side effect of saving 100 soldiers is necessarily disproportionate; the comparisons cannot be precise. But it does imply that any act that kills significantly more civilians than it saves soldiers is morally impermissible'. While apparently supporting a view that the Israeli tactics seemed 'morally impermissible', it should be remembered that neither Goldstone nor anybody else has asked how many soldiers'

⁸⁸ Professor of Jewish Thought and Philosophy at the Hebrew University.

⁸⁹ Author's interview with Halbertal in Jerusalem on 5 February 2009. See also, Moshe Halbertal, 'The Goldstone Illusion: What the UN Gets Wrong about Gaza- and War', *New Republic*, November 6, 2009.

⁹⁰ Thomas Hurka, 'Proportionality in the Morality of War', *Philosophy and Public Affairs*, 33, 2005, pp. 34-66. See also Paul Christopher, *The Ethics of War and Peace, An Introduction to Legal and Moral Issues*, (New Jersey: Prentice Hall, 1994), for an argument that a state is not entitled to prefer its own civilians lives whether or not in the military above those of the enemy.

⁹¹ Hurka, 'Proportionality', p63.

lives were saved by the Israeli tactics. Of course, it is much easier to measure lives lost than lives saved.

To be sure, the debate goes further than the ranking of soldiers and civilians. In Walzer's terms, if there is a duty to protect civilians, then it extends to not placing them in danger in the first place. In Gaza, Hamas strategically eliminated the distinction between its own forces and its civilians and conducted military operations from among them. It is easy enough to justify the position that each side bears a responsibility for harm to civilians, but the more difficult question is whether and to what extent the conduct of one side can be excused by the immoral acts of the other. Should the unjust conduct of the war by one side reduce the standards to be applied to the other? The attacking forces will be quick to argue that the defenders should not be allowed to profit from their misdeeds?

For Walzer, Hamas is responsible for mixing combatants with civilians but this does not reduce the moral obligations of the IDF: 'It is not that responsibility for the mix is irrelevant, but that the side that creates the mix does not thereby free the other side from its own moral obligations'⁹². Hence, for Walzer it is right that there should be an ethical enquiry into the endangering of civilians and that responsibility for harm should be parcelled out among those involved in the military conflict, but findings of responsibility should not undermine the universal nature of standards of behaviour in war. For Walzer, the same argument holds true when considering whether combatants fighting for unjust and just causes should be held to the same standards; the traditional strict separation between *jus ad bellum* and *jus in bello* must be maintained.

As we have seen, traditional Just War theory is constructed on the strict separation of *jus ad bellum* and *jus in bello* and that, despite proposing radical change to the Doctrine of Double Effect, Walzer retains the duality. Traditionalists maintain the view that, since all parties to

⁹² Walzer, 'Responsibility and Proportionality', p5.

wars claim to be justly entitled to go to war and regard their enemies as unjust, applying different standards would be dangerously unworkable; the ethics of going to war are relevant to a judgment of the acts of the sovereign and that the actions of soldiers in war are to be judged in relation to discrete military actions. This dichotomy is also strongly upheld in the formation of IHL, which requires the same standard of conduct from both the aggressor and defender alike. Nevertheless, there are emerging views among contemporary Just War theorists that the separation is artificial. Jeff McMahan's *Killing in War* is a persuasive argument challenging the traditional position and his ideas are worthy of detailed examination⁹³.

McMahan collapses the duality to arrive at the idea of just and unjust combatants to argue that combatants fighting in support of an unjust cause fight immorally irrespective of their methods so that there can be no proportionality in service of an unjust cause. Conversely, just combatants should in some circumstances be released from the present constraints on their behaviour. This position is worthy of detailed consideration because of the parallel position in modern international law scholarship that observes the collapse in legal practice of the theoretically separate *jus ad bellum* and *jus in bello* judgments, whereby parties whose cause we approve of are subject to less rigorous legal standards over their conduct of their hostilities than those whose cause we find less attractive⁹⁴.

McMahan's critique of traditional just war theory and, indeed, of Walzer's position, rests on a return to a value-laden concept of innocence. This challenges the principle of the moral equality of combatants and places the whole edifice of distinction on a moral basis. Non-combatants have a moral, not instrumental, status that protects them from attack and combatants lose the right to fight, whether defensively or aggressively, in the absence of just cause. The consequences for proportionality are clear. Proportionality works to allow harm in

⁹³ Jeff McMahan, *Killing in War*, (Oxford: Clarendon Press, 2009),

⁹⁴ This is an important insight, which is considered in detail in the next chapter.

furtherance of a valuable goal; if the good effect of military advantage is lost in pursuit of an unjust cause, it follows that civilian harm can never be proportionate in an unjust war. This leads McMahan to extend the discussion of proportionality from its preoccupation with harm to civilians ('wide proportionality') to consider attacks on combatants ('narrow proportionality') whose moral status affects the degree of violence that can be done to them. This is to argue that attacks on just combatants can never be proportionate in either the wide or narrow sense, and means that only the just can claim the moral authority to fight at all. While McMahan constructs a logically attractive argument that appears to deny unjust combatants the rights of just combatants, he runs into difficulties when considering the practical implications his position.

Traditional Just War theorists have long recognised that all sides to a military conflict claim just cause. Acknowledging this, McMahan has to accept that any differentiation of the restraints of just and unjust combatants involves the very real risk of unjust combatants simply claiming to be acting justly or failing to recognise the legitimacy of a code of restraint that discriminates against them. If all attacks by unjust combatants are disproportionate, where is the incentive for restraint? In the context of Gaza, if Israel is judged fighting to prolong an illegal occupation (a *jus ad bellum* position) and any attack is disproportionate, why exercise restraint in accordance with *jus in bello* principles of distinction and proportionality? This suggests that by importing *jus ad bellum* considerations into *jus in bello* assessments, there is the potential for all sides to abandon restraint- the good because they are not required to and the bad because they get no benefit from it. Struggling for a practical solution, McMahan explores the idea that the good of the proportionality matrix be restricted to the welfare of the attacking combatants, thereby removing the objective of a potentially unjust victory from the mix. Again, practical considerations stand in McMahan's way since

proportionality must recognise strategic advantage, which may have no real relevance to the immediate saving of military lives.

McMahan convincingly refutes the moral arguments in favour of the moral equality of soldiers and is, indeed, arguing for a position that is intuitively correct- that people fighting for an unjust cause are morally in the wrong and should be less free to attack their opponents. But by failing to formulate moral norms of conduct in war that give practical effect to this propositions, McMahan comes dangerously near to validating the realist conviction that there is no place for morality in war- a danger that McMahan himself recognises⁹⁵. McMahan is left promoting his moral position of differentiation between just and unjust combatants while at the same time recognising the need for a legal enforcement of restraint. While promoting his moral position, McMahan is reduced to defending the diametrically opposite legal regime of IHL. This denies Just War theory one of its main claims to contemporary relevance, its connection with IHL. McMahan places the blame for this on weak *jus ad bellum* requirements and, more convincingly, the lack of a recognised authoritative legal body, so that combatants do not have any alternative to reliance on the views of their own government⁹⁶.

Having explored McMahan's influential views in some detail, it appears that his challenge to the traditional duality of Just War theory produces morally attractive positions but ultimately leads to a legal dead end. However, consideration of IHL in the next chapter shows that modern Just War thinking is permeating the application, if not the theory, of the legal regulation of warfare.

Before concluding this discussion of Just War theory it is necessary to recognise the relevance of *Jus Post Bellum* or the just ending of wars. This was long neglected by Just War scholars, being seen as no more than a process of reinstating the *status quo ante bellum*. As

⁹⁵ McMahan, *Killing in War*, p36.

⁹⁶ Ibid p.108

Coates points out, this is in stark contrast with utopian ideas of creating a just state from the ashes of the defeated aggressor but it does extend to the idea that a Just War should result in a just peace. For modern just war thinkers a just peace includes putting in place structures that prevent further aggression⁹⁷. Walzer calls this 'restoration plus'⁹⁸. Building on Walzer's sparse treatment of the subject, Michael Orend employs traditional just war principles to provide a framework for a just peace that uses ideas of discrimination, proportionality, right intention, just cause and proper authority to give moral guidance to the restoration of peace⁹⁹. Trudy Govier puts forward a powerful argument for the development of Just War theory to recognise the duties of the victors to deal justly with the victims and perpetrators within the defeated society¹⁰⁰. Building social trust through reconciliation processes is for her more important than the treaties and conventions that bring wars to an end. Clearly, there are important developments in *jus post bellum* scholarship that merit greater attention than is possible in this thesis. Indeed, the failure to plan for the post bellum in Iraq stands as powerful testimony to the practical contemporary relevance of *jus post bellum* thinking.

The foregoing review of contemporary just war theory is necessarily brief and cannot do justice to the breadth of just war scholarship. It is nonetheless sufficient to show that Just War scholarship is engaging with the difficult questions currently generated by modern asymmetric warfare. How to react to an Afghan that may be a disinterested farmer or a Taliban fighter, how many civilians can be put at risk in an attack on a rocket launcher located in a village, whether a power station can be attacked and whether rules of engagement should be relaxed when fighting against combatants who conceal themselves among civilians are the meat and drink of Just War debate. Just War Theory claims ownership of the language

⁹⁷ Coates, *The Ethics of War*, p 273-291.

⁹⁸ Walzer, *Just and Unjust wars*, p 119-124.

⁹⁹ Brian Orend, *Michael Walzer on War and Justice*, (Cardiff: University of Wales Press, 2000), p135-152.

¹⁰⁰ Trudy Glovier, 'The Challenges of Reconciliation', in Larry May (Ed.) *War; Essays in Political Philosophy*, (Cambridge: Cambridge University Press, 2008), p 229-248.

and the ethical principles to discuss the moral questions posed by war and its major positions form an important element of the regime of legal regulation of war. However, there are other ways of thinking about the choices made in war that have always challenged threaten the primacy of Just War theory.

4) Battles with Realism, Consequentialism and Militarism

This thesis does not attempt to locate Just War theory within the wide tradition of political philosophy or international relations theory¹⁰¹; the focus of the inquiry is on the place of morality in military decision-making and its impact on the construction of operational legal advice.

That said, it is instructive to briefly consider the Just War critique of realism, consequentialism and militarism in order to gauge the robustness of Just War thinking and the relevance of other ways of understanding the decisions that are taken in war¹⁰².

¹⁰¹ Placing Just War theory within a context of political theory is a far more demanding task than examining Just War theory's critiques of realism, consequentialism and militarism. The key debates is the extent to which Just War moral positions are recognised as universal moral norms that apply to behaviour both within the state and externally. Apparent universal norms take on particular forms in different societies. Walzer in, *Spheres of Justice: a Defense of Pluralism and Equality*, (New York: Basic Books, 1983) thinks in terms of 'thick' state morality and 'thin' international and cosmopolitan morality. Walzer's thin universalism is a product of 'thick' particularism. The incorporation of particularistic communities in theories of cosmopolitanism allows for the influence of particular constructions of identity on morality. The challenge is to account for moral diversity without abandoning ideas of universal morality; for a useful starting point see, David Boucher, *Political Theories of International Relations*, (Oxford: Oxford University Press, 1998).

¹⁰² Just war thinkers locate their scholarship as the alternative to realism and pacifism as a body of thought on war. Kantian philosophy is usually regarded as pacifist, although Brian Orend challenges the conventional view to claim that Kant has a form of just war theory that shares much of Just War theory's 'moral logic', particularly in the area of *jus post bellum*: See, Brian Orend, 'Kant's Ethics of War and Peace', *Journal of Military Ethics*, (2004) 3(2): 161-167. Although Orend is able to show some commonality of principles by using the *Doctrine of Right* to re-interpret *Perpetual Peace* to argue that Kant's ethical position on defensive wars amount to a just war theory, Kant's refusal to distinguish between the rights of combatants and non-combatants in war is difficult for just war theorists to accommodate. Indeed, Kant's evident contempt for Vattel's talk of just and unjust wars suggests that Kant's recognition of the place of morality in state behaviour does not of itself enable just war theorists to claim Kant as part of their tradition. For a concise discussion, see David Boucher, *Political Theories of International Relations*, (Oxford: Oxford University Press, 1998), p.270-284. For a realist argument that Kant saw the inevitability, if not the morality, of war see, Kenneth N. Waltz, 'Kant, Liberalism, and War', *The American Political Science Review*, Vol. 56, No. 2 (Jun., 1962), pp. 331-340 and Eyal Benvenisti, 'Human Dignity in Combat: The Duty to Spare Enemy Civilians', *Israel Law Review*, V.39, 2006, at p. 83 has a nice reference to Kant in the judgment of ICTY in *Prosecutor v Kupresckic*, 14 January 2000, at paragraph 518,

4.1) Realism

Realism is not something that just war theory can easily ignore when promoting its discourse on war¹⁰³. In fact Walzer begins *Just and Unjust Wars* by describing his task as that of presenting an answer to Realism. While this is not the place for a textured investigation of Realism, it is important to understand the Just War critique of Realism. Just War theorists identify in realism the antithesis of their world view and almost all modern Just War writing begins with an attack on Realism. In so doing, Just War critiques can be accused of setting up a straw man by playing down the Realist recognition of the instrumental role of moral argument or the benefits that may flow from policies that meet moral criteria. Rather, Just War theorists tackle the Realism that denies the relevance of morality to the conduct of affairs of state and, indeed, regards moral influences on state action as downright harmful; moral influences are there to be excluded from the decision-making process and this holds for war as it does in all international relations since war is, after all, international *relations in extremis*. For Realists evil can be used to maximise the interests of the state and thus ceases to be really evil; morally duplicitous methods, used to bring some semblance of an advantageous balance of forces, are a price worth paying¹⁰⁴. The fact that the difference between Just War and realist approaches to war is so fundamental, enables Just War theorists to attack realism without distinguishing between the various strands of realist thinking. Indeed, in the context of this polarisation of the debate between Just War theory and realism the multiplicity of positions within Just War theory also lose their significance.

where the humanitarian rules are described as the result of '[T]he transition into legal norms of the "categorical imperative" formulated by Kant in the field of morals: one ought to fulfil an obligation regardless of whether others comply with it or disregard it'.

¹⁰³ While there is an extensive realist literature, reference is usually made to Edward Carr, *The Twenty Years' Crisis 1919-1939*, (London: Macmillan, 1939), Hans Morgenthau, *Politics Among the Nations*, (New York: Alfred A. Knopf, 1973), Kenneth Waltz, *Man, the State and War*, (Princeton NJ: Princeton University Press, 1978) and Robert Keohane (ed.), *Neorealism and its Critics*, (New York: Columbia University Press, 1986).

¹⁰⁴ For a realist account of foreign policy, see Henry Kissinger, *American Foreign Policy*, (London: Weidenfeld & Nicholson, 1969).

The Realist view is that war is justified by the self-interest of states, takes place in an anarchical international environment and a state should do whatever is necessary to win. This is a discourse of power, security and self-interest that denies a place for justice otherwise than in purely instrumental terms. In so far as moral considerations are recognised by realists, it is a matter of assessing the consequences of compliance and non-compliance in a cost-benefit analysis. This is an approach that recognises the moral norms as part of the decision-making environment but such moral standards are to be subordinated to the standards of politics¹⁰⁵. Appeals to justice for the sake of justice are to be disregarded. As Coates puts it, 'From a realist perspective, however, it is the political utility of morality which is paramount: morality plays, or ought to play, an important instrumental but always subordinate role'¹⁰⁶. Realists argue that their approach to war is less likely, in practice, to lead to war and, once begun, less likely to lead to excess than the pursuit of justice by Just War theorists. For Realists, war is always instrumental and subordinate to a political cause- to paraphrase Clausewitz, a continuation of political relations¹⁰⁷. Coates neatly expresses the realist argument that, 'In the end morality is better served by those who seem to disavow it than by those who trumpet it and who seek to carry all before it'¹⁰⁸.

To be sure, the relationship between realism and morality is troubling. Realists do not deny the utility of morality as a means to an end; rather they deny the elevation of moral standards above other political strategies. However, since realists cannot ignore the consequences of immoral behaviour in personal affairs, Realist thinkers recognise a duality of personal and political morality. Personal morality, such as decisions taken by a soldier in battle, submits to

¹⁰⁵ Morgenthau, *Politics among Nations*, p.13.

¹⁰⁶ Coates, *The Ethics of War and Peace*, p. 21.

¹⁰⁷ C. Von Clausewitz, *On War*, (London: Penguin, 1982), p 402, quoted by Coates, *The Ethics of War*, at p.28, 'We maintain, on the contrary, that war is nothing but a continuation of political intercourse, with a mixture of other things.'

¹⁰⁸ Coates, *The Ethics of War and Peace*, p.26.

political morality where political morality is in service of the state, such as rules of engagement, to maximise its gains. Whether political morality and personal morality are separated in context or function, the Realist ultimately makes a virtue of subjugating the moral to the political. This confirms the Realist view that war and the conduct of war are matters of state and not subjected to moral restraints. How this works in practice depends on whether the soldier in the heat of battle can separate personal morality from the public morality expressed in his rules of engagement.

Coates reminds us of another form of war realism, 'a grassroots variety' of 'combat realism'¹⁰⁹, that is not the concern of theorists but rather the experience of soldiers in war who find that it is impossible to fight morally when fighting for personal survival. This tendency is reinforced by military training that may be designed to turn the soldier into a disinterested killing machine. Indeed, the group dynamics, organisation and training of soldiers militate towards realist behaviour. The group identity engenders loyalty to comrades that can militate against moral conduct in war. The time for reflection can be seen as after the conflict and moral reflection on the battlefield may be perceived as a dangerous indulgence. Soldiers may not be enthusiastic followers of Walzer's injunction to take personal risks to reduce the risk to enemy combatants, and, indeed, the commanders may be equally unhappy to see them do so. The experience of the soldier, who eschews heroic warfare, endorses the realist view that war is hell beyond the realm of morality. To be sure, Realism in its various forms is a powerful opponent of Just War theory.

In *Just and Unjust Wars*, Walzer derides the language of realism. Realist language is the language of self-interest and cost-benefit analysis. Walzer's point is that this hard talk is incapable of addressing the moral complexities of war, but this is hardly surprising since Realists are not interested in moral complexities. While Walzer's response is that most people

¹⁰⁹ Coates, *The Ethics of War and pPeace*, p.28-31.

are interested in the morality of war, Just War theory has to show that this is for good reason. Just War theorists argue that people ought to be interested in the morality of war and also need to be so interested, because Just War theory must have a practical utility to compete with realism in the hard places of military decision-making. To be persuasive, Just War theory must address the realist position not only in terms of the importance of morality but also to show convincingly that a moral ordering of war works better in practice.

Walzer's objection to Realism is organised around the argument that there is room for moral content in the choices that states make in the conduct of their affairs, whether domestically or internationally, and that the moral content of decision-making both satisfies a human need and advances their interests. Walzer does not ignore the malign intentions of states, but denies them the role of organising principle. Instead, shared moral beliefs form the basis of collective association and a shared moral discourse on war. It is the value of human life and the right to it that underpins common values in war that demand a standard of conduct, rather than the realist limits of what the state can get away with. In short, Just War theory lays claim to universal moral norms that inform a shared approach to war.

Resisting the Realist charge that justice is an elusive and dangerously vague term that leads to excess in war, Just War theorists distinguish between realistic expectations of justice and realism. This is the openly consequentialist aspect of Just War theory that recognises limits to the pursuit of justice in war. While moral means are to be used to moral ends, Just War theory puts a break on its prescriptive aspect to recognise that both ends and means are limited by what is possible. To be sure, human suffering is to be minimised, but it cannot be avoided. Brian Orend counters the Realist position with the argument that prescriptive Realism, which claims that a state ought to behave amorally in the international arena, undermines co-operation between states producing sub-optimal results¹¹⁰. In practice, avoiding this outcome

¹¹⁰ Orend, *Michael Walzer on War and Justice*, p68.

leads to a possible behavioural congruency between the realist and the Just War theorist; recognising the benefits of cooperative action, the realists will, in some circumstances, accept the prudence of observing rules such as the limitation of war to situations of self-defence. In these circumstances the outcome of rule compliance might be the same for the Just War theorist and the realist, though the behaviour justification would be in the different discourses of morality and self-interest.

Just War theorists attach great importance to the role of the tradition in the creation of the moral principles of war that have been given legal force in the codification of international law. Nevertheless, the relationship between just war theory and IHL is strained. Just War theorists debate behaviour in war as though IHL does not regulate the activity, while, at the same time, maintaining that IHL can only be properly understood from a Just War perspective and the law should be developed to accommodate changes in just war positions. Meanwhile, realists deny IHL its moral code and the moral justification for its development. As Orend observes, realists might argue that the process whereby Just War rules have been codified into international law has been one of rational choice bargaining between self-interested parties rather than recognition of shared moral values. Indeed, from a realist perspective it is the process of self-interested rational choice bargaining that drives the development of IHL rather than the evolution of universal moral norms. Nevertheless, whether or not the result of self-interested bargaining, it is a mark of the strength of Just War theory that it is the rules constructed within the discipline have been codified into international law.

4.2) Consequentialism

Just War Theory is often criticised from a philosophical perspective for its concern with the consequence of behaviour in war. Those who challenge the moral strength of DDE see proportionality as surrendering the moral content of behaviour in war to the end of military advantage- bad means justified by good ends. Just war theorists tend to deflect this criticism by its own attacks on utilitarianism- the biggest target among the array of consequentialist targets. In doing so just war theorists, who cannot deny a consequentialist aspect to their theory, emphasise its moral content.

Walzer distinguishes his rights based conception of justice in war from utilitarian justice. While he acknowledges that utility plays a part in his theory, it is at all stages limited by rights. Orend observes that Walzer's framework of 'something like absolute' human rights to life and liberty in war operates to bar utilitarian calculations that would deny those rights¹¹¹. Clearly, the fact that the right to life and liberty in war is not absolute allows a consequentialist element to the theory. The point, then, is not whether Just War theory is consequentialist, but rather that most consequentialist theories treat as negotiable the moral principles regarded by Just War theorists as universal.

Just War criticism of consequentialism usually focuses on classical Benthamism with its disdain of human rights and promotion of a conception of justice based on the greatest happiness for the greatest number. The essence of the Just War critiques of utilitarianism is the obvious potential for the happiness of the many to cause injustice to the few. While variants of utilitarianism, such as rule utilitarianism, can recognise the value to the majority of rules that protect the minority, Just War theorists powerfully argue that, for utilitarians, rules and rights will always be threatened by cost-benefit analysis that may fail to recognise

¹¹¹ Orend, *Michael Walzer on War and Justice*, p.77-78.

this value above others. Indeed, utilitarians who fail to see the value of a rule would be inclined to break it or at least stretch its meaning to suit their purpose.

For all the theorising about rule compliance, and irrespective of their relative respect for rights, the fundamental difference between Just War theorists and utilitarians lies in their conception of justice. The maximisation of pleasure for the greatest number where 'pleasure' is a moveable feast is not how Just War theorists see justice in war, or indeed anywhere else.

4.3) Militarism

Militarism is deserving of separate consideration since it is better understood as an ideology than a philosophical theory or a particular genus of political organisation. The strength of militarism within a culture, whether at the societal, institutional, group or individual level inhibits the acceptance of Just War theory and the subjection of military advantage to humanitarian need. As Coates puts it, 'Militarism is rife in the modern world, where its pervasive and multiform presence constantly threatens the moral regulation of war'¹¹². Militarism has been seen as the product of fascist particularism, socialist revolutionary ideology, prescriptive democracy and religion in conflict with secularism or rival creeds. In fact militarism is better understood as a product of, and response to, social constructions of security that can arise in any society whatever its political organisation. Understood in this way, the old debates about the extent to which militarism is confined to the extremes of fascism or socialism are unhelpful.

From a Just War perspective, militarism presents a real challenge to Just War practice since militarism disregards the just war constraints on the resort to war and the conduct of war. It has this in common with realism but with an added element; while realism adopts an amoral cost-benefit analysis that may or may not result in war, militarism tilts the balance in favour of war. It is easy to characterise militarism as blood lust for combat, but this is to

¹¹² Coates, *The Ethics of War*, p.40.

underestimate the power of the ideology. Militarism is better understood as the propensity to see military solutions to political problems. While for Just War theorists, war is a matter of last resort, for the militarist it is the first option on the agenda. As was seen in chapter one, Israeli civil-military relations scholarship has produced a compelling analysis of Israeli militarism as a cultural phenomenon.

Influential Israeli sociologist Baruch Kimmerling terms this ‘cognitive militarism’ or ‘military-mindedness’, which he applies to his own society:

Despite its centrality and the high esteem accorded to it, the Israeli military is mainly professional and does not seek to intervene in social or political issues or processes. From this point of view, the military is not much more “militaristic” than any military in any democratic country; rather, considerable portions of Israeli civilian society have become highly militarised. The militarisation of Israeli culture is expressed mainly by the use of excessive power in solving social and political problems, by the “military-mindedness” of large parts of the civilian population and political leadership, and by the high expectation that the military will solve non-military problems¹¹³.

In Israel, resources are allocated in anticipation of war and the country is in a state of constant readiness. Whether this is in response to real or perceived military threats is irrelevant, since the Israeli construction of national security recognises a multitude of threats as social facts that can, and are, addressed in military terms. It is not that Israel’s decisions to go to war evidence militarism, rather the alternative policy options are undermined by a belief in the inevitability of war. In these circumstances a militarised society is resistant to Just War principles designed to limit the recourse to war to a strict interpretation of self-defence and there is a stretching, if not disregard, for the letter of IHL¹¹⁴.

¹¹³ Baruch Kimmerling, *The Invention and Decline of Israeliness: State, Society and the Military*, (Berkeley: University of California Press: 2001), p.226.

¹¹⁴ For useful review of militarism from an Israeli perspective, see Yoram Peri, ‘The Radical Social Scientists and Israeli Militarism’, *Israel Studies*, fall 1996, Vol. 1, No. 2, Pages 230-266. Peri distinguishes between ‘the national policy and its implementation, the institutional-organizational aspect, and the value or ideological aspect’. Policy and implementation is characterised by military excess, the institutions are influenced by the military and the ideological aspect. Peri strongly disputes Kimmerling’s position and claims that there are counter-balancing anti-militaristic trends in Israeli society that condemn wars of choice.

While it is easy to understand that cognitive militarism challenges Just War principles of *jus ad bellum*, the effect of militarism on the processes of terminating hostilities is equally pronounced. The Just War message is one of restraint in negotiating the ending of war, but militarism encourages victory in arms rather than compromise. Clearly, there are opportunities for peace in the course of war that militarists spurn in favour of one more push. A military state of mind is not well versed in processes of reconciliation.

Militarism has in common with Realism a world view that sees anarchy in the international relations of states and war as its natural product. The militaristic assessment of neighbouring states and their populations is a constant preparation for war. Unlike Realism, militarism does not necessarily deny the place of morality in the conduct of war but this will depend on the strength of militaristic ideology. Where militarism is closely linked to nationalism there will be a tendency towards privileging citizens whether civilian or soldier above enemy civilians. Thus, Kimmerling would not have been surprised by the Kasher position. To the extent that Just War theory is accepted by militaristic societies, it will be adapted to emphasise the reciprocal nature of restraint in war and in conflicts such as Gaza, where Hamas sought to collapse the principle of distinction, there would be a tendency to relax the ethical constraints. In these circumstances Just War theory will be seen as relevant in a form that meets the perceived security needs of the state as filtered through a cultural militarism. That said, the breadth of debate within Just War scholarship allows the tradition to accommodate moral positions within a practical framework designed to enable wars to be fought and militarists are slow to deny the utility of rules of combat whatever their moral content.

5) Conclusion: The Place of Just War Theory

Just War theory is located within the field of applied ethics and has a narrow focus; it engages with law, philosophy and political thought only where they speak about the resort to

war and the conduct of war. Nevertheless, it seeks to influence behaviour. Publishing in newspapers and magazines and meeting with the military, the theorists working in this area are devoted to making their knowledge more accessible and comprehensible. To be sure, some discussions can become complex but writers in the field constantly return to battlefield situations to test the application of their theory. The relevance of Just War theory lies in its narrow philosophical focus on the difficult decisions in war and its prescriptive claims to guide both conduct and the correct understanding of international humanitarian law. This enables Just War theorists to claim ownership of the moral analysis of war and the ethical training of its practitioners. If, as was argued in the previous chapter, the choice of legal interpretation of IHL involves an ethical assessment, Just War theory certainly claims to inform the ethical content of the decision making process. As such, it overlaps the boundaries between the ethics of war and the philosophy of law as it applies to war. This puts Just War doctrine firmly within an international institutional regime of legal regulation of war.

A brief survey of modern just war theory has shown that traditional Just War theory is undergoing a period of renaissance with a confusing array of moral positions on the key principles of discrimination, proportionality and the moral equality of combatants. Underlying the debate is a disagreement about the balance to be struck between the utility of war and the protection of civilians. If it is accepted that, as Walzer puts it, 'Often, it is morally necessary to fight; and then it may also be necessary, this time in the sense of "inevitable", that civilians will die, and those who are fighting on the side of right will do some of the killing'¹¹⁵, then a balance has to be struck between protecting civilians and allowing the military to do its job. As we have seen, Walzer wants only careful killing of civilians while Kasher emphasises the morality of force protection. At the other end of the Just War spectrum there are Just War practitioners whose aversion to militarism turns just war

¹¹⁵ Michael Walzer, 'Responsibility and Proportionality in State and Nonstate Wars', *Parameters*, Spring 2009, p42.

theory into 'pacifism's functional equivalent- a kind of cover for people who are not prepared to admit that there are no wars they will support'¹¹⁶. The practical effect of these diverse positions is that Just War theorists do not speak with one voice except in so far as their opinions are always expressed in moral terms. In fact, the key to understanding Just War theory is to recognise that whether or not *jus ad bellum* and *jus in bello* are kept apart, the discipline demands that both the means and the ends must meet stringent moral criteria; the resort to war and the conduct of war, whether linked or separate, must be just. This is what distinguishes Just War theory from other discourses on war.

However, Just War theory claims practical application and it is the theoretical concessions to utility that leave it open to criticism- particularly from the political left. How can soldiers fighting for an unjust cause be justified in killing civilians by reference to the 'good' of their military objects? Even if this is accepted, why should unintended killing be acceptable when it is the obvious consequence of the intended act? While Just War theory jumps through hoops to provide a moral answer, its task is made urgent by the moral outrage of armchair observers of real-time media images of civilian suffering in war. The intense media coverage of war drives the hardening of the norm against civilian harm and strains the Just War positions that aim to protect civilians while permitting some degree of efficient warfare. Just War theorists seek to influence moral culture and offer prescriptive advice to the military, claiming to identify and interpret universal moral norms. The problem arises when trying to balance the moral norms against the needs of the military. The practical consequences, despite referencing universal morality, will not be universally popular- indeed Just War theorists may find themselves detached from popular morality. In these cases the unspoken pact between the military and Just War practitioners that Just War doctrine is an accurate guide to what is generally acceptable, fails to deliver. Proportionality goes out the window

¹¹⁶ Walzer locates these thinkers as being primarily among the European left.

when the cameras broadcast images of dead children and their distraught families. The Israeli efforts to keep reporters out of Gaza were not so much an admission of war crimes as recognition that even legal and Just War compliant operations can offend moral sensibilities with severe political consequences.

In these circumstances, McMahan may be right to accept a decoupling of Just War theory and international law in order to locate just war theory closer to popular morality and to push practice closer to public expectations rather than to the limits of international law. In practice, our judgment of the rightness of the resort to war does influence our judgment of military behaviour in war. If this leads to differing judgments of behaviour in war, then those militaries fighting for a cause that is popularly perceived to be unjust can expect a rough ride. The Israelis are well aware of this, with several commentators bitterly noting that the American operation in Fallujah was far more destructive than their operation in Gaza but the criticism of the US was mild by comparison. The same can be said of NATO actions in Kosovo. Whether Just War theory can provide a guide to the nature and strengths of universal moral norms in war is itself open to question. Communitarians, for instance, would argue moral values are mediated by states and the very concept of universal norms or values implies a world community that does not yet exist. In the meantime claims of universal moral norms may be no more than the imposition of the moral values of the dominant states. Cultural relativism would suggest the partial application of moral values, which may or may not extend rights to non-citizens- a position reminiscent of Kasher's ordering of the state's duties towards its own citizens and those of the enemy.

Whether or not the Just War tradition's claim to universal moral standards is well founded, it remains open to the criticism that it is too responsive to the needs of the military. Those who care less for military efficiency than they do for the protection of civilians see Just War theory as ethics in service of the military and failing to properly protect civilians in war. This

charge was forcibly made against Kasher and Yadlin by Zeev Sternhall, participating in the Kasher/Walzer New York Review of Books exchanges:

The framework of Israel's recent operation in Gaza was shaped by the main lesson that was drawn from the warfare in Lebanon in the summer of 2006: that Israeli society would not stand for another offensive war that would claim heavy casualties. This was, beyond all sophistry and mental gymnastics, the true goal of the ideological cover, which Yadlin and Kasher provided the government and the army: "Zero casualties for our troops"¹¹⁷.

This critique goes to the heart of the matter. If Israel adopted a policy of force protection in Gaza it did so with the moral force of Kasher's Just War ethical position. Indeed, Kasher's analysis pre-dates Gaza and was generated in support of Israel's policy of targeted killing during the Second Intifada. Both policies received widespread popular support within Israel demonstrating a congruency between Kasher's scholarship and popular morality when faced with perceived existential threats from non-state actors. If this is Kasher providing 'ideological cover', it is also an engagement in the contestation of ethics, identified by Clarke as a key input of international legitimacy.

From a theoretical perspective, the point to be emphasised here is that in the absence of universalist moral positions on the right way to fight, Just War theory provides the intellectual framework to inform military ethics in practice but, within the boundaries of Just War doctrine, allows for differing ethical outcomes. Consensus positions are reached at the domestic level through political engagement. In Israel, the Kasher position appears to be widely accepted and to inform the conduct of recent Israeli military action in Gaza. However, it has been argued throughout this thesis that the international level of analysis, where legitimacy is contested, influences domestic military behaviour and the practical application of military ethics- despite the absence of moral universalism. Here, Adler's communities of purpose allow an understanding of groups of elite actors reaching consensus positions on the

¹¹⁷ Zeev Sternhall, Leo Blum Professor Emeritus of Political science at the Hebrew University, letter to the editor, *New York Review of Books*, Vol. 56, No. 13, August 13 2009.

right way to fight. This suggests a fruitful avenue of research into where Israel's ethical positions are located in terms of like minded communities.

However, ethical ideological cover is not enough to meet the needs of the military. There is also the need for legal cover, which has been provided by the IDF military lawyers who approved the targeted killings and the major targeting decisions during Cast Lead. As was shown in the last chapter, the grey areas of IHL invite ethical decision-making in the process of legal decision-making. It will be recalled that the Martens clause has formed a part of the laws of armed conflict since its first appearance in the preamble to the 1899 Hague Convention (II) with respect to the laws and customs of war on land:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.¹¹⁸

As discussed in the previous chapter, the clause can be seen as an embedded moral code within IHL. In legal terms, this is recourse to natural law principles. Since Just War theory has informed and constructed the principles that became recognised as natural law, the clause can operate to enable Just War Theory to influence the construction of legal advice to the military. This is a very direct route to influencing the behaviour of militaries, but as we have seen the 'requirements of public conscience' are contested. Indeed, Just War scholarship can be seen as framing the political contestation that precedes and challenges consensus positions on the morality of military operations. If Kasher's views are a measure of the Israeli 'public conscience', it is to be expected that the IDF military lawyers will adopt a permissive

¹¹⁸ For a brief discussion of the legal interpretations of the clause, see Rupert Ticehurst, 'The Martens Clause and the Laws of Armed Conflict', *The International Review of the Red Cross*, 30 April 1997, no 317, p. 125-134. Eyal Benvenisti, 'Human Dignity in Combat: The Duty to Spare Enemy Civilians', *Israel Law Review*, v.39, 2006, p.83 quotes the Kupresckic judgment at p.518 and discusses the developments in IHL post-WW1 as a move away from treaty principles of reciprocity and 'marks the transition into legal norms of the "categorical imperative" formulated by Kant in the field of morals'. But armies are unlikely to give an advantage to the enemy who does not recognise the same restrictions on its behaviour.

approach to force protection when they construct their legal advice in the grey areas of the legality of targeting. This theme will be explored in the course of the case studies. On the other hand, other views of what is legal may be generated by differing moral positions on the obligations of militaries to avoid harming 'their' civilians.

It follows that, before beginning the case studies, it is necessary to have a clearer understanding of what constitutes authoritative international humanitarian law. In the absence of a powerful international court where pluralistic interpretations abound, whose law is law?

As Asa Kasher recently formulated the question,

How then can international law meant for classical warfare apply to non-traditional wars? One way is by means of creative interpretations of international law. The problems with such an approach, however, are immediately apparent. Whose interpretation prevails? The interpretation of the Supreme Court of Israel? The US Supreme Court? The Marine Corps' Judge Advocate Division? Somebody within the United Nations?¹¹⁹

These questions recognise the problem of identifying law and legal authority beyond the sovereign state in the absence of a powerful international court. This uncertainty requires an enquiry into what international humanitarian law is and, if the law is pluralistic, whose opinion counts? To frame the same question differently, whose opinion confers legal legitimacy? These issues will be addressed in the next chapter.

¹¹⁹ Asa Kasher, 'A Moral Evaluation of the Gaza War- Operation cast Lead', *Jerusalem Centre for Public Affairs*, Jerusalem Issue Brief, vol. 9, no. 18, 4 February 2010.

Chapter 5: Understanding the plurality of IHL

1) Introduction

This chapter presents a methodological analysis of IHL's legal pluralism that links the legal to the political and locates the construction of legal advice by military lawyers within a larger political calculation of the consequences of military actions in war. It will be recalled that chapter two examined the increasing use of law as a medium of political judgment of war. Chapter three looked at the detail of IHL and saw that there are large grey areas where the law is imprecise and open to multiple interpretations. In chapter four we considered philosophical positions on war and the connection between Just War theory and IHL.

In this chapter, we acknowledge the continuing close association of Just war theory and IHL but argue that the dynamic cannot be understood without recognising that the application of ethics to the construction of law is more than giving weight to ethical principles embedded in IHL; the application of ethics to law involves political choice. Equally, the choosing between laws is a political act. The challenge is to adopt a methodology that accounts for the plurality of international law in terms of the exercise of political power and furthers an understanding of the role of military lawyers.

Rather than adopt the classical positions of legal philosophy, which explain the juridical process as a disinterested application of legal rules and principles whereby the one law is revealed within a closed logical system, the approach here is to see law in political and sociological terms, so that the political nature of the 'legal' function of the military lawyer can be better understood. The argument is informed by American Legal Realism and Michael Reisner's work on the 'incident' as a decisional unit in International law. This approach acknowledges the weakness of the letter of the law in international conventions, and in the

absence of a strong international court capable of establishing and enforcing a detailed body of law that is case specific, looks to elite responses to international incidents as indicators of international law in practice. The multiplicity of responses of elites reveals the existence of choice in identifying law. This is not to suggest that IHL is epiphenomenal. Rather, competing constructions of IHL and their promoters are elements of a legal regime that includes the international and the domestic. Recognising the plurality of international law as a diverse structure allows for the agency of the legal advisor, whose choice is not between law and non-law but between competing constructions of law. The approach opens the way for consideration of the question posed by Asa Kasher in the concluding section of the last chapter: whose law is to be preferred?

Emanuel Adler thinks in terms of several, often overlapping, transnational or international communities where, 'members have collective understandings of what they are doing'¹. These 'communities of practice' are not just based on shared values but also on norms that shape practice and expectations of consequences. The approach adopted in this thesis does not deny the relevance of universal values but recognises diversity of expectations and rules of behaviour. Seen from this perspective, the choice of law becomes a function of which community of practice is preferred.

As Brunnee and Troope put it in their promotion of their interactive law model of international law, 'International law today is largely a set of interlocking communities of practice that uphold relatively weak norms, but there are some sites of richer normality'². This thesis adopts Reisman's analysis for the identification of pluralistic statements of IHL but retains a communitarian view of 'interlocking communities of practice'. Using elite

¹ Emanuel Adler, *Communitarian International Relations: The Epistemic Foundations of International Relations*, (London and New York: Routledge, 2005).

² Jutta Brunnee and Stephen J. Troope, *Legitimacy and Legality in International Law*, (Cambridge: Cambridge University Press, 2010).

behaviour and political reactions to military behaviour as statements of IHL means that, in the absence of a powerful international court, predicting the legal consequences of military action amounts to a political analysis expressed in legal language. Viewed from this perspective, the role of the military lawyer can be understood as that of a specialist political advisor speaking the language of law with the authority of the international lawyer.

2) The intersection of the legal, the ethical and the political

As has been discussed in previous chapters, IHL mandates an ethical balancing of humanitarian and military values to determine the boundaries of legality but the relevance of Just War doctrine is seldom recognised in the legal literature. Indeed, while Just War theory has been remarkably influential in giving form to IHL and continues to provide a framework for moral discussion of law, it is tempting to see the relationship as having irretrievably broken down, with Just War thinking and IHL going their separate ways. After all, Walzer's revision of the Doctrine of Double Effect that requires militaries to make sacrifices to reduce harm to civilians suggests a different view of proportionality to that of the international lawyer. Equally, McMahan's arguments for collapsing the distinction between *jus ad bellum* and *jus in bello* to distinguish between just and unjust combatants runs counter to the fundamental architecture of IHL³. The language is the same, but its usage has changed. If international lawyers talk of justice at all, it is in relation to procedure rather than substance. The triumph of positive law has been to replace nature with formalism and throw out abstract principles that are not clear legal principles of interpretation. Nevertheless, it will be argued here that, it is precisely because IHL compels consideration of humanitarian values that Just War theory and IHL have more in common than their vocabulary; a commonality of thought and purpose arises from IHL's balancing of its humanitarian aims against the requirements of

³ For a detailed discussion of Walzer's and McMahan's positions see chapter 4.

military necessity- a process that invites both legal and ethical investigation. In fact, Just War theorists have important insights that are informing the development of IHL.

The Just War analyses of the ethical requirements of warfare are addressing the very issues that currently concern legal commentators: the extent to which the balance between civilian protection and military necessity requires adjustment to meet the challenges of modern asymmetric warfare. In fact, the two disciplines most profitably intersect in discussion of force protection and whether the *jus in bello* requirements should be relaxed in respect of militaries fighting non-state actors that fight among their civilians and wear no uniforms. At first sight, Just War theorists and legal commentators appear as ships that pass in the night, so that Just War revisions to the traditional theory appear removed from IHL and lacking the traction to achieve legal change. In fact, there is a much closer relationship than at first appears. While not interdependent, the two disciplines have overlapping agendas so that MacMahon chose to debate his ideas with Israeli academic international lawyers before publishing *The Ethics of War* and their responses appear as articles in a special issue of the *Israeli Law Review*⁴. This congruency of interest is evident in influential Israeli professor of law Ayel Benvenisti's⁵ essay, 'Rethinking the Divide Between Jus ad Bellum and Jus in Bello in Warfare Against Nonstate Actors'⁶, where he marshals both the ethical and the legal arguments in support of a thesis advocating the partial collapse of the separation of *jus ad bellum* and *jus in bello*. There is a similar ethical and legal discussion in Benvenisti's treatment of the tension arising from the expectations among militaries of the reciprocal nature of IHL obligations- an expectation that runs counter to the structure of IHL⁷. Legal scholars addressing the pressing legal issues arising from contemporary warfare very soon

⁴ *Israel Law Review*, Winter 2007.

⁵ Professor of Law at Tel Aviv University.

⁶ Eyal Benvenisti, 'Rethinking the Divide between Jus Ad Bellum and Jus in Bello in Warfare Against Nonstate Actors', *Yale Journal of International Law*, 13 May 2009. Available at SSRN: <http://ssrn.com/abstract=1403882>. (Last accessed 12/1/09)

⁷ Eyal Benvenisti, 'Human Dignity in Combat: The Duty to Spare Enemy Civilians', *Israel Law Review*, V.39, 2006, pp. 81-109.

find themselves grappling with the consequences of either reinforcing or collapsing the *ad bellum/in bello* duality and are increasingly recognising the analytical value of current just war scholarship. The employment of Just War ethical thinking by international lawyers is particularly evident in the proliferating legal scholarship on the conduct of asymmetric warfare, where Just War arguments are deployed to question the balance between humanitarian and military objects.

The tension between the humanitarian protection of civilians and the needs of the military is at the heart of many of the difficult judgment calls in IHL. However, it would be a mistake to assume that balancing conflicting rights, duties and benefits is a special feature of IHL. In fact, balancing is not at all unusual and is a common feature of legal codes, especially when the rights of individuals are to be constrained by the needs of the state. Indeed, the legal framework of the welfare state rests on a balance of the rights of the individual to social goods against the needs of the state to ration those goods⁸. However, in IHL the process is complicated by the requirement to balance the wellbeing of individuals with the needs of states of which they are not citizens. Critical Legal Theory⁹ would have us recognise that this is not just balancing the rights of the individual, but rather the rights of the 'other' - a much more troubling category of person.

As was argued in chapter three, the balancing of civilian protection against military objects results in legal grey areas where a plurality of legal positions are possible and where human rights lawyers and military lawyers can be expected to disagree about what the law is and what it requires. This disagreement can be framed in legal terms that are informed by the

⁸ Both just war theory and IHL scholarship look to the domestic legal analogy of the criminal law of self-defence but find that the analogy breaks down because the law of self-defence is designed to measure individual responsibility and because it has an expectation of enforcement that is largely lacking in IHL. In fact domestic legal regimes that regulate the allocation of resources are a much more fruitful guide, particularly the provision of expensive drugs where there is an interaction between law and medical ethics.

⁹ See, Roberto Mangabeira Unger, *The Critical legal Studies Movement*, (Cambridge, MA; Harvard University Press, 1986).

differing ethical positions discussed in Just War theory. The Just War discussion of the protection of innocent civilians, and the need to sacrifice a degree of military efficiency in the process, translates into the fundamental legal tension that is found throughout the law: the conflicting demands of the individual and the state. As legal scholar Amichai Cohen puts it with regard to proportionality, 'In practice there exist two very different approaches to the interpretation of the principle of proportionality: the human rights model, which gives preference to the interests of civilians who might be harmed by military action, and the contractual model which gives precedence to state interests.'¹⁰ In IHL this tension can be represented as an axis that runs from the interest of the individual (human rights) to those of the military (the state) with the human rights lawyer located at one extreme and the military lawyer at the other.

The relative positions of Just War theorists can be similarly represented, with the axis running between the near-pacifist and the near-militarist. Superimposing the ethical onto the legal, it can be seen that Kasher¹¹ (whose position on force protection can be seen as near maximalist) would be closer to the military lawyer and Walzer¹² (who believes that soldiers should risk their lives to protect enemy civilians) to the human rights lawyer. While this treatment of the respective positions of lawyers and Just War theorists lacks sophistication, it does show that the disciplines are more complementary than either is usually prepared to acknowledge. The practical consequence of this is that the moral arguments of the Just War theorists add weight to the corresponding legal positions. Hence, lawyers and ethicists who share the same position on the axis would have similar assessments of the right balance to be achieved on issues such as force protection. While Kasher defends force protection on ethical grounds, Benvenisti uses IHL to argue that proportionality does not require soldiers to be put

¹⁰ Amichai Cohen, *Proportionality in Modern Asymmetrical Wars*, Jerusalem Centre for Public Affairs, 2010, available at, <http://www.jcpa.org/text/proportionality.pdf>. (Last accessed 06/03/2011)

¹¹ See chapter 4 for a detailed discussion.

¹² See chapter 4 for a detailed discussion.

at risk to protect enemy civilians¹³. In short, both law and ethics can be read together in support of a range of positions from civilian to force protection. In these circumstances law and ethics need not be oppositional and can be mutually supportive. This is more than a coincidence of views between ethical and legal commentators, but rather an ongoing debate within the two disciplines as to how wars and warfare should be regulated that is informed by both legal and ethical enquiry. In so far as there is an engagement of ideas, the legal commentators are more inclined to engage with Just War theory than the Just War theorists are to grapple with IHL.

We saw in the last chapter that most modern Just War Theorists such as McMahan are uncomfortable with the separation of *jus ad bellum* and *jus in bello* on the grounds that just and unjust combatants should be held to differing standards of behaviour, but are struggling to see how the separation can be collapsed without an unwelcome relaxation of *in bello* protection of civilians. We have observed that this concern is shared by some legal scholars analysing the application of IHL to asymmetric warfare. In fact, there is a greater symmetry to be found by examination of the practical application of IHL, where there are grounds for concluding that the separation of the two legal codes is something of a legal fiction.

Returning to McMahan's position on collapsing the distinction between *jus ad bellum* and *jus in bello*, it will be recalled that McMahan argues that it offends moral expectations to fail to distinguish between the morality of the military actions of the unjust combatant and the just combatant. Put simply, there can be no strong moral argument in support of the right to kill to further the objects of an unjust war nor is it clear that those fighting a just war should be subject to the same constraints as the unjust. On the face of it, IHL's insistence on the separation of the two codes has no place for an analysis based on the relative moral status of the combatants, so that IHL and McMahan's version of Just War theory appear to be

¹³ Benvenisti, 'Human Dignity in Combat', discussed in detail in chapter 4.

completely at odds. To be sure, traditional 'black letter' IHL is clear that the constraints on the conduct of warfare should apply equally to the parties whatever the legality of the initial recourse to war.

Generally speaking, although modern Just War scholarship tends towards collapsing the duality with reservations about how this would work in practice, the balance of legal scholarship seeks to reinforce the separation¹⁴. Lawyers are well aware that the regime under the UN Charter that allows armed conflict only in self-defence (Article 51) or by Security Council authority (Article 42) is a defective regime when it comes to determining which party is the aggressor and which the defender. In these circumstances, it is generally argued that all *ad bellum* judgments are overly politicised and to link them to *in bello* assessments of legality would be to expose combatant rights and responsibilities to political calculation. However, ethical considerations may already have held sway since it is increasingly becoming accepted among legal commentators that the strict separation between *ad bellum* and *in bello* judgments is something of a legal fiction that does not accurately describe the operation of IHL in practice.

As Michael Schmitt puts it, "conflicts continue to be viewed in terms of 'good' and 'evil'... [and] the reality is that such differences, real or perceived, matter."¹⁵ Any assembly of the differing legal positions on *jus in bello* incidents leads to the conclusion that this is right. Judith Gardam, analysing legal responses to the first Gulf War of 1991, observes that, "in the assessment of proportionality, civilians, and to a lesser extent combatants, of the aggressor state were afforded less weight in the balancing process than combatants of the 'just side'."¹⁶

¹⁴ See for instance, Robert D. Sloane, 'The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War', *The Yale journal of International Law*, Vol. 34, 2009, p47-112.

¹⁵ Michael N. Schmitt, 'Asymmetrical Warfare and International Humanitarian Law', 62 *Air Force Law Review*, 1/ 41 (2008), quoted by Benvenisti, *Rethinking*, at p.544.

¹⁶ Judith Gail Gardam, *Proportionality and Force in International Law*, 87 *American Journal of International Law*.

391, 412 (1993), quoted by Benvenisti, *Rethinking*, at p.544.

Robert Sloane, sees the *ad bellum* judgments in terms of an aggressor-defender model operating within a normative system made defective by institutional paralysis at the international level. Without effective U.N. sanction against aggression, redress is sought at the *in bello* level so that judgments of *in bello* acts are informed by *ad bellum* considerations of whether the actor is the aggressor or the defender.

Sloan's thesis is that this is more than a legal judgment, although it is expressed as such. Military operations resulting in collateral civilian damage get an easier ride where the reason for war is:

either (1) widely perceived as legal (for example a clear unassailable case of self-defense) or (2) formally illegal but still perceived as legitimate, meaning that it furthers broadly shared international values: preserving minimum order, halting human rights atrocities, and so forth¹⁷.

This amounts to a complex relationship whereby legitimacy is disconnected from legality at the *ad bellum* level to form a structure that influences the application of legal judgment at the *in bello* level. Sloane uses the oft quoted example of NATO's actions against Serbia in aid of the Kosovans in support of the second proposition. In fact, the converse is also true: *ad bellum* judgments that regard acts as formally legal can be seen as illegitimate if they offend the values of the observer, leading to greater condemnation of *in bello* collateral damage than would otherwise have been the case- a charge frequently made by the Israelis. Indeed it is the politicised nature of the *ad bellum* judgment that is seen to import political positions to the *in bello* judgment.

Certainly, Jerusalem was quick to point out that the Goldstone Mission prefaced its assessments of Israeli military operations with a strong condemnation of Israel's culpability

¹⁷ Sloane, 'The Cost of Conflation', p.55.

for launching the attack on Gaza in the first place¹⁸. The Mission found that that Israel was not fighting a defensive war¹⁹ in response to Hamas missile attacks but rather the object of the operation was to punish the people of Gaza for their support for Hamas:

While the Israeli Government has sought to portray its operations as essentially a response to rocket attacks in the exercise of its right to self-defence, the Mission considers the plan to have been directed, at least in part, at a different target: the people of Gaza as a whole²⁰.

In this respect, the operations were in furtherance of an overall policy aimed at punishing the Gaza population for its resilience and for its apparent support for Hamas, and possibly with the intent of forcing a change in such support²¹.

Critics of the report see the *ad bellum* finding as the real force behind the severe criticism *in bello* criticism of Israel's conduct of the campaign. Hence even Israel's unprecedented use of warnings to the civilian population of planned attacks is viewed by the Mission as a device to terrorise civilians rather than reduce civilian harm²². Equally, Israel's conceptualisation of Hamas in Gaza as a terrorist near state can be seen as leading to an assumption of *ad bellum* legality and an Israeli claim to favourable *in bello* treatment for operations such as the targeting of the Gaza police force. Since there appears to be some truth in both perspectives, Cast Lead neatly illustrates the politicisation of *in bello* judgments through conflation of the two codes.

In fact the Goldstone Report does more than demonstrate the strength of the aggressor/defender model as a conduit for the politicisation of IHL; it demonstrates the importance of another level of analysis- the increasing power of NGOs as promoters of humanitarian values in international law. Among the non-state actors NGOs predominantly promote a humanitarian version of IHL that privileges the human rights of the individual

¹⁸ Report of the United Nations Fact-Finding Mission on the Gaza Conflict, available at: <<http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf> (18 December 2009)>. (Last accessed 10/12/2010).

¹⁹ Article 51 of the UN Charter allows war in self-defence without UN authorisation.

²⁰ Report of the United Nations Fact-Finding Mission on the Gaza Conflict, paragraph 1883.

²¹ Report of the United Nations Fact-Finding Mission on the Gaza Conflict, paragraph 1884.

²² Report of the United Nations Fact-Finding Mission on the Gaza Conflict, paragraph 1920.

above the rights of the state, with state military action almost always seen as disproportionate to the harm caused to civilians.

How then should we understand the divergence between the clear letter of the law as expressed in the Conventions and state and elite practice? Is this a breach of the law or a recognition that the law differs from its formal written form? The point to be emphasised here is that this is not hypocrisy or a breach of the principle of equality before the law, but rather a political reality of the application of law in practice that suggests that IHL is more than, and different from, the codified words of the principle treaties. Clearly, an analysis of IHL that ignores the political cannot explain this apparent disconnection between the letter of the law that requires a strict *ad bellum/in bello* separation and its practical application. To be sure, the custom and practice of states has always been recognised as an important source of international law that allows for dynamism and change in response to perceived need²³, but a deeper understanding of this dynamic requires a conception of law that recognises, rather than obscures, its political function and content and can account for the plurality of legal opinion in key areas of IHL. Before there can be any attempt to understand the role of military lawyers advising on the conduct of war, there needs to be in place a legal methodology that can account for the fact that, despite the letter of the law that requires a disinterested application of *jus in bello*, when it comes to the actual application of IHL, militaries whose wars we approve of are more likely to be judged to be acting lawfully than those fighting in pursuit of an unpopular cause.

While legal philosophy has traditionally sought to downplay the political aspects of the juridical process in favour of various representations of the disinterested application of legal rules and principles, American Legal Realism is a fertile ground for those seeking to uncover

²³ See, Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, (Cambridge: Cambridge University Press, 2004), p.5: 'Customary international law crystallises when there is "evidence of a general practice accepted at law".' This is a process that takes decades according to Dinstein.

political influences on legal decision making. Legal realists look beyond the statutes to recognise the role of the judges as lawmakers that operate as part of, rather than separate from, society²⁴. The American Legal Realists have traditionally distilled their wisdom from observation of the US Supreme Court where conflicting constitutional principles are often used to balance the interests of the community and the individual. The degree of judicial choice arises from the practical application of often vague and conflicting constitutional principles to hard cases. Anyone who doubts the political nature of the legal institution and its practices has only to examine the Presidential appointment process where the choice between apparently liberal and conservative judges is accorded great political and constitutional importance. At the time of writing²⁵, consideration of President Obama's nomination of Elena Kagan to replace retiring Justice John Paul Stevens centres on her known political positions that include moral acquiescence to capital punishment, support of gay rights in the military and apparent opposition to terror detainee trials in civilian courts²⁶.

While there are many strands of American Legal Realism, their common positions include the central importance of the judges, particularly the appellate judges of the US Supreme Court, as creators of law and the role of legal advisors as predictors of judicial decisions. As the leading American Legal Realism theorist Oliver Wendell Holmes put it, 'The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law'²⁷. This legal scholarship attaches greater importance to records of judicial decisions, or 'case law', than the legislative codifications of law that are frequently no more than statements of principle.

²⁴ Leading figures in the movement are Oliver Wendell Holmes, Karl Llewellyn and Jerome Frank. Their hallmark is empiricism and pragmatism. For a useful survey of Legal Realism see, William Twining, *Karl Llewellyn and the Realist Movement*, (London: Weidenfeld & Nicholson, 1973).

²⁵ May 2010.

²⁶ 'Obama nominates the youngest judge', *The Times*, 11 May 2010, p. 33.

²⁷ Oliver Wendell Holmes, *The Path of the Law*, in *Collected Legal Papers* 167, 173 (1921), quoted by W. Michael Reisman, 'The Incident as a Decisional Unit in International Law', *The Yale journal of International Law*, Vol. 10, No. 1, Fall 1984, p7.

This analysis certainly fits with our observation of the principled but vague treaty codification of IHL, but the problem with adopting the 'legal science' of the American Legal Realists is that the focus of their analysis is on the powerful appellate court of the US constitutional system as the creators of law and there is not yet an institutional equivalent in IHL. While it may be the case that the International Court of Justice (ICJ) and the International Criminal Court (ICC) will one day acquire such status and create a comprehensive case law that gives clear case by case guidelines thereby shrinking the grey areas, this is clearly not an option at present. If the construction of IHL is a politicised juridical process that is not yet being carried out by a powerful international court, the question then surely is one of who is exercising the power of the identification and creation of IHL. Traditionally the answer has been in the conduct and practice of nations, but what does this mean in practice? Who decides what the law requires of the military and whose legal opinions influence the behaviour of the military and its lawyers, especially if there is no consensus on what is the general practice of nations let alone whether it has yet coalesced into the rules of IHL? Any meaningful analysis must take account of the dynamic relationship between the international and the municipal.

2) The municipal or the international? Whose law? Whose condemnation?

It is well established in international law that a state cannot escape its obligations under international law by relying on its own municipal law even including its own constitution²⁸. Further, there is a general duty to bring internal law into conformity with international law²⁹. The International Military Tribunal at Nuremberg did not admit pleas that the accused person had complied with German law. The extent to which international law, particularly customary

²⁸ See, the Vienna Convention on the Law of Treaties, 1969, Art. 27.

²⁹ For a discussion of the import of IHL into Israeli law and the influence of military attitudes on this process, see Amichai Cohen, 'Administering The Territories: An Inquiry into the Application of International Humanitarian Law by the IDF in the Occupied Territories', *Israel Law Review*, Vol. 38, No. 3, (2005), pp. 24-79.

international law, is incorporated into municipal law and the constitutional process whereby this is achieved vary from state to state³⁰. The position is further complicated by the particular relationships between courts and legislature that make some issues in some jurisdictions non-justiciable. This is the legal principle that some areas of life are beyond the reach of the courts and reflects the particular power relationships between the elected and non-elected judicial organs of the state. In practice, if not in theory, this has been the approach of the Israeli courts in respect of the legality of Israel's settlement policy; less controversially, courts will rely on the principle of non-justifiability to avoid being drawn into political debate or strategic and operational military decision-making. Consequently, municipal courts rarely rule on matters of IHL.

However, as we saw in chapter two, since the 1980s the Israeli Supreme Court has shown an increasing willingness to use IHL to decide petitions involving the IDF to regulate targeted assassination, house destruction, deportation, suspension of military operations to allow humanitarian aid and, most recently, military exclusion of media reporters from Gaza. The process is enhanced by the right of Palestinian citizens of the Occupied Territories to directly petition the Israeli Supreme Court- thereby creating a channel of IHL issues from the Territories directly to Israel's most senior judges. It follows that the IDF's military lawyers will be predicting the likely reactions of the Israeli Supreme Court to military decisions, but given the lack of precision of IHL, and the extent to which municipal interpretation of international law is a product of the particular society, Israeli judicial decisions on the conduct of the IDF are but one of many possible constructions of IHL.

The Universal Jurisdiction also functions at the municipal level in an international context with a political profile far above its legal profile. As discussed in chapter two, the Universal

³⁰ For a discussion of this process of internalisation see, Harold Koh, 'Why do Nations Obey International Law?' *Yale Law Journal*, 106, 2599, 1997.

Jurisdiction relies on state enactment of domestic legislation to enable criminal prosecution in their own municipal courts of war crimes committed anywhere in the world. This growing jurisdiction has the potential to bring some clarity to some aspects of IHL but the paucity of cases suggests that any significant benchmarking is unlikely. The jurisdiction seems set to be a highly politicised threat to the travelling military elites rather than a process of judicial law making³¹.

Clearly, the municipal is but one level of analysis. Consideration of whose law influences the behaviour of the IDF and its lawyers, and to what extent, suggests a political calculation of the consequences of compliance and non-compliance with a variety of 'legal' opinions that are held by the elite actors in a global arena. Some account must also be taken of the dynamic nature of norm formulation and the changing perceptions and power of IHL; what is acceptable today may lead to an arrest warrant tomorrow. Israeli generals who acted beyond the reach of IHL in the 1980s have found themselves liable to prosecution under the Universal Jurisdiction in the twenty-first century. This means that the calculation of possible reactions to military operations require not only consideration of the immediate behaviour of domestic and international actors but also their possible positions in future.

Michael Reisman, the distinguished Yale professor of law, argues that, given the weakness of international legal institutions, international law is identified from the responses of elite international actors to incidents; he calls this an Incident Analysis Approach that charts normative positions of key actors by observation of reactions to incremental incidents³². This methodology is derived from the legal realist identification of law as the product of appellate court rulings in hard cases. In the sphere of IHL, where there is no strong appellate court with

³¹ For a more detailed discussion of the politicisation of the jurisdiction see chapter 2.

³² Reisman is the Myres S. McDougal Professor of Law at Yale. See in particular, W. Michael Reisman, 'The Incident as a Decisional Unit in International Law', *The Yale journal of International Law*, Vol. 10, No. 1, Fall 1984.

a succession of hard cases to decide, Reisman looks to behaviour as descriptors of international law. His analysis treats the incident as the hard case and the elites as the judges. Instead of the law being what the judge says it is, the law is what we can take from how the elites behave in response to the incident³³. Reisman defines the incident as follows:

‘I define an “incident” as an overt conflict between two or more actors in the international system. It must be perceived as such by other key actors and resolved in some non-judicial fashion. Finally, and this is of crucial importance, its resolution must provide some indication of what elites in a variety of effective processes consider to be acceptable behaviour. Though the incident is “resolved” in a factual if not authoritative sense, without judicial imprimatur which routinely indicates law in domestic settings, the incident may often be a more reliable indicator of international law than are codes or case law.’³⁴

If we are considering IHL in respect of military operations, the operation is the incident and the reaction of the elites is the law. Simply put, IHL is described by what the elites say and do in response to military action. Such responses may well be contradictory and lacking in coherence but they are capable of empirical study and fit the legal realist pretensions towards legal science. It is not necessary to consider the merits of the theory in its entirety; the attraction for our purposes is the clear link that Reisman makes between elite political responses to military action and the predictive function of the legal advisor as descriptors of IHL.

As was discussed in detail in chapter three, in the absence of an overriding powerful international legal institution, there is no right or wrong understanding of the law in relation to whole swathes of imprecise written legal regulation; rather, it is the behaviour of the actors themselves that describes the law and if behaviour lacks unanimity the law is pluralistic with contradictory norms of varying coercive value- at least until behaviour coalesces and thereby acquires greater normative value. This is to radically depart from the Pure Theory of Law that limits its focus to a structural analysis of rules and principles emanating from legal institutions narrowly understood and demands that each norm be validated by a preceding

³³ American Legal Realism is influenced by behaviourist thinking in the identification of norms.

³⁴ Reisman, ‘The Incident’, p.12.

power-conferring rule³⁵. While Reisman's approach shares with Legal Positivism the understanding that there is no compelling universal moral content to law, it rejects the Legal Positivism's inward perspective by recognising the legal dynamic of norm aggrandisement through conclusions drawn from observation of social reality. Nevertheless, by applying Legal Realism to IHL and shifting the focus from the appellate court to elite behaviour, Reisman is losing a significant analytical tool that Legal Realism offers to the discussion of how law changes. One of the great strengths of Legal Realism is its simple answer to this question: forget grand theories of norm validation and rely on the behaviour of the judges in creating law. If law is the outcome of legal judgment, there is simplicity and certainty. The problem, of course, is that if law is the outcome elite behaviour there is complexity and confusion.

Reisman accepts that his approach can be disturbing: 'Some who endorse this concept of law [the conventional understanding of a rational process of organised public deliberation] are apt to find disturbing the fact that the incidents approach draws its normative inferences from no more than the apparent expectation of elites.'³⁶ Reisman's analysis is indeed disturbingly empirical, and the approach fails to produce an ordered normative structure capable of identifying clear normative positions that can resolve the hard cases of IHL and shrink the grey areas of legal imprecision. However, important areas of IHL are vague and undecided and the methodology captures very well the confused nature of IHL where there is little agreement in practice on how to balance civilian protection against military efficiency. The strength of the method is that it allows for the conclusion that there may be multiple norms in play at any one time and it is capable of identifying them.

³⁵ This approach is best exemplified by Hans Kelsen, *Pure Theory of Law*, transl. Max Knight (Berkeley and Los Angeles: University of California Press, 1957).

³⁶ Reisman, 'The Incident', p.18.

It must be remembered that the reason for adopting this approach is the weakness of international legal institutions. Reisman's approach is not to replace case law but to supplement it so that, '[I]ncidents may serve as a type of "meta-law" providing normative guidelines for decision makers in the international system in those vast deserts in which case law is sparse'³⁷. If and when the ICJ and the ICC eventually become powerful international legal institutions capable of providing authoritative statements of IHL that are accepted by elite actors, IHL will undergo a process of clarification and its provisions will be identifiable from the treaties and the court decisions. Until then Reisman offers his realist approach to norm identification.

To be sure, there are many theories of law but the significance of Reisman's Incident Analysis Approach lies in the explicit understanding that the written legal code of IHL cannot alone account for the diverse normative reactions of elite actors to 'incidents' of military behaviour in war. This does not deny the existence of legal norms and their application—rather it accounts for the diversity by recognising the political instrumentality of normative judgments and directs the concerned actor to the behaviour of elites as indicators of what is, and what is not normatively acceptable. It follows that Reisman's advice to the military lawyer would be that to perform a useful function it is necessary to be able to identify the normative positions of the key national and international actors. Without this knowledge it would not be possible to provide the military planners with the necessary breadth of IHL advice.

American Legal Realists stress the connection between law and politics. If law is created by judges who exercise a political role in creating law and that role is constrained by the constitution, what are the political constraints on law created by the behaviour of international elite actors? This is a discussion of state power that is beyond the scope of this

³⁷ Reisman, 'The Incident', p.19.

thesis which does not purport to advance a new theory of state and domestic behaviour. It is perhaps sufficient to observe that for Reisman, in the absence of an authoritative court decision or unambiguous codification, the visible exercise of power is *a* statement of the law. This circular justificatory relationship between power and international law denies any distinction between 'right' and 'wrong' understandings of the law other than as instruments of power and acknowledges the normative content of the key IHL treaties only in so far as they constrain the behaviour of elite actors. Indeed, the behaviour of Reisman's elite actors may or may not describe an IHL that accords with the ethical principles that Just War theorists regard as universal normative principles of *jus in bello*. However, power is not exercised in a vacuum and if these really are universal moral norms based on widely shared values, they will inform the political behaviour of the elite actors and the political, ethical and legal will form a coherent mutually reinforcing statement of IHL. Implicit in Reisman's approach is an understanding that ethical positions are specific to societies and cultures and inform and are informed by those societies and cultures and the internal and external pressures to which they are subjected. Indeed ethics and law are part of society and shape, and are therefore evidenced by, behaviour. Consequently, using behaviour as a statement of law does not deny the relevance of Just War theory to law, or the relevance of Just War thinking to our attitudes to war and how war ought to be fought, rather it recognises that ethical thinking both precedes and follows the legal statement. Whether or not Just War thinking influences the behaviour of Reisman's elite actors must therefore depend on the extent that the societies of which the actors are a part share the moral positions of the Just War theorists. Viewed in this way, Reisman's observation of the incident as the decisional unit in international law is an observation of law, ethics and politics in practice.

Whether or not the observer understands behaviour in ethical, political or normative terms is a matter of analytical choice. Either way, the same behaviour serves to inform the predictive

calculations of the advisor, whether they are political analysts or military lawyers. It follows that when considering the big issues of IHL, whether the discourse is the politics of which side to support, the ethics of civilian suffering or the legality of military operations, the real calculation is one of locating the limits of acceptable military action in the particular context of the armed conflict. Is this a legal, ethical or political calculation? From the perspective of the international lawyer, the question simply does not arise since if law is elite behaviour it encapsulates all three. The fact that so much of political and ethical judgment is expressed in legal terms only goes to prove the point.

This approach to identifying the norms of IHL helps us to understand the disconnection between the strict treaty separation of *ad bellum* and *in bello* judgments and the collapse of the two codes in practice. The elite behaviour of judging the conduct of warfare by actors by an application of the defender/aggressor model is a clear statement that for many actors the law does allow *ad bellum* judgments to inform considerations of the legality of *in bello* actions. The fact that this behaviour may not yet be at the level of the custom and practice of states does not prevent us from concluding that for many actors the law has changed from its formal written form.

Since everyone is capable of expressing a view of the legality of military action, the political question is whose views matter to whom. Who are the key actors whose behaviour is so influential? Reisman does not offer a clear definition of his elite actors. Looking at law in terms of the power and product of legal institutions, suggests that the actors are the municipal courts, courts of foreign countries that use the universal jurisdiction as a coercive tool, and the International Criminal Court. Reisman has a wider focus than this and clearly includes the behaviour of states, influential organisations such as the International Commission of the Red Cross and elite jurists, academics and members of the military such as those who made up the Goldstone mission. The apparent breadth of enquiry can be understood in terms of New

Institutional thinking that can incorporate differing laws, legal ethics and actors within a regime of international humanitarian law³⁸.

To be sure, legal theorists seeking to identify norms in the social processes evident in the behaviour of institutions beyond courts and legislatures have adopted the New Institutional expansive understanding of institutions. The pioneering work of legal philosophers Ota Weinberger and Neil MacCormick applies New Institutional thinking to Legal Positivism to create Institutional Legal Positivism, which recognises the value of positivist logic while treating norms as social facts³⁹. Norms gain their validity through the social processes of institutions rather than as a result of vague moral criteria. Their rejection of Legal Realism as being too narrowly associated with a narrow view of legal institutions⁴⁰ suggests that Reisman's analysis could very well be viewed with favour. Perhaps the doctrinal disagreement would arise over the primacy of international appellate courts as their jurisprudence expands. The value of Institutional Legal Positivism to this thesis is its import of sociological theories of the institution into legal scholarship without losing sight of the importance of normative behaviour. The concept of the institution is intended to lift the level of analysis above the isolated individual in order to identify the normative behaviour of the individual as an element of a larger social structure. Drawing lines round structures to identify institutions is strongly resisted by Weinberger⁴¹; the complications arise from the

³⁸ See the discussion of New Institutionalism in chapter 1.

³⁹ See, Ota Weinberger, *Law, Institution and Legal Politics, Fundamental Problems of Legal Theory and Social Philosophy*, (The Netherlands; Kluwer Academic Publishers, 1991) and Neil McCormack and Ota Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism*, (Dordrecht, Holland; D. Reidel Publishing Company, 1986), available at: http://books.google.co.uk/books?id=evOn9D6dmkcC&printsec=frontcover&dq=Neil+McCormack+and+Ota+Weinberger,+An+Institutional+Theory+of+Law:+New+Approaches+to+Legal+Positivism,&source=bl&ots=aj-HkdkXmO&sig=IpQbupJHcXh3_-PUf2KvG5l4sqc&hl=en&ei=kx_pS7HzLYz-0gSsp9TRDA&sa=X&oi=book_result&ct=result&resnum=1&ved=0CBUQ6AEwAA#v=onepage&q&f=false (Last accessed 10 May 2010).

⁴⁰ Weinberger, *Law, Institution*, pp. 210-211.

⁴¹ Weinberger, *Law, Institution*, p. 24.

constant shifting of focus between the individual as an signifier of institutional norms and the institution as a larger social grouping that exerts a normative influence on the individual.

Institutions can be social organisations or normative structures- a chess club but also the rules of chess. Hence institutions are a form of communal action and the social arrangements that make those actions possible. Institutions are the place of action and the result of interaction.

As Weinberger puts it:

The term “institution” denotes a family concept of a particular kind: wherever we refer to institutions, the reference infers something that contains the same essential ingredients: namely, relations between individuals and a community, relations with a certain tendency to permanence, relative regularity and narrative order. Nevertheless, the institutions are so varied that it is impossible to set down a unified class of attributes to define all of them.

Clearly, analysis of this sort is open to the criticism that the basic concept is so imprecise that it undermines any useful insights it might throw up. While there is an apparent similarity in Reisman’s and Weinberger’s focus of regard, Wienberger is looking to institutions to account for the creation of normative behaviour as well as evidence of the existence of the norm, Reisman is simply attempting to identify the norms. Nevertheless, consideration of Institutional Legal Positivism does suggest that there is good reason to adopt a wide focus when following Reisman’s prescription to examine the behaviour of elite actors as signifiers of IHL.

Taking a broad view of legal institutions brings into consideration practicing lawyers of international repute such as Judge Goldstone, academic lawyers of international repute, international NGOs such as Amnesty and Human Rights Watch, and domestic NGOs such as the respected Israeli NGO B’t Selem. In addition there are the judgments of actors such as international institutions, international allies and enemies. The political calculation must be one of who the key international and national actors are and the limits of their toleration or condemnation. Adopting a purely instrumental approach, the question that the military is really asking its military lawyer is whether a proposed action is likely to sufficiently offend

IHL that a key actor is going to condemn the behaviour in legal terms not- whether or not those terms are legally correct⁴². Additionally, the commander may well ask whether a proposed action is going to result in personal legal liability with the possibility of real personal consequences. This is an entirely different question since it requires an assessment of likely court action at the domestic, foreign (under the universal jurisdiction) and international levels (ICC). Ultimately, the choice of law is a matter of political contestation that is best understood as expressing a preference for one or more of Adler's 'communities of practice'.

3) Military lawyers as legal advisors.

The foregoing analysis suggests that the military lawyer's knowledge of the law will need to be drawn from a variety of possible sources and that the choice of whose law to consult will be an overtly political process. One would expect that deciding whose law to apply to military operations would be an institutional position determined at government level. Certainly, the Israeli Foreign Ministry monitors the legal positions of various actors⁴³. Their International Law Department monitors legal responses to Israeli military actions. In addition, there are institutional links between Israeli diplomats, military and legal personnel that evaluate understandings of IHL among key actors. Israeli military and Foreign Ministry lawyers regularly meet their opposite numbers in NATO and the US and are aware of each other's positions on key issues in IHL. As Mandelblit testified to the Winograd Commission, there are regular meetings between Israeli military lawyers and their opposite numbers in the

⁴² Holmes used the concept of the 'bad man' to illuminate his view of law in purely instrumental terms: 'If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict'. Oliver Wendell Holmes, *Collected Legal Papers*, (London: Constable & Co., 1920), p. 171. However, this surely over states the relevance of coercion to obedience of the law. We can add the concept of the 'good citizen' to acknowledge the organisational power of identity, which allows recognition of the importance of respect for the institution of the law and the good opinion of others as drivers of behaviour.

⁴³ See, author's interview with Daniel Taub, Deputy Head of the International Law Department of the Israeli Foreign Ministry, at Jerusalem on 18 May 2009

US military as well as with military lawyers from other countries with whom Israel maintains friendly relations. This is not just a matter of keeping track of attitudes. It is part of the process of observing the behaviour of key elites in response to Israeli military actions (Riesman's 'incidents') and the normative positions of 'communities of practice' whereby Israel and its military lawyers identify the IHL that matters.

This monitoring of the behaviour of elites can be seen as part of the process that creates the legal knowledge that is made available to the military lawyer. If this is correct, one would expect to find that the Israeli Foreign Ministry and Israeli actors with knowledge of the behaviour of key international elites have channels of communication with Israeli military lawyers. This can be seen as part of Bark and Sheffer's security network and it should be no surprise that the International Committee of the Red Cross organises regular symposiums on IHL with Israeli academic lawyers and Israeli military lawyers with guest experts from abroad⁴⁴ or that the senior lawyers in the Israeli military international law department (IDL) have regular meetings with their allied opposite numbers, frequently attend international symposia and work closely with the legal department of the Israeli Foreign Ministry⁴⁵. However, ultimately the military lawyers are serving military officers tasked to assist the military in the achievement of its military aims and these institutional interests may conflict with government policy. This suggests that the choice of IHL is a matter of political contestation with institutional constraints.

Assuming that the lawyers' legal veto stands, knowledge of contradictory understandings of IHL and the details of operations that the IDL has approved enables the outside observer to identify the particular construction that the legal advisor will have used when advising in the grey area. Why the choice was made in this way will be a product of the military,

⁴⁴ Author's interview with Eitan Diamond, legal director of the Israeli ICRC at Tel Aviv on 25 May 2009.

⁴⁵ Author's interview with Pnena Shavit-Baruch, former head of the IDL, at Tel Aviv on 21 May 2009.

governmental and legal institutional regimes that constrain the actions of the lawyers. In the following chapters case studies of controversial Israeli military operations that have been the subject of widespread legal comment will allow conclusions to be drawn about the legal choices made by the IDL and the extent to which they have been used constrain the Israeli military.

4) Conclusion

This chapter has drawn on legal, ethical and IR scholarship to understand the plurality of IHL and the exercise of choice by the military lawyers. Previous chapters have examined the political utility of IHL and its formal judicial processes in the context of the international system, where law is used by political actors to challenge or endorse the legitimacy of military operations. The regulations that make up IHL have been analysed and shown to be imprecise; the legal balancing of humanitarian aims and military objectives produce grey areas of law and inconsistent legal positions. These opposing legal positions are evidenced by the diametrically opposing positions of NGO lawyers and military lawyers when applying the same legal regulations to the same facts of military behaviour. Consideration of Just War Theory revealed similar polarities within Just War thinking that fail to agree on a 'right' understanding of the grey areas of IHL, instead providing ethical support for, and generation of, the various legal interpretations. In these circumstances how should a military lawyer correctly identify the law to apply to the facts of a proposed military action?

In this chapter we have arrived at the position that there may be no 'right' answer in strictly legal terms. Rather, in the absence of a powerful international court, key areas of IHL are pluralistic. Adopting an American Legal Realist approach, and in particular Michael Reisman's Incident Analysis as an identifier of international laws, coupled with a communitarian view of communities of practice, allows the confused state of IHL to be

accepted and identified in the diverse political behaviour of international elites . Viewed from this perspective, the plurality of IHL is neither a surprise nor a problem. The objection to uncertain law is that it is unpredictable and arbitrary, but law is a product of the society that it is designed to serve and, in the absence of a cohesive global society, international law is both constructed by, and at the service of, the various international elites that employ law in the furtherance of their own interests and those of the communities they represent. *Ad bellum* legal judgments are politicised and vary according to the perceived status of the actor as either aggressor or defender and this judgment influences *in bello* legal assessments despite the formal legal separation of the two codes. It follows that actors with different views of the 'rightness' of the resort war will apply different standards of *in bello* judgment or 'law' to the actions of the parties to the conflict.

Applying Reisman's analysis to the role of military lawyers is to recognise the behaviour of elite actors in response to Israeli military operations as an expression of IHL and an indication of how those actors are likely to view the legality of future Israeli military operations. This means that, rather than rail against the uncertainty of IHL, the legal advisor should accept the troubling notion, rejected by mainstream legal philosophy, that there is not IHL but IHLs and advise the military accordingly. In so doing the lawyer is exercising choice among competing constructions of IHL that reflect the understandings of differing domestic and international actors- whether elites or communities. It is tempting to suggest that when taking stock of IHL in planning its operations, Israel may have particular regard to the IHL promoted by the White House. After all, Israel and the US can be seen as members of a security community that requires a degree of shared values and shared expectations of behaviour that includes military behaviour. However, the fury expressed by Jerusalem at the 'bias' of the Goldstone Report, and the allegations against the Israeli elite perused through the Universal Jurisdiction, indicate the need for a more nuanced appreciation of the plurality

of IHL and the likely future reactions of elite actors whose opinion may also count. This methodology recognises that the IDL is exercising choice in its construction of the law that it applies to the IDF military operations and asks the question, not whether their legal constructions are right, but rather which version of IHL they have chosen to apply and whose interests does it serve? These issues will be explored in the following chapters by reference to case studies of controversial Israeli military operations that received the prior approval of the IDL.

Introduction to the Case Studies

This section of the thesis is arranged as follows:

Case Study 1. The Second Intifada: the targeted killing of Salah Shehadeh

Case Study 2. The 2006 Lebanon War

Case Study 3. Operation Cast Lead

Case Study 4. The 2010 Turkish Flotilla- the Mavi Marmara Affair

The case studies have been selected to enable the examination of the role of the IDF lawyers (IDL) in some of the more controversial IDF military operations that occurred between 2000 and 2010. The time frame coincides with the increased involvement of the IDL in operational decision making that began in the Second Intifada and has been increasing ever since. The analysis is informed by the author's interviews with IDL officers, including Colonel (Rtd.) Daniel Reisner and Colonel (Rtd.) Pnina Sharvit-Baruch, the two IDL senior officers whose periods of service in command of the IDL span the period under examination. As such, these case studies present original research material in an area that has thus far received little attention.

Each of the case studies reveals how the IDL was used by the IDF to address new operational military challenges that tested the boundaries of International Humanitarian Law. The first case study concerns the IDF use of military force against a Palestinian rebellion against Israeli rule. The IDL was required to provide a legal analysis that allowed the IDF to employ the full force of its military might to crush an insurgency increasingly defined by the use of a campaign of suicide bombing. The case study examines the Israeli policy of targeted killing and the IDL's

construction of legal guidelines for the institutionalisation of the process. The second case study sees the IDF conduct a war against Hezbollah, which required a legal framework that set the limits of military conflict against a non-state actor conducting operations from a sovereign state. The case study focuses on the targeting decisions against an enemy concealing itself and its military operations among its own civilians. The legal question here was the extent to which the humanitarian provisions of IHL could be relaxed to meet the needs of the military in such situations. The third case study looks at the Israeli military conflict against Hamas in Gaza during Operation Cast Lead. Here, the IDL developed their Lebanon legal analysis to address the further problem of a terrorist organisation that has governing functions within a distinct territory that has not acquired the status of a state. The final case study looks at the role of the lawyers in Israel's strategy of blockading Gaza and, in particular, the *Mavi Marmara* affair. This case study exposes the role of the IDF lawyers in the construction of a legal regime that enabled the use of force against apparently humanitarian convoys, with the suffering of the citizens of Gaza as a proportionate price for the improved security of Israeli citizens living in the south of the country.

Previous chapters have identified IHL in practice as an uneasy balancing of humanitarian and military concerns that complicate targeting decisions. The key principles of distinction that separates what can be targeted from what cannot, proportionality that puts a limit on collateral damage and military necessity that seeks to exclude unnecessary harm are all imprecise constraints on military targeting. In the absence of a robust structure of international courts, the targeting law in practice remains pluralistic and subject to the pushes and pulls of political contestation. To be sure, ethical principles inform legal judgment and structure the legal and political debate so that each case study considers the legal decision making in its ethical context. Indeed, it is useful to recognise the conflicting legal and ethical positions as part of a regime of international humanitarian law than right of wrong legal and ethical positions. Discussion of the

case studies frequently returns to the key issue about which the considerations of law, politics and ethics coalesce: the extent to which Israel is prepared to risk the loss of life of its soldiers to spare hardship to 'their' civilians- force protection when fighting non-state actors.

Research has revealed the extent to which the IDL has become involved in IDF target selection. This allows each case study to examine specific military operations that the IDL reviewed in advance. Military security has not allowed the interviewees to reveal the details of their legal advice, although they do say that their advice was followed. This means that by only looking at the military operations that took place and that the IDL would have been involved in, the discussion focuses on what they must have approved. Further limiting the focus to the operations that have come under heavy international legal criticism puts the hard decisions under the spotlight. Where possible international fact finding reports prepared by UN missions and NGOs have been examined to present the critical IHL positions and the Israeli legal defences have been used to imply the legal arguments that the IDL will have used to approve the operations. This has enabled judgments to be made on the role played by the IDL in controversial targeting decisions including targeted killings, bombing villages in southern Lebanon, Shiite districts of Beirut, the Hamas government infrastructure and police force, the imposition of the Gaza naval blockade and the seizure of the Turkish flotilla.

Each case study addresses the question of the extent to which the IDL adopted a permissive construction of IHL that met the needs of the IDF and meets the less exacting standards of communities of practice comprising those states whose militaries are engaged in fighting terrorism and insurgencies. Such a legal advice would, of course, enable the Israeli military to condition the battlefield by putting in place a construction of IHL that best meet its operational needs. The case studies are also used to test the three hypotheses that were posed in chapter 1 to account for the increased involvement of military lawyers in IDF operational decision-making:

- 1) The application of international law by the Israeli Supreme Court,
- 2) The threat of foreign prosecutions of Israeli decision-makers for war crimes and
- 3) The increased use of International Humanitarian Law as a measure of the legitimacy of military action.

Finally, the case studies reveal a more general observation that will be explored in the concluding chapter: the importance of IHL to the military as a civil institutional regime that must be engaged with both domestically and internationally in order for the IDF to achieve its military objectives and for a more robust civil control of the military.

Before, considering the case studies, a further note on methodology is appropriate. This research is heavily reliant on interviews with former officers of the IDL. The interview method was one of unstructured interviews designed to allow consideration of the lawyers' understanding of their role in military, legal, ethical and political terms. Open source material including government reports, NGO reports and newspapers were used to authenticate information given in interview. Assistance was also derived from the International Committee of the Red Cross. The main constraint was that the IDL had only become routinely involved in operational decision-making since 2000 and the military interviewees could not discuss the specifics of recent operations. Nevertheless, sufficient original information was obtained to allow useful observations to be made and conclusions to be drawn that make a real contribution to a scholarly understanding of the role played by Israeli military lawyers in operational decision-making.

Chapter 6: Case Study 1: The Second Intifada: the targeted killing of Salah Shehadeh

1. Introduction

The Second Intifada¹ began on 28 September 2000 when violence erupted following Ariel Sharon's visit to the temple mount in Jerusalem. This marked the end of the optimism of the Oslo years when peace had seemed possible. There is no firm date for the ending of the intifada but the assumption of power by Mahmoud Abbas in 2004 and the negotiations that led to the Israeli disengagement from Gaza, are generally taken as indicators of an end to the uprising.

The Second Intifada was qualitatively and quantitatively different from the Palestinian resistance that had gone before. Past terrorist violence had largely been instigated from across Israel's borders and the civil unrest of the First Intifada had been associated more with stone

¹ Also called the Al-Aqsa Intifada and the Second Palestinian Uprising.

throwing than bombings. Suicide bombing was the signature attack of the Second Intifada; terrorist attacks took the struggle for Palestinian nationalism to Israeli cities with unprecedented Israeli civilian loss of life². Once the Israeli government characterised the Palestinian violence as an existential threat, the stage was set for the use of unprecedented military force to quash the uprising. The adoption by the IDF of new and harsher tactics to suppress the Second Intifada took place in an uncertain legal environment and came at a time of increased legal activism at home and abroad. It will be argued in this case study that this legal and military context generated a demand from the military that its operations would not be disrupted by legal challenges, or its commanders prosecuted for war crimes- a demand that led to a new institutional role for the IDF International Law Department and a much increased involvement in operational decision-making. The Salah Shehadeh affair is used to illustrate how this worked in practice.

2. A new paradigm

From the beginning, the Israeli response to the Second Intifada was to meet violence with violence. However, it was the election of Ariel Sharon's right wing Likud government in 2001 and widespread disillusion with the peace process that led to the adoption of severe measures to crush the uprising. On 4th December 2001, after a weekend when 26 Israelis were killed and 230 injured, Sharon abandoned the discourse of policing the occupied territories in concert with Arafat's security forces and declared to an angry public that Israel was at war

² Israel Ministry of Foreign Affairs, *Suicide and Other Bombing Attacks in Israel Since the Declaration of Principles (Sept 1993)*, available at, <http://www.mfa.gov.il/MFA/Terrorism-%20Obstacle%20to%20Peace/Palestinian%20terror%20since%202000/Suicide%20and%20Other%20Bombing%20Attacks%20in%20Israel%20Since>. [Last accessed 11 March 2011].

with the terrorists³. His choice of words, clearly echoing Bush's War on Terror, avoided any reference to war with the Palestinian Authority (PA) since this would imply some recognition of statehood. The intifada was characterised by the Sharon government as an existential threat to the Israeli state and the response was not to be one of law enforcement, diplomacy or a more restrictive occupation; the response was to be warfare whereby the enemy was to be killed or captured and control regained within the limited restraints of the laws of war. This was to involve re-occupation of areas that had been put under limited PA control following the Oslo Accords, destruction of Arafat's administrative infrastructure, mass detentions and a stepping up the policy of targeted assassination. In the absence of a clear legal regime that fitted the new strategy, Sharon adopted the Talmudic formulation, 'He who is going to kill us, his blood will be shed by us'⁴. As the ancient legal authority for pre-emptive killing, this signalled the importance attached to targeted killing both in terms of counter-terrorism strategy and as a statement to the Israeli public that the state would reach out to the suicide bombers and kill them. To an Israeli public that had seen clubs, restaurants, buses and celebrations blown apart this policy received and continues to receive popular approval. This was a very different agenda from the Oslo years when policy was influenced by a gradual recognition of Arafat's police force as a partner if not for peace, then at least for increased security. The Palestinian administrative infrastructure was now to be a target in the resumption of absolute Israeli control⁵. This policy had been an election winner. Sharon's very public presentation of targeted killing as the answer to suicide bombing indicates that it was to play a key role in combating the intifada.

³ 'Full Text Sharon's Address', *BBC News*, 4 December 2001, available at, http://news.bbc.co.uk/1/hi/not_in_website/syndication/monitoring/media_reports/1690673.stm. (Last accessed 3/11/2010).

⁴ Sanhedrin 72a

⁵ Prime Minister Ariel Sharon's Political Address to the Knesset 8 April 2002, *IMRA*, 8 April 2002, available at, <http://www.imra.org.il/story.php3?id=11188>. (Last accessed 3/11/2010).

Operation Defensive Shield began on 29 March with incursions into areas previously placed under Palestinian control, including Ramallah, Tulkarm, Jenin, Nablus, Nazareth, and Qalqilya. In a very high profile operation Arafat was effectively confined to his administrative offices while the administration of the Palestinian Authority was destroyed around him. Moshe Yaalon, former IDF Chief of Staff sees an increase in targeted killing as integral to the policy,

Effective counterterrorism should be based on two guiding principles. The first of these is that the best defence is a good offence...Israel has further exemplified this principle since the April 2002 Operation Defensive Shield, when the IDF moved from the defensive to the offensive, including the use of targeted killing as a defensive tool. It should be emphasised that the targeted killings in the aftermath of Munich and those since April 2002 serve different purposes: while both deterred future attacks, the former were additionally intended to punish, while the latter were intended to pre-empt, terrorist attacks.’⁶

This new paradigm raised awkward legal questions at a time when the Israeli Supreme Court had evidenced an increased interest in the legal regulation of the IDF’s activities in the Occupied Territories. As was noted in chapter two, studies of the Supreme Court agree that in the 1990s the Court had begun to make significant judgments involving the conduct of the military in security matters. While there is some disagreement about the extent to which the Court was prepared to find against the military, there is a consensus that the Supreme Court under Chief Justice Barak was promoting the institution of the court as a mechanism of democratic oversight of the military, particularly the military in the Territories. As Mandelblit put it in his testimony to the Winograd Commission, ‘This simply put us in a position where we had to give many answers to petitions’.

Some aspects of declaring war on terrorists in the occupied territories were to raise complex legal issues. How exactly was war to be conducted against a population under occupation that

⁶ The Washington Institute for Near Eastern Policy, *Lessons from the Fight against Terrorism; a forum following a screening of the film Munich*, Peace Watch# 533, special forum report. 29 December 2005, available at, <http://www.washingtoninstitute.org/templateC05.php?CID=2427>. [Last accessed 11 March 2011].

had legal rights both under international humanitarian law and under international human rights law? In what circumstances, if any, could civilians be targeted for assassination?

As has already been noted, international humanitarian law is largely but not exclusively codified within the Hague and Geneva Conventions. The Fourth Geneva Convention provides a framework for the military administration of occupied territory and the protection of civilians during military conflict⁷ within a regime that balances civilian protection with military necessity. International human rights law (IHR), on the other hand, recognises the right to life and confers human rights by way of international treaty and declaration. International law recognises an uneasy relationship between the two codes whereby they are considered to apply in tandem, although in circumstances of armed conflict and occupation IHL is understood to take preference⁸. Put very simply, if IHL does not allow a military act, it will usually fall foul of IHR. Israel's administration of a semi-permanent occupation had developed a legal character all of its own; however, in 2000 the position was less clear.

By 2000, Israel's maintenance of a near forty-year occupation without formal annexation had been facilitated by a multi-layered legal system designed to privilege Israeli residents of Israel and Israeli settlers, while the rights of the Palestinian population were shrouded in ambiguity. The legal regime of the Geneva Conventions is designed to maintain the pre-existing structures pending termination of occupation and is not designed as a long term replacement for the laws and legal institutions of the occupied population. This meant that in the absence of formal annexation a legal melange had developed to allow limited Palestinian institution building while maintaining Israeli control and settlement⁹. Although Israel was clear that Israeli sovereign law applied to the residents of the settlements and Israeli military law applied to the Palestinian residents of the Occupied Territories, there was a genuine

⁷ See Chapter 3.

⁸ The Legal Consequences of the Construction of a Wall in The Occupied Palestinian Territory, [2004] ICJ.

⁹ See Chapter 1, The application of international law by the Israeli Supreme Court.

uncertainty about the relationship in practice of IHR and IHL and the nature of Palestinian human rights. The Oslo accords themselves raised another layer of complexity by changing the status of some parts of the occupied territories by allocating security and civil control between Israel and the Palestinian Authority depending on whether they were in areas A, B or C¹⁰.

With Arafat now firmly identified as part of the problem rather than part of the solution, the complex, area-specific arrangements for Palestinian security responsibility did not sit well with a military strategy that was to include action against the Palestinian administration's civil and security infrastructure. Furthermore, Israel's use of creative legal analysis to challenge the legitimacy of treaty monitoring bodies and resist judicial interference in matters of security made the analysis even less clear.

To be sure, the IDF had been operating within this uncertain legal environment for many years and targeted killing had been frequently employed. However, as has been noted earlier¹¹, during the relative quiet and optimism of the Oslo years the Israeli Supreme Court, under the direction of Chief Justice Aaron Barak, had involved itself in the legal determination of security issues that had previously been left to the unchallenged discretion of the IDF. Thus by the start of the Second Intifada the Court had already demonstrated its power to review and to a limited extent control military operations in the territories.

At the international level, June 2001 had seen Ariel Sharon and Amos Yaron indicted in Belgium for war crimes arising out of the Sabra and Shatillah massacres of 1982, sparking a

¹⁰ Under these agreements, the West Bank was divided into three different zones: 'A' areas in which both civil and security matters were in the hands of the Palestinian Authority established under the agreements; 'B' areas, in which security control remained the responsibility of Israel, while civil matters were the responsibility of the Palestinian Authority; and 'C' areas in which Israel retained responsibility for security matters while responsibility for civil matters was divided between Israel and the Palestinian Authority. In Gaza there was a similar, although not identical, arrangement.

¹¹ The increasing involvement of the Israeli judiciary in security matters is discussed in chapter 1.

sudden interest by Palestinian NGOs in the universal jurisdiction as a tool to bring Israeli political and military elites to justice. The point to be emphasised here is that when the second Intifada erupted, and particularly after Sharon took office, the IDF found itself using military power against an occupied civilian population where the law was uncertain and where the Courts at home and abroad could intervene at any time. It was within this military and legal context that legal knowledge assumed a greater value and the previously neglected IDF International Law Department found its services in demand- particularly when it came to targeted killing.

3. The involvement of the lawyers

The Israeli military lawyers that deal with international matters such as military obligations under treaties, maritime law and the laws of war work in the IDF International Law Department (IDL). They are under the command of the Military Advocate General (MAG) who is subordinate to the Chief of Staff but is answerable to the Attorney General in legal matters. In 1989 there were five lawyers and by 2009 the department had grown to twenty. In time of war their number is further increased by drafting in reserve officers. However, it is not the increasing size of the department so much as its expanding scope that is of interest to this study. Col. (Res.) Daniel Reisner served as Head of the department from 1995 until 2004, having joined as a legal adviser in 1985. As such, he has been best placed to observe the department's changing role.

In fact, within weeks of the outbreak of the intifada Reisner was used by the IDF to explain to the press the methods that the IDF were employing and why they were a legal response¹².

¹² Israel Ministry of Foreign Affairs, *Press Briefing by Colonel Daniel Reisner- Head of the International Law Branch of the IDF Legal Division*, 15 November 2000, available at, http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2000/11/Press%20Briefing%20by%20Colonel%20Daniel%20Reisner-%20Head%20of. [Last accessed 11 March 2011].

While keen to make the point that the IDF was exercising restraint, Reisner was at pains to establish a new paradigm,

These differences between '87 and today are some of the reasons why we no longer view the legal situation as being the same. From a legal perspective, international law, classical international law, actually only recognizes two situations: peace or war. But life isn't as simple as that, and there are lots of terms running around the concerning the in-between. "Lower intensity conflict", "limited war", etc. Be the term what it may, the current situation, the fact that now a large percentage of the attacks involve live weapons, that we are facing a Palestinian authority, that we are facing a Palestinian security service which in part is taking active participation in hostilities, has brought us to the conclusion that we are no longer in the realm of peace. So where are we? While we are not at the end of the spectrum, which is war, because war is a conflict between two armies or two states, we are definitely in the area of armed conflict. Call it what you wish, some call it "un-conflict", some call it "active hostilities" - whatever the term you wish to use that's fine with us, but please understand that for us, we have reached the decision, and I think I would be quoting the Attorney General, who I saw yesterday on television, saying that the current situation has more of a semblance of war than of peace. As a result, we are also applying the principles applicable to warfare to the current situation, and no longer the principles applied in a time of peace.

Reisner made it clear that the rules of engagement had changed in accordance with his department's legal advice,

Up to the current events, the rules of engagement of the Israel Defense Forces in the West Bank and Gaza Strip were police rules of engagement. Use of live weapons only in self-defense, or after a warning shot to carry out an arrest, which is not relevant right now because we are not involved in arresting people at this point in time - that's historical from our perspective. In all other cases when you're not in a life-threatening situation, you are allowed to use non-lethal weapons systems which I'll deal with in a few minutes. When this new situation came about, and we came to the legal decision that we have crossed the line between the area of peace and the area of let's say active hostility, I came to the Israeli military and said, "We can, at this juncture, look again at our rules of engagement, and they can move down that scale a bit more." Because the facts have changed... Up to the current events, the rules of engagement of the Israel Defense Forces in the West Bank and Gaza Strip were police rules of engagement. Use of live weapons only in self-defense, or after a warning shot to carry out an arrest, which is not relevant right now because we are not involved in arresting people at this point in time - that's historical from our perspective.

This statement to the press, which was followed by a question and answer session, is indicative of the advisory role that Reisner's department was playing at the time and of the nature of the legal advice. Placing the conflict somewhere between policing and warfare appeared to rely on complexity to enable military tactics against civilians. The fact that Reisner is giving the statement in the first place has the head of the International Law

department describing the new security tactics within a mixed security and legal discourse that is characteristic of what Clarke calls processes of legitimisation. Reisner's department was to do more than advise and explain- it was to become routinely involved in operational matters.

Reisner recalls that when he joined the department, they were giving advice on issues involving the West Bank and the Gaza Strip but were not directly involved in operational matters¹³. Reisner would be involved in drafting rules of engagement that reflected a policing role in the West Bank. He recalls that his department was using rules of engagement that were similar to those used by the British army in Northern Ireland. The work of the department changed as the army engaged in operations that went beyond a policing role and asked about the legality of their operations in the West Bank and Lebanon. This resulted in the department becoming writing legal annexes to operational orders covering issues such as POW detention and the protection of civilian objects. Involvement was within the operational world but always pre-operational.

In fact, Reisner already had experience of the department playing an operational role, albeit an unusual one. This had been in 1988 when he was sent to sea to accompany the Israeli Navy Flotilla Commander tasked to intercept the Palestinian refugee ship Exodus. His task was described to him by the Flotilla Commander as, 'if we come close to that ship and they start shooting at us I want you to tell me if I can shoot back'. Reisner remembers saying to himself 'this is a different type of law they are asking me to practise, unlike the law which I previously had been practicing in my office'. In fact there was no confrontation at sea as the vessel was sabotaged in Limassol harbour before it had time to set sail, probably by Israel's

¹³ Author's interview with Reisner, Jerusalem, 24 May 2009.

elite naval commando unit Flotilla 13¹⁴. Reisner maintains that after he became Deputy Head of the Department he began, in the early 1990s, to push the IDF to accept operational legal advice as a 'product we can offer the army'.

Reisner is clear that the Second Intifada led to a sharp increase in the involvement of his department in military operations. Reisner's views are confirmed by Colonel (Rtd.) Pnina Sharvit Baruch, who joined the IDL in 1989 and later replaced Reisner as head of the IDL, retiring after Cast lead in 2009¹⁵. She recalls that the military lawyers had not been involved in operational matters during Israel's conflict with Lebanon between 1982 and 2000 and agrees with Reisner that the changed role evolved during the Second Intifada. Her recollection is that the military found that the regulations governing the Occupation did not reflect a reality that Israel had characterised as war. In these circumstances, there was a demand for access to legal knowledge to understand the level of military violence that could legally be used to put down the intifada. Reisner believes that the catalyst was the issue of targeted killing,

The major change happened during the Second Intifada because Israel moved from a law enforcement model to an armed conflict model. This raised the question of whether military hardware could be used in a military fashion- when tanks could be used for instance. This came to a head when discussing the issue of targeted killing when we were asked point blank whether we could lawfully deliberately go and kill someone.

The problem, of course, arose from wanting to use the power recognised under international law as pertaining to an armed conflict between states, in circumstances where Israel was very keen to avoid any suggestion that the institutions of the Palestinian Authority amounted to anything of the sort. On the other hand, tactics of targeted assassination were inappropriate to a law enforcement situation, even one that was taking place in occupied territory. Reisner's

¹⁴ Serge Schmemmann, 'Raiding Party in Lebanon belonged to Elite Unit', *New York Times*, 6 September 1997, available at <http://www.nytimes.com/1997/09/06/world/raiding-party-in-lebanon-belonged-to-elite-unit.html> (last visited 20 May 2010).

¹⁵ See, author's interview with Pnina Sharvit Baruch at Tel Aviv, 21 May 2009.

legal department constructed their advice to meet the Israeli understanding of the operations as 'anticipatory self-defence'. If the targets were to be terrorists bent on Israel's destruction, their elimination became a matter of self defence and therefore permissible whether or not a state of war was in existence. In the opinion of the IDF International Law Department, this legal formulation gave the military the right to carry out its liquidation policy in the occupied territories. This was consistent with the official Israeli discourse of preventative strikes and targeted frustration. The opinion, written in early 2001, remains classified and according to Reisner set out the following criteria for a legal kill:

- i) Only target actual terrorists or their command level. No political or religious leaders or philosophers or support structure.
- ii) You can only target if there is no viable arrest opportunity.
- iii) Any attack must be proportionate in the law of war context.
- iv) You can only launch an attack in areas where Israel does not have security responsibilities. You cannot do this in a place where you must be able to arrest someone.
- v) This must be a Ministerial level decision (since we did not want this to be an operation that could be signed off by the Chief of staff or someone)¹⁶.

The legal guidance reflects an eclectic mixture of concerns: there is the IHL requirement of proportionality to provide some measure of protection for bystanders; the requirement for arrest rather than capture suggests that law enforcement is to be preferred where possible. Limiting the operations to where Israel did not have security responsibilities implies recognition of the Oslo framework of divided responsibility for security. The IHL principle of distinction is imported in a strict but imprecise form to limit the operations to 'actual terrorists or their command level'. Finally, to preserve direct political control, these operations were to be under direct ministerial supervision.

¹⁶ Author's interview with Reisner.

A brief analysis of Reisner's opinion to the military reveals the complexity of the legal position. If this is a military operation regulated by IHL, the principle of distinction allows the targeting of only enemy combatants or enemy civilians that have lost their privileged status by engaging in armed conflict. Why then is there an obligation to apprehend where it is practical to do so when there is no such requirement when conducting military operations? If this is a police operation to foil an attack, the normal strict rules of self-defence and proximity of attack apply. Added to that, there is the familiar problem of proportionality.

The very formulation of the guidelines by the legal department is an exercise of institutional power. Moreover, the fact that Reisner's legal prescription asks as many questions as it answers increases, rather than dispenses with, the need for real time legal advice. As Reisner puts it, 'After receiving this opinion the army said that these conditions are a little difficult to implement'. According to Reisner the military had difficulty in understanding how to decide who is in which circle of terrorism, how reliable the intelligence must be, when an arrest is viable and the limits of proportionality. Consequently, having got their legal advice, the IDF decided that they needed a lawyer from IDL in the room during the operational discussions of whether to kill someone, when, where and how to do it. The IDF had put together a legal justification for the use of lethal force where there existed no war and no possibility of effective policing. In so doing they had created a legal framework for an administrative process for the liquidation of Israel's enemies that preserved the political echelon's power of veto. The process of targeted killing had been institutionalised by the lawyers five years before the Israeli High Court ruled on the issue¹⁷.

¹⁷ The Palestinian Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v The Government of Israel and others. Ref HCJ769/02, available at, http://74.6.146.127/search/cache?ei=UTF-8&p=http%2F%2Felyon1.court.gov.il%2F&fr=mcafee&u=elyon1.court.gov.il/files_eng/02/690/007/A34/02007

However, it was not only the politicians that had a veto. Both political and legal sources confirm that if the lawyers say that an operation is unlawful it does not go ahead. Reisner is clear that he has vetoed operations that the military were very keen to carry out and although there had been efforts to have his decision reversed, his view prevailed. Given the nature of the operation, where the legality of the killing depends on what is known at the time of the attack, decisions on the lawfulness of the operation demand close contact with the IDL legal team including involvement of the lawyers in real-time operational decision-making. Reisner gives a chilling example of his involvement, and it is worth quoting at length,

One case stays in my mind, which was where there was a huge proportionality problem. I was called unexpectedly to a targeted killing meeting. The meeting was in mid-session and they had not called me before, which meant that they had encountered a problem that they had been unable to resolve without a lawyer. These people had received our advice in the past and usually knew what to do without involving us. The problem was that a three man terrorist squad had kidnapped an Israeli agent who was a Palestinian. They were currently holding him in an apartment and interrogating him somewhat unpleasantly. They were going to finish interrogating him and then kill him. I asked whether their question of me was whether they could launch a missile right now and kill all of them including the suspected agent. My opinion was that this did not look like a proportionality problem. They said that they knew that already. Their concern was that the mathematical assessment of the missile strike gave an 80% probability that the next door apartment, about which they knew nothing, would be destroyed or at least suffer serious damage. Their question was whether they were allowed to launch the attack. I said that, on that information I had no idea. I then spent 15mins giving orders for more information. We had a drone in the air and an agent on the ground. I asked questions like whether there was washing hanging outside etc. I served in the Territories for 20yrs so I had some idea what to ask. At the end of the day the next door apartment looked closed and I said to them 'Look if it's an orphanage we are screwed and if it's the local Hamas headquarters we are fine'. They said 'OK but can we?' I told them that it looks more probable that it is an empty apartment because there are no signs of life but that this was one of those cases where there was no clear rule. I told them that it did not look to me as if it was an automatic war crime if they decided to launch the attack because they could legitimately claim that they had made a determination that there was a good chance that it was an empty apartment. However, I told them that they were taking a risk because although the law says that you are not supposed to be judged on the basis of hindsight, if something bad were to happen you would have to argue that you made a reasonable determination on the basis of the information you had at the time, and that is a tough sell if something bad happens. I told them it was not an obvious no. In fact they did not launch the attack. This was not because of me. They took my answer as a yes. It was because they could not get the ministerial level approval in time.

Former Deputy Defence Minister Ephriam Sneh confirms that the decision to carry out a targeted assassination needs political approval from the top¹⁸. The recommendation is from the Shabbak and although the lawyers are not usually present, their written opinion is considered at the meeting. Sneh confirms that the lawyers have an effective veto so that if they say no the operation does not proceed. Nevertheless, whether the procedure is always followed in practice is open to doubt. At the time of writing, the current police investigation of Anat Khan concerns her theft of documents while working at the office of the Head of Central Command. The documents that Khan has revealed to Israeli journalists apparently show that in 2007 the IDF Central Command was planning assassinations where arrest would have been possible¹⁹. It remains to be seen whether the lawyers were a party to this. On the other hand, Anat Khan affair is controversial because of the suggestion that the standard operational procedures were being circumvented and this suggests that the formal arrangements are regarded as important. While the exception does not prove the rule, it does not disprove it either.

Consideration of the formal institutional arrangements for Israeli targeted assassinations shows that the IDL was instrumental in creating a decision making process that required their input and which give the IDL veto powers. While Reisner mentions the difficulty in applying his department's legal criteria as requiring the lawyer to be in the room, their enthusiasm for legal involvement may be related to the fact that the Supreme Court had taken an interest in the targeted killing policy. On 24 January 2002, two NGOs, The Public Committee Against Torture in Israel and the Palestinian Society for the Protection of Human Rights and The Environment, had submitted a petition to the Supreme Court for an order that the targeted killing policy be declared illegal. The case was not ultimately decided until December 2005,

¹⁸ See, author's interview with Ephraim Sneh at Herzliya, 7 September 2007.

¹⁹ Yossi Melman, 'The Source', *Tablet Magazine*, 8 April 2010 available at, <http://www.tabletmag.com/news-and-politics/30174/the-source/> (Last accessed 20 May 2010).

after the Intifada had come to an end, but the point to be emphasised is that from January 2002 until the end of the intifada the military was operating a policy of targeted killing while the state was defending the policy in the Supreme Court. With the Attorney General defending the military at the Supreme Court, it is no wonder that the military was turning to the IDL.

When finally giving their judgment, the Supreme Court substantially agreed with the IDL's formula. According to Michael Sfar, who acted as attorney for one of the petitioners, Barak 'koshered targeted assassination'²⁰. In fact Barak did not just Kosher the policy in substantially the same terms as Reisner's advice, he put in place a further layer of legal bureaucratic procedure. In giving his judgment Chief Justice Aaron Barak stipulated that the operation receive legal approval before hand and, after the killing, there was to be an examination of the operation by internal inquiry with legal involvement,

Third, after an attack on a civilian suspected of taking an active part, at such time, in hostilities, a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed (retrospectively). That investigation must be independent.

This amounts to institutionalising targeted killing in the IDF in terms of both military and legal institutions that led to the involvement of lawyers both before and after the event.

4. The killing of Salah Shehadeh and its legal aftermath

While Reisner's narrative of the unfortunate informer shows the exercise of covert power, the killing of Salah Shehadeh was a very public demonstration of the complexity of the issues and immediately became the cause celebre of those who challenge the legality of the policy.

^{20 20} Michael Sfar, joint attorney for the petitioners, is very critical of the judgment. It was deliberately delayed by the court from 2003 till 2005 and then , 'Barak Koshered the idea of waging a war on terrorism by assassination'. Author's telephone interview with Sfar 6, September 2007. See also, Avigor Feldman. 'Croaking Swan Song', *Haaretz* , 28/06/07.

Salah Shehadeh was commander and founder of the Izz al-Din al-Qassam Brigades, the military wing of Hamas, and his responsibility for ruthless attacks on Israeli civilian targets is not disputed. On 22 July 2002 an Israeli F16 fighter plane dropped a one ton bomb on Shehadeh's house in the crowded Al Daraj neighbourhood of Gaza city. The strike was a direct hit in an extremely densely populated area that was well known to the Israelis. It was inconceivable that the operation could be carried out without causing death and injury to other residents of the apartment block and the surrounding buildings. Eight houses in the vicinity of the bombing were severely damaged with walls blown out by the blast²¹. Fifteen people died, including nine children, and many were injured. This operation was controversial not because there was any significant body of opinion in Israel that believed that Shehadeh did not deserve to die or that he could have been arrested without Israeli loss of life, but rather it was the inevitability of death and injury to neighbours and bystanders that caused questions to be asked. Viewed from this perspective, it is a classic legal question of proportionality²². However, as has previously been noted, the legal judgment of proportionality and its moral component are tightly intertwined.

The moral perspective that accepts state killing of terrorists that are beyond the territorial reach of its law invites further consideration of what constitutes beyond reach. To what extent should the state risk the lives of its military to apprehend rather than kill the target? This, of course, is another aspect of the familiar issue of force protection that was addressed in some detail in chapter four. In Israel the dominant moral position is in favour of targeted killing of those, such as Shehadeh, who organise suicide attacks on Israeli civilians. Equally, there is a

²¹ Author's interview with Mathew Kalman in Jerusalem 10, June 2007, who examined the scene the following morning.

²² See discussion of the grey area of proportionality at chapter 3.

strong consensus that Israeli soldiers should not be required to risk their lives to capture rather than kill such people.

This ethical position is widely promoted by the influential Israeli moral philosopher Asa Kasher. It will be recalled that Kasher, who regularly lectures to the IDF, bases his analysis on the duty that the state owes to its citizens to provide security. The citizens of the state rank above non-citizens in a scale of duty and obligation and, unlike Walzer's position on collateral damage, there is no moral requirement to risk the lives of soldiers to protect non-citizens. Killing terrorists who cannot be captured without risk to soldiers is an ethical exercise of self-defence, even where civilians are going to die in the process. Furthermore, where the terrorists operate from among civilians, it is their use of civilians as human shields that is morally objectionable rather than the decision to target them in this environment. Having established the moral position for targeted killing of terrorists, Kasher's position on proportionality is particularly pertinent to the Shehadeh case,

Hence, when only a single act of targeted prevention of terror by killing the terrorist is considered, the possibility exists that the number of casualties of the collateral damage is much higher than the number of saved citizens who are jeopardized by that single act of terror. However, consideration of a single act rather than the whole mode of activity is morally wrong. It is not the benefit gained by preventing a single act of terror that should be considered but the cumulative benefits gained by preventing a series of acts of terror to be committed if the terrorist enjoys immunity from military attack. Consideration of accumulative benefits will obviate the difficulty raised by the apparent disproportionality.²³

Nevertheless, even 'apparent disproportionality' is morally disturbing and while there is no consensus on what constitutes acceptable collateral damage in such operations, there was considerable moral criticism within Israel of the Shehadeh operation²⁴. International criticism was immediate and the Israeli Minister of Defence who was in the UK at the time raced from one TV studio to another in an attempt to justify the operation.

²³ Asa Kasher and Amos Yadlin, 'Assassination and Preventive Killing', *SAIS Review*, Winter-Spring 2005, P.53.

²⁴ See for instance, Ze'ev Schiff, 'In a Fit of Rage', *Haaretz*, 29/07/02

From a legal perspective, the operation appears difficult to defend. As discussed in chapter Additional Protocol I, Article 51(5) (b) prohibits, 'an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.' This provision codifies customary international law that is generally understood to apply to both international and non-international armed conflict. Indeed, when Barak discussed proportionality his example of a disproportionate attack, at paragraph 46 of his targeted killing judgment, is a thinly veiled reference to the Shehadeh operation,

The proportionality rule applies in regards to harm to those innocent civilians The rule is that combatants and terrorists are not to be harmed if the damage expected to be caused to nearby innocent civilians is not proportionate to the military advantage in harming the combatants and terrorists. Performing that balance is difficult. Here as well, one must proceed case by case, while narrowing the area of disagreement. Take the usual case of a combatant, or of a terrorist sniper shooting at soldiers or civilians from his porch. Shooting at him is proportionate even if as a result, an innocent civilian neighbor or passerby is harmed. *That is not the case if the building is bombed from the air and scores of its residents and passersby are harmed.* (Emphasis added)

The political value to the Sharon government of killing Shehadeh together with the fact that previous attempts using smaller munitions had failed would have led to substantial institutional pressure to proceed with the operation as planned. Those involved have argued that the intelligence suggested that the timing of the attack was designed to reduce the likelihood of civilian casualties and that Shehadeh, who had already been unsuccessfully targeted, was using his family and neighbours as human shields. This attempt to pass the responsibility for the civilian deaths and injuries mixes the moral and legal arguments. The only basis for arguing in law that the operation was legal is to present a case that the operation was both necessary and proportionate because of the massive importance of Shehadeh to the continuation of the campaign of suicide terrorism- in other words, Kasher's long view. This amounts to an application of the proportionality test that is tailored to attacks on terrorists. As Israeli professor of law David Kretzmer puts it,

Use of lethal force must always conform to the proportionality test. In this context this test should be based on balancing three factors: 1. the danger to life posed by the continued activities of the terrorists; 2. the chance of the danger to human life being realized if the activities of the suspected terrorist are not halted immediately; and 3. the danger that civilians will be killed or wounded in the attack on the suspected terrorist. As mentioned in the discussion above of the proportionality test, a heavy burden rests on the state to justify killing or wounding of civilians during an attack on suspected terrorists. The presumption should be that suspected terrorists may not be targeted when there is a real danger that civilians will be killed or wounded too.²⁵

Avi Dichter, former head of Shin Bet has defended the action on the basis that Shehadeh was an important target whose elimination would seriously disrupt lethal terror attacks in Israel and that there was a danger that he would not be found again if the attack were not to proceed; he defended the decision to use such a large bomb on the grounds that a previous attack had been unsuccessful because concern for civilian casualties had led to the use a smaller bomb that had caused structural damage without killing Shehadeh. Nevertheless, the need for a larger bomb does not make its use proportionate. Furthermore, the argument that lives will be saved by the disruption of future attacks demands more than mere assumption if it is to be used in the balance against immediate extensive civilian deaths. In fact there have been legal challenges both domestically and internationally.

It is well established that proportionality is judged by the information available at the time that the operation is carried out and Dichter claims that there was an intelligence failure so that the IDF wrongly believed that the neighbouring dwelling was empty. Even so, it is difficult to believe that widespread loss of life was not inevitable. Dichter's insistence on the importance of Shehadeh to the ongoing terrorist campaign is more convincing²⁶.

²⁵ David Krezmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or legitimate Means of Defence?' *European Journal of International Law*, Vol16, no.2, p. 203-204.

²⁶ Avi Dichter and Daniel Byman, 'Israel's Lessons for Fighting Terrorists and their Implications for the United States', *The Saban Centre*, analysis Paper, No.8, March 2006.

Legal proceedings have been brought on behalf of the injured civilian bystanders against the IDF in the Israeli Supreme Court and internationally under the Universal Jurisdiction. On the domestic front the case has been stalled by virtue of the fact that, following Barak's ruling that there must be post-facto investigations of operations involving the death of civilian bystanders, there is a long standing ongoing IDF investigation and the Court has refused to rule on the matter until the investigation comes to an end²⁷.

Internationally, the legal repercussions have been most evident in Spain. The Spanish case began in January 2009 when Judge Fernando Andreu, an investigating magistrate at the national court in Madrid, began an investigation at the request of the Gaza-based Palestinian Centre for Human Rights. The intention was to pursue war crimes allegations under the universal jurisdiction. In view of the involvement of the Israeli political and military elite in the operation, the prosecution involved very high profile Israelis including, Binyamin Ben-Eliezer (former Defence Minister), Dan Halutz (former Chief of the Air Force and subsequently Chief of Staff), Avi Dichter (former head of Shin Bet and subsequently Internal security Minister), Moshe Yaalon (former GOC Southern Command and Chief of Staff), Doron Almog (former head of Southern Command) and General (Res.) Mike Herzog. The investigation was eventually quashed by the Spanish Supreme Court in April 2010 after intense legal and political manoeuvring. Nevertheless, lawyers active in support of the Palestinian cause are known to have lodged files of evidence on the Shehadeh operation with prosecuting authorities around the world so that proceedings can be started should Israeli political and military elites come within their national jurisdiction²⁸.

²⁷ HCJ 8794/03 Yoav Hess et al. v Judge Advocate General et al.

²⁸ Author's interview with Daniel Machover (London solicitor representing Palestinian NGOs), London, 20 September 2007,

The threat of prosecution abroad is a very real concern among the Israeli political and military elites involved in the Shehadeh operation. This is apparent from the steps taken by successive governments to counter the threat of prosecution. In addition to legal challenges to the prosecution there are high level diplomatic efforts designed to achieve changes in foreign domestic law. Successive UK governments have refused to change UK law despite a series of attempted prosecutions of visiting Israeli politicians and senior IDF officers. This is not to suggest that it is only the Shehadeh operation that raises the threat of prosecution given the former military careers of many of Israel top political figures. However, the operation continues to head the list of threatened prosecutions with former IDF Chief of Staff Moshe Yaalon narrowly escaping prosecution while on holiday in New Zealand in November 2006²⁹.

Besides the predictable involvement of government and IDL lawyers in the defence of the court cases themselves, there has been a government institutional response that directly involves the military lawyers in the legal and political strategies designed to counter the prosecutions. Central to the Government response is the establishment of a new legal department within the Ministry of Justice to act as a task force to co-ordinate a response to international legal proceedings involving the state and those who act on its behalf to counter terrorism. The department works in conjunction with a permanent steering committee composed of experts in relevant fields from the Ministry of Justice, the Ministry of Foreign Affairs, the Ministry of Defense, the IDF, and the Office of the Prime Minister³⁰. These institutional arrangements bring together the MAG, state and academic lawyers to co-ordinate the defence of the civil and military elites against legal proceedings initiated overseas arising from the Shehadeh and similar operations.

²⁹ Ronny Sofer, 'Yaalon Escapes arrest in New Zealand', *Ynet News*, 30 November 2006, available at, <http://www.ynetnews.com/articles/0,7340,L-3334597,00.html>. (Last accessed 12/12/10)

³⁰ Ido Rosesweig and Uval Sheny, 'Establishment of a Legal Department by the Israeli Security Cabinet to Deal with Issues of International Jurisdiction', *Terrorism Newsletter*, Issue 12.

The successful strategy in Spain operated on at least two levels. On the diplomatic level Israeli diplomacy was coordinated with that of the US to successfully persuade the Spanish government to change its domestic law so that war crimes prosecutions could only be brought where there is a direct Spanish involvement³¹. This change was not retrospective, so that the merits of the case against the Israelis had to be challenged before the Spanish Court of Appeal and the Spanish Supreme Court. At the legal level, the Spanish Supreme Court was persuaded to order that the investigation was inappropriate on the grounds that there was a credible ongoing Israeli investigation into the Shehadeh affair. This last point reveals the legal institutional connection between foreign and domestic legal institutions. It will be recalled that Chief Justice Barak had ordered an independent inquiry within the IDF into the Shehadeh killing and it was the existence of this enquiry that was used to persuade the Spanish Supreme Court that the Spanish proceedings were inappropriate. Ironically the same argument was successfully made by the state before the Israeli Supreme Court when the Israeli Court was petitioned to rule on the legality of the killing³². Thus at the time of writing the issue of the legality of the Shehadeh operation is being investigated within the IDF very slowly and the Spanish and Israeli courts are giving the investigation a wide berth. Nevertheless, the threat of prosecution at home and abroad continues to hang over those involved in the operation.

5. Conclusion

It will be recalled that the discussion in chapter one raised the following hypotheses:

- 1) The IDF military lawyers exercise choice in the construction of their advice and apply a permissive construction of international humanitarian law to IDF targeting decision making.

³¹ This is similar to the changes made by the Belgians' to their criminal code following US pressure.

³² HCJ 8794/03 Yoav Hess et al. V. Judge Advocate General et al.

2) Their choice of IHL accords with a consensus among states conducting military actions against non-state actors and conflicts with legal positions adopted by communities of NGOs and UN commissions of enquiry.

3) The increased involvement of lawyers in Israeli military decision-making is an institutional reaction by the IDF to the following changes in its external environment:

a) The application of international law by the Israeli Supreme Court.

b) The threat of foreign prosecutions of Israeli decision-makers for war crimes.

c) The increased use of humanitarian law as a measure of the legitimacy of military actions.

Second Intifada was a sea change in the Palestinian style of resistance that produced in Israel a political determination to crush the intifada by the employment of Israel's military might.

The IDF lawyers played a crucial role in constructing an understanding of international humanitarian law, which used law that had traditionally been applied to inter-state conflict and adapted it to a war against terrorists. Reisner and his team produced a hybrid version of a law enforcement and international law model. Under Reisner's formulation the IDF was only able to kill the target if capture would endanger Israeli forces. In war there is no obligation to capture rather than kill enemy combatants. Furthermore, the definition of combatant to include people who were not at the time actively engaged in a mission was particularly wide. This represented a choice of law that met the needs of the military and supports the hypothesis that the lawyers had exercised choice in their selection of law and that the choice amounted to a permissive construction of international humanitarian law- the particular circumstances of the Shehadeh killing show just how permissive.

If it is accepted that the operation should have been vetoed by the lawyers, this raises the question of why it was allowed to proceed. It is possible to draw some tentative conclusions about the legal input of the IDL lawyers. The military lawyers are operating at the intersection of legal and military institutions and their legal advice will be subject to both sets of institutional constraints. On the one hand, professional standards and peer pressures will militate against self-serving legal positions that cannot be defended in good faith and on the other there will be the pressure of a military culture that demands that the IDF be allowed to win. However, the analysis is made more complex by the militarised nature of Israeli society, which is itself influenced by the ethical positions promoted by opinion formers such as Asa Kasher.

In these circumstances the legal institutions of a militarised society will bend to pressure from the military and tend towards advice that lets the IDF win. The literature recognises these pressures on institutional lawyers, and it will be recalled that MAG Mandelblit told the Winograd Commission in no uncertain terms that his loyalty is to the military, 'Now I need to help the IDF win, like any army officer. I want the IDF to win the war, and that's why I want to help the operational body to succeed as much as possible'. As a statement of the institutional culture of his corps, this may go some way towards explaining the IDL advice in the Shehadeh affair. This analysis suggests that the legal institutional culture was overwhelmed by the offensive spirit of the IDF with the result that the lawyers became the instrument of the military.

The second hypothesis is that the choice of IHL accords with a consensus among states conducting military actions against non-state actors and conflicts with legal positions adopted by communities of NGOs and UN commissions of enquiry. Adler's concept of communities of purpose allows further insight into the choice that the IDF lawyers made. Such communities have consensus positions on what is required of militaries by international

humanitarian law. This is best understood in the wider legal context of a choice between a law enforcement paradigm and a war paradigm. Reisner is very clear that this was the choice that was in the minds of the military and political planners when deciding how to respond to Palestinian terrorism. Sharon's December 2001 declaration of war on Palestinian terrorism echoed the US response to 9/11, which had taken place less than three months earlier and was made shortly after the October 2001 invasion of Afghanistan. By adopting the war paradigm, the Israeli government was consciously adopting the legal and ethical norms of the US and its allies fighting a war on terror. Thus Israeli legal advice that brought targeted killing within a legal institutional framework can be understood as being within a legal consensus of communities of states whose common purpose is fighting terror. Such communities bestow legitimacy on the targeted killing policy grounded in this legal and ethical consensus. The particular circumstances of the Shehadeh case shows the importance of properly gauging the consensus, since it is probably the case that that particular operation breached the consensus and has been difficult for Israel to defend even among its friends. This does not detract from the main point to be emphasised, which is that the Israeli military lawyers chose their legal advice to enable the Israeli military to fight a war against a Palestinian insurgency that was, with some exceptions, consistent with a new legal and ethical paradigm that had been adopted by states fighting a post 9/11 war on terror. In so doing they correctly judged that a policy of targeted killing would be seen as both legal and legitimate in the eyes of Israel's allies. Indeed, not only was the targeted killing of insurgents seen as legitimate it has since become the weapon of choice in the drone operations in US and UK operations against the Taleban and Al Qaeda. The fact that this policy is not universally accepted as legitimate by states and NGOs is illustrated by the efforts, discussed in chapter three, of the International Red Cross, other NGOs and their state supporters to promote a narrower legal definition of combatants. Reisner makes the distinction between states fighting terror and those that are

not. In his view Israel is fighting in accordance with the consensus position of the US, UK, Germany, Russian and China³³. While this approach suggests a research agenda that includes mapping attitudes towards the legality of targeted killing, it can be said at this stage that the case study supports the second hypothesis.

The third hypothesis, is that the increased involvement of lawyers in Israeli military decision-making is an institutional reaction by the IDF to the following changes in its external environment:

- a) The application of international law by the Israeli Supreme Court.
- b) The threat of foreign prosecutions of Israeli decision-makers for war crimes.
- c) The increased use of humanitarian law as a measure of the legitimacy of military actions.

Reisner and Sharvit-Baruch, who are both former heads of the IDL confirm MAG Mandelblit's evidence to Winograd that the department become involved in IDF operations during the Second Intifada. The department had previously been concerned with operational matters at the planning stages and in drafting rules of engagement. Now they drafted new rules of engagement and Reisner was used by the IDF to promote their legal legitimacy. Added to this, there was a new involvement in real-time targeted killing decisions that brought the lawyers into the operations room. Both legal and political sources are clear that the IDL has a veto if they decide that an operation is not legal. The point has already been made that the state was putting the fight against Palestinian terrorism onto a war footing and that the lawyers were needed to advise on the legal limits, but this could have been done without their being allowed a new role in operational decision-making. The third hypothesis

³³Author's interview with Reisner on 24th May 2009 at the Kind David Hotel Jerusalem.

suggests that the increased legal involvement in operational matters was not just the result of a more challenging operational environment, but also a response to a more rigorous legal environment. The Israeli Supreme Court had already demonstrated an increasing willingness to regulate the actions of the military in the occupied Territories and the government and the military must have anticipated that an unprecedented use of military force would lead to further legal challenge- not least to the policy of targeted killing. The fact that the case against the policy was before the court for years can only have served as a spur to further legal involvement. The danger of legal proceedings outside the country would have been readily apparent following the Sharon case in Belgium but in 2000 the threat of the universal jurisdiction had not yet become a major concern. To be sure, it was to grow during the intifada and has been a powerful response to the Shehadeh case. As such it can be argued that the permissive approach adopted by the lawyers failed to protect the military and political elites from the risk of personal legal proceedings for war crimes, ironically thereby producing a demand for greater rather than lesser legal involvement. As far as the greater use of international humanitarian law as a measure of the legitimacy of military operations is concerned, the evidence presented in this case study does not advance the argument, possibly because in the immediate aftermath of 9/11 the constraints of a legal humanitarian discourse were, for a time, displaced by the perceived need to strike back at terror and a discourse of American frontier justice.

In summary, the greater legal involvement in operational matters coincided with a major shift in the legal paradigm applied by Israel to combat a Palestinian insurgency. This took place in challenging operational and legal environments. The case study presents strong evidence in support of the hypotheses that the lawyers chose legal advice that was permissive and that reflected a post 9/11 consensus position among states fighting a war on terror. Their initial involvement in operational matters reflected a belief that law mattered, if only because of the

expected rush of domestic legal challenges to Israeli military operations. It seems likely that the threat of prosecutions abroad under the universal jurisdiction played some part but there is no evidence that this was a major concern at the beginning of the intifada. However, it is likely that it became so in the aftermath of the Shehadeh operation, which drew fierce international condemnation. The analysis has not revealed that the increasing use of humanitarian law as a measure of the legitimacy of military action was a major factor.

Chapter 7: Case Study 2: The 2006 Lebanon War

1) Introduction

This case study examines the role of the IDF lawyers in the Second Lebanon War, which lasted from 12 July 2006 until 14 August 2006. The significance of the study lies in the fact that this was the first time that the military lawyers have been involved in wartime operational decision-making. This involvement coincided with a change in strategic thinking that saw Israel attempt to win a war without the major deployment of ground troops. Instead, there was a sustained aerial campaign against Hezbollah targets and Lebanese infrastructure¹. In these circumstances the military lawyers were, for the first time, routinely involved in significant categories of target selection and had the opportunity to veto operations that contravened international humanitarian law.

The argument will be made that, an examination of the targeting of the Lebanese infrastructure, the Shiite Dahiyeh section of southern Beirut and villages in Southern Lebanon shows that the IDF lawyers adopted a permissive view of the law that enabled Israel to target Hezbollah fighters and rocket launchers embedded among Lebanese civilians without risking the lives of its soldiers in potentially costly ground operations. This choice of a more permissive form of international humanitarian law, which was based on an optimistic view of the effectiveness of warnings, met the needs of the military by reducing the risk of IDF casualties. However, the consequent damage to Shiite villages, Shiite sections of Beirut and the Lebanese infrastructure became the focus of UN and international NGOs allegations of war crimes that challenged the legitimacy of the war itself. It will be argued that in the aftermath of the war the legal discourse

¹ See, Amos Harel and Avi Issacharoff, *34 Days: Israel, Hezbollah, and the War in Lebanon*, (New York: Palgrave Macmillan, 2008) and Avi Kobar, 'The Second Lebanon War', *The Begin-Sadat Centre for Strategic Studies*, Perspectives Paper No. 22, 28 September 2006.

became central to Israel's defence of its campaign and the lawyers now played an unprecedented international role in defending the legitimacy of the war.

2) The Israeli conduct of the war.

The war was precipitated on 12 July by Hezbollah, whose fighters crossed the border into Israel, killing three IDF soldiers and taking two captured IDF soldiers back into Lebanon. The attack also featured rocket fire into Northern Israel. The immediate Israeli attempt to recover its soldiers resulted in humiliation, with the loss of a tank to a landmine, killing three of its crew and injuring a fourth. The IDF lost a further soldier in a follow up operation to recover the casualties. In the aftermath of the failed attempt to recover the kidnapped soldiers, Israel launched a full-scale military offensive apparently designed to restore Israel's deterrence capability. In fact, the Winograd Commission, which was established in the aftermath of the war to investigate Israel's military and intelligence failings, is highly critical of the Government's failure to establish clear war aims². It seems that the military campaign was designed to weaken Hezbollah, destroy its offensive capability in Southern Lebanon and encourage the Lebanese government to assume control. How this was to be achieved was a matter of constant debate with Chief of Staff Halutz calling most of the shots. Halutz's stated aim of relying on air superiority to destroy the Lebanese infrastructure as a means of pressurising Lebanon's government into acting against Hezbollah was constrained by opposition from Prime Minister Olmert who had been informed of Washington's veto³. Indeed, Israel denies that punishment was the intention; rather, this was an Israeli variant of the American effects-based operation

² The Winograd Commission official site including the report and testimony (in Hebrew) can be accessed at <http://www.vaadatwino.org.il/statements.html#null>. (Last accessed 4 February 2011).

³ Uri Bar-Joseph, 'The Hubris of Initial Victory: The IDF and the Second Lebanon war', in Clive Jones (ed.) *The Israel-Lebanese Conflict: an Interstate and Asymmetric War in Perspective*, (Abingdon : Routledge, 2010), pp. 147-163.

(EBO) that sees the enemy as a system with vulnerable nodes and uses stand-off firepower to bring about cumulative effects that produce cognitive-strategic collapse⁴.

Israel's initial response was Operation Specific Gravity, which had been planned well in advance and was the highly successful targeting of Hezbollah's Fajr missile facility in the early hours of 13 July. The attack destroyed a significant proportion of Hezbollah's Iranian-made intermediate range rockets⁵. The operation was the product of excellent intelligence and marks the high point of Israel's campaign. In the first three days the Israeli Air Force destroyed most of its pre-planned Hezbollah targets, including arms and rocket storage locations in Lebanese villages, Beirut international airport and Hezbollah's Beirut headquarters. The IDF responded to Hezbollah's multiple rocket launchings with air and artillery strikes, having issued warnings to the civilian population to leave the area south of the Litani River. Communications routes to the north were cut with bridges destroyed although Israel maintains that it kept open a safe route for refugees to escape the fighting. Israel repeatedly targeted the Shiite Dahiyeh section of Southern Beirut, which was the centre of Hezbollah activities in the city, and included its political offices, homes of its leaders and the Hezbollah's TV station (*Al-Manar*). However, Hezbollah's diversified command structure, the enormous number of short range rockets available to Hezbollah and the ease of movement of their launchers, meant that it was very difficult for the IDF to prevent Hezbollah from maintaining a steady rate of fire of short range rockets into Northern Israel.

⁴ For a comprehensive Israeli analysis see, Ron Tira, 'The Limitations of Standoff Firepower-Based Operations: On Standoff Warfare, Manoeuvre, and Decision', *Institute for National Security Studies*, Memorandum 89, March 2007, available at, [http://www.inss.org.il/upload/\(FILE\)1188302040.pdf](http://www.inss.org.il/upload/(FILE)1188302040.pdf) (Last accessed 10/12/2010)

⁵ The IAF are believed to have destroyed most of the 150- km-range Zelazal 1 launchers and rockets as well as about 500 Fajrs.

The war soon became defined in terms of Hezbollah's rocket campaign against Israel⁶.

Operation Specific Gravity had apparently neutralised the threat from the Iranian long-range missiles that were capable of hitting nearly every major Israeli city⁷. The remainder of the conflict, with the exception of the long-postponed and largely ineffectual ground campaign, amounted to, 'a slugging match between the Hezbollah's rocket teams and the IDF's airmen and soldiers. The IDF employed artillery, special forces, and manned and unmanned aircraft in an effort to suppress the rocket fire'⁸. There was extensive use of highly skilled special forces who were tasked to work closely with the air force⁹. The strategy was to use small specialist units acting independently to apply network-centric tactics designed to expose the rocket launchers to aerial attack. This was linked to the idea of controlling rather than capturing territory.

Israel made extensive use of warnings to clear the battlefield of civilians¹⁰. Warnings were frequently given to villagers to evacuate before attacks and the whole population living south of the Litani River was directed to move north, while residents of Dahiyeh were advised to move out of the quarter. These warnings were given by fliers dropped from aircraft, radio broadcasts in Arabic from Israel and direct telephone calls to local civic leaders.

Israel had invested heavily in launcher-hunting strategies, employing quick response technologies that destroyed a launcher within one minute of its detection. However, it appears that Israeli technology was countered successfully by the simple tactic of treating the

⁶ For a comprehensive influential analysis of the campaign and Israel's strategic response see, Uzi Rubin, 'The Rocket Campaign against Israel during the 2006 Lebanon War', The Begin-Sadat Centre for Strategic studies, *Mideast Security and Policy Studies*, No. 71.

⁷ It is generally accepted that not all of the missiles were destroyed and there is no definitive explanation for their non-deployment (with the possible exception of one failed launch). For an argument that Hezbollah did not have the Iranian authorisation to use the undamaged remnants of the arsenal see, Rubin, 'The Rocket Campaign', pp.5-7.

⁸ Rubin, 'The Rocket Campaign', p.19.

⁹ See Avi Kober, 'The Second Lebanon War', *BESA Perspectives Papers on Current Affairs*, Perspectives 22, 28 September 2006 available at, <http://www.biu.ac.il/Besa/perspectives22.html>. (Last accessed 7/311)

¹⁰ As required by Protocol 1, article 57(2)(c).

launchers as disposable. Throughout the war Hezbollah demonstrated a capacity to maintain and even increase the rate of its rocket fire directed towards Israel's northern population centres; this single statistic is widely seen as the measure of the failure of Israeli strategy.

The IDF did not deploy significant land forces until 23 July where their performance in Southern Lebanon has attracted much Israeli criticism¹¹. While there are several structural reasons for the poor performance of the IDF ground forces, it is the reluctance with which they were deployed that is particularly relevant to this case study. As has previously been noted in chapter one, Yagil Levy has charted the decline in the republican ideal and the emergence of aggressive liberalism in Israeli society that has resulted in a reluctance to make individual sacrifice for the benefit of the state. This means that, in Levy's contractual analysis, Israeli soldiers and their wider society expect more of the army in return for their service and that chief among these expectations is the protection of the lives of Israeli soldiers. These demands are given purchase within Israel's democratic political system by a clear understanding among the political and military elite that the Israeli public will not long countenance a military campaign that involves significant Israeli losses. This phenomenon is at first sight counter-intuitive to those who see Israeli society as heavily militarised, where as Kimmerling observed military solutions are habitually sought to non-military problems.¹² In fact it simply translates to a tendency to expect military solutions that do not cost the lives of Israeli soldiers. This produces, in Edward Luttwak's terms, a 'post-heroic' style of conflict where force protection structures strategy.¹³

¹¹ Israel deployed about 30,000 troops according to, 'The War in Numbers', *Jane's Defense weekly*, 23 August 2006.

¹² Kimmerling's scholarship was discussed at length in chapter one.

¹³ Edward Luttwak, 'Toward post-heroic warfare', *Foreign Affairs*, May 1995. Vol. 74, Iss. 3; pp. 109-133 and Clive Jones, 'The Writing on the Wall: Israel, the Security Barrier and the Future of Zionism', *Mediterranean Politics*, Volume 14, Number 1, March 2009, pp. 3-20.

In Israel, this popular position is informed by competing ethical frameworks but is given particular support by the work of Kasher and Yadlin¹⁴. As has previously been noted, they contest the ethical space to promote an understanding of Just War military ethics that uses social contract theory to challenge the belief that 'our' soldiers should be exposed to risk of death to reduce harm to 'their' civilians. A second limb of this ethical approach is particularly capable of wider popular dissemination; this is the idea that combatants who hide among civilians and conduct their attacks from behind human shields should not be immune from attack. The contrary argument is seen as denying Israel the right of self-defence against terrorism. Furthermore, the increased civilian casualties are the responsibility of the terrorists not Israel.

As was noted in chapters three and four, mainstream Just War doctrine and IHL agree that civilian protection does not depend on reciprocity. The fact that one party to a military conflict deliberately targets civilians does not entitle the other to do so. However, there is an emerging position that distinguishes the intentional targeting of civilians from shielding combatants behind their own civilians. It is not a matter of targeting Lebanese villages because Hezbollah targets Israeli villages, rather an acceptance of a mixed civilian and combatant battlefield. In such circumstances distinction and proportionality are not to be abandoned, but the mounting civilian body count is the responsibility of their own side.

Adopting this ethical position conditioned the Israeli popular culture to expect high civilian casualties from its aerial response to Hezbollah rocket fire from or near to Lebanese villages or, indeed UN positions.

¹⁴ Asa Kasher, 'A Moral Evaluation of the Gaza War- Operation cast Lead', *Jerusalem Centre for Public Affairs*, Jerusalem Issue Brief, vol. 9, no. 18, 4 February 2010. Asa Kasher and Amos Yadlin, 'Assassination and Preventive Killing', *SAIS Review*, Volume 25, Number 1, Winter-Spring 2005, pp.41-57. Asa Kasher and Amos Yadlin, 'Military Ethics of Fighting Terror: An Israeli Perspective', *Journal of Military Ethics*, Vol. 4, 2005, pp. 3-32. Asa Kasher and Amos Yadin, 'Military Ethics of Fighting Terror: Principles', *Philosophia*, Vol. 34, 2006, pp.75-84. Asa Kasher, and Amos Yadin, 'Israel and the Rules of War: An Exchange', *New York Review of Books*, June 11, 2009. Asa Kasher, The Gaza Campaign and the Ethics of Just War, *Azure*, autumn 2009, no.38, pp.1-11.

As was observed in chapter three, the balancing of civilian harm and military efficiency that is at the heart of IHL, produces a flexibility of approach that is often seen as legal imprecision or grey areas that enable military practice to vary with the prevailing ethics and their political manifestations. It is clear that force protection is a military objective in itself. It will be recalled that the ICTY accepted the legality of NATO high level bombing designed to protect its own airmen even though this resulted in increased civilian casualties¹⁵. This enables Amichai Cohen to argue that proportionality should be a less stringent constraint where the enemy is hiding among its own civilians.¹⁶ Whether this requires a different formulation of the proportionality principle or whether a commander is better placed to push it to the limits or is entitled to some sort of benefit of the doubt, are all legal strategies to accommodate an ethical position that seeks to share if not shift the blame. This legal approach to targeting decisions would certainly reinforce a tendency towards a post-heroic style of conflict that would accept collateral civilian deaths to immediate artillery and IDA response to rockets launched from the vicinity of Lebanese villages, rather than risk the deployment of ground forces to clear the region.

While much has been written about Israel's failure to destroy Hezbollah's capability to maintain its rocket attacks on Israel throughout the war, little attention has been given to the strategy of destroying the Lebanese infrastructure. If it is accepted that Israel does not have a military answer to Hezbollah's rocketry other than politically unacceptable ground attacks, it seems likely that in the next war there will be an even greater concentration of fire on the Lebanese infrastructure. Indeed, this is exactly the thesis of influential Major General (ret.)

Giora Eiland who paints a chilling picture of the next Lebanon war,

¹⁵ 'Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia', 39 I.L.M. 1257 (2000). For an alternative view see, Amnesty International, 'NATO/Federal Republic of Yugoslavia, 'Collateral Damage' or Unlawful Killings? Violations of the Law of War by NATO during Operation Allied Force', (6 June, 2000) (Available at <http://www.amnesty.org>)

¹⁶ Cohen, Amichai. 'Proportionality in Modern Asymmetrical Wars', *Jerusalem Centre for Public Affairs*, 2010, available at, <http://www.jcpa.org/text/proportionality.pdf>. (Last accessed 7/3/11).

Such a war will lead to the elimination of the Lebanese military, the destruction of the national infrastructure, and intense suffering among the population. There will be no recurrence of the situation where Beirut residents (not including the Dahiya quarter) go to the beach and cafes while Haifa residents sit in bomb shelters. Serious damage to the Republic of Lebanon, the destruction of homes and infrastructure, and the suffering of hundreds of thousands of people are consequences that can influence Hezbollah's behaviour more than anything else.'¹⁷

This is not to say that Israel did not attack Lebanese infrastructure targets during the 2006 war. There was substantial targeting of the Lebanese infrastructure including roads, bridges, Beirut airport, the fuel storage tanks of the Jiyeh power station and numerous factories. In fact, the damage to the Lebanese infrastructure would have been far more extensive had the US not placed limitations on the extent of the damage to be inflicted on Lebanon's democratic government.

The twin strategies of directly smashing Hezbollah's offensive capabilities and indirectly constraining Hezbollah by coercing the Lebanese people and their government meant that Israel characterised the war as a war against Lebanon rather than a war or military campaign against Hezbollah. Hezbollah's minority presence in the Lebanese government reinforced the conflation of Hezbollah and Lebanese responsibility for the attacks on Northern Israel and the understanding of the war as an interstate conflict, while at the same time allowing the enemy to be targeted both as a non-state actor and as a government that was failing to control its own population.

This was the military and ethical context of operational decision-making during the Second Lebanon War. Hezbollah had made no secret of its intention to kidnap Israeli soldiers or its stockpiling of missiles. Israel's response comprised attacks that had been pre-planned. Given that this was to be the first war that the IDF lawyers were to play a major part in, there was

¹⁷ Giora Eiland, 'The Third Lebanon War: Target Lebanon', *Strategic Assessment*, 11/2, November 2008, p16.

the opportunity for an unprecedented application of international humanitarian law (IHL) to the targeting decision making process.

3) The involvement of the lawyers

As was discussed in Case Study one The Second Intifada, the IDF lawyers had become involved in operational decision-making during the Second Intifada. The development that now took place was the operational involvement of lawyers in the 2006 Lebanon War.

According to Pnina Sharvit-Baruch, who in 2004 had taken over from Reisner as head of the IDL, during that war her department had legal advisors sitting in at headquarters forums and at Northern Command. On the outbreak of hostilities, a team from the IDL had reinforced the Northern Command lawyer. Operating at Headquarters and Command level, the IDL lawyers were directly involved in approval of target selection. This included advance target selection and sitting in the targeting cells (operational decision-making rooms) reviewing target and munitions selection. However, the lawyers were normally out of the loop when it came to artillery or air support, when it was called in response to enemy fire or targets of opportunity. According to IDL sources, this explains why the initial decision to fire cluster bombs was taken by artillery batteries without prior IDL consultation, although the department defends the legality of their use.

The choice of targets, munitions and rules of engagement had all been worked out well before the start of hostilities. The lawyers had played their part in the selection of banks of targets in the military planning stage before the war. Once hostilities had begun decisions were made on a daily basis concerning which targets should be selected from the bank and when they should be attacked. Updated intelligence was used. This included targets that had become apparent during operations and had not yet been attacked. Sharvit-Baruch confirms that the

lawyers were reviewing the targets to confirm that the principles of distinction and proportionality are being observed:

The lawyer will mainly be discussing the legal aspects of the target to be attacked; here we are considering the principle of distinction. In our operations we are frequently dealing with civilian areas that are being used for military operations. When operating against the Palestinians and also the Hezbollah it is rare to have purely military targets. We must see whether somewhere indeed has lost civilian status and become a lawful target. This involves the consideration of what use is being made of the target building or area. Then there is a further consideration. This is the question of proportionality. Here the whole analysis is made on the basis of the information you have available at the time of making the decision. The proportionality and the precautions will include questions of when to attack- in the night or in the day. There are questions of what size of bomb to use to cause the minimum collateral damage and then the decision as to who is to carry out the attack the next day. It is usually the air force.

During the Lebanon War the lawyers operated at Headquarters and at the Northern Command centre but not at Divisional level. However, since this was mainly an air assault and the majority of the decisions were made in advance. However, Sharvit-Baruch acknowledges that lawyers were not involved in the short cycle targeting; these are situations where Hezbollah may be shelling IDF troops who have called in air or artillery support. Equally, it may be that a target has been spotted that is thought to be too good to miss. Sharvit-Baruch gives the example of a truck that was thought to be carrying rockets although it in fact turned out to be transporting gas cylinders.

Lawyers were closely involved in drafting the rules of engagement, which remain classified. In addition, the IDL claims credit for the widespread use of warning leaflets that were used to clear the battlefield of civilians. Both Reisner and Sharvit-Baruch maintain that their advice is backed up by the Judge Advocate General and that commanders who have failed to observe the IDL's veto have been denied career advancement. While both claim to have on occasions prevented attacks and required changes in military plans, they are unable to divulge details. Consequently, in order to gain some insight into the IDL's legal role in the 2006 War it is necessary to look at those IDF military operations that would have been vetted in advance by the military lawyers and the legal controversies that they caused.

4) The legal controversies: Soares, Amnesty and the Israeli legal defence

‘Legal controversy’ is used in the present discussion in its general rather than legal sense to mean a prolonged public dispute about the legality of Israeli operations. The purpose of the examination is not to establish whether or not the operations were lawful per se. Rather, the examination, which is limited to those operations that would have been reviewed in advance by the IDL, is designed to allow conclusions to be drawn about the advice that the lawyers must have given the military. The value of the conclusions relies on the research gathered in the course of this thesis, which states that the lawyers had a veto over operations that they regarded as being unlawful.

The legal basis for states to use military force in response to attack relies on Article 51 of the UN Charter. This right was traditionally understood as the right of a state to self-defence in response to an attack by another state¹⁸. The Articles on State Responsibility set out the circumstances in which a state is responsible for military action. This is not the place for a full consideration of the issues but Lebanon’s responsibility for the attack can be located in the repeated Security Council demands for Lebanon to take control of its territory bordering with Israel. As far as Hezbollah is concerned, the right of self-defence against non-state actors has emerged through state practice following 9/11 and the Security Council resolutions authorising state action¹⁹. This legal framework is not controversial and allows the normal rules of IHL to be applied to the conflict²⁰.

¹⁸ It was not 25 March 2007 that Israel decided that there had been a ‘war’ and called the conflict ‘The Second Lebanon War’.

¹⁹ S/RES/1368(2001) and S/RES/1373(2001)

²⁰ For a detailed discussion see, Andreas Zimmermann, ‘The Second Lebanon War: Jus ad Bellum, Jus in Bello and the Issue of Proportionality’, *Max Planck Yearbook of United Nations Law*, Volume 11, 2007, p.104-118.

At the *jus ad bellum* level of analysis, as was discussed in chapter three, the legal military response to aggression must be defensive and proportionate. It is accepted that the level of defensive violence is calibrated to stop the attack may be at the level of destroying the aggressor's capacity to continue the conflict. Nevertheless, the intent must not be one of punishment or reprisal²¹. It is clear that the Hezbollah attack was sufficiently serious to entitle Israel to mount a military response under Article 51. Since Hezbollah's command structure was located in Beirut and its resupply routes were through Syria in the north, proportionality did not require military operations to be confined to the Hezbollah heartland of the south.

The findings of the Winograd Report into the conduct of the war confirm that PM Olmert and Defence Minister Peretz were heavily influenced by the military strategy promoted by Chief of Staff Halutz, which relied on the IAF to stop the rockets and coercion of Siniora's Lebanese government to bring about change in the strategic environment. On 4 August Halutz said in a discussion at the GHQ, 'I think that we should destroy Lebanon, threaten with the destruction of Lebanon and bring it to the dark and stone age- with no water, no electricity, no oil, no roads, no government institutions, nothing'²². This is perhaps an unfortunate formulation of the American effects based strategy that had gained currency in the IAF in the decade preceding the war. Compliance with IHL requires that civilian harm is unintended. Put simply, the strategy calls for the targeting of military and dual use targets to produce a cumulative dysfunction of the opposing military rather than the capturing and holding of territory. The effect on civilian consciousness is represented as an unintended consequence²³.

²¹ For a detailed discussion see, Judith Gardam, *Necessity, Proportionality and the Use of Force by States*, (Cambridge; Cambridge University Press, 2004).

²² Quoted in Bar-Joseph, 'The Hubris of Initial Victory'.

²³ This manifestation of the Doctrine of Double Effect was discussed in detail in chapter 3 and appears in this context as a particularly obvious hypocrisy.

The UN Human Rights Council Commission of Enquiry on Lebanon published its report on 23 November 2006²⁴ (the Soares Report) amounts to a damning legal critique of Israel's conduct of the war. The Commission was headed by Joao Clemente Baena Soares a Brazilian diplomat, Stelios Perrakis a Greek professor of international law and Mohamed Chande Othman a Tanzanian judge. The mandate was to investigate Israeli actions alone and is expressed in terms that prejudge Israeli guilt including the 'systematic targeting and killing of civilians by Israel in Lebanon'²⁵. The Israeli response was to refuse to co-operate with the commission, providing only general legal justifications and refusing to make available intelligence reports that may or may not have justified its operational decision-making. The effort to block the enquiry through non-cooperation failed and, as was to be expected, the report is a savage indictment of the Israeli conduct of the war. It is instructive to look at the findings in some detail to gain a critical legal perspective of the operations approved by the IDL.

The report expressed particular concern with the extent of the damage to the Lebanese infrastructure,

(20) During the conflict, major damage was inflicted on civilian infrastructure, including critical infrastructure. According to the Government of Lebanon, 32 "vital points" were targeted by IDF, 109 bridges and 137 roads damaged. The destruction of the land transportation network had a huge impact on humanitarian assistance and on the free movement of displaced civilians. Housing, water facilities, schools, medical facilities, numerous mosques and churches, TV and radio transmission stations, historical, archaeological and cultural sites also suffered massive damage. The economic infrastructure was targeted by aerial bombardment and 127 factories were hit by IDF strikes. In addition, agriculture and tourism were particularly hit. The Commission considers that it will take years for Lebanon, with the help of the international community, to be able to rebuild all the damaged buildings and other facilities. In the meantime, solutions must be found for the civilian population to see their human rights, in particular their right to adequate housing and to the highest attainable standard of health, respected.

²⁴ United Nations Human Rights Council, *Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1**, A/HRC/3/2, 23 November 2006, available at, www2.ohchr.org/english/bodies/hrcouncil/docs/.../A.HRC.3.2.pdf. [Last accessed 11 March 2011].

²⁵ HRC resolution S-2/1

(21) Israel justified its attacks on the civilian infrastructure by arguing its hypothetical use by Hezbollah. The Commission appreciates that some infrastructure may have had “dual use” but this argument cannot be put forward for each individual object directly hit during this conflict. By using this argument, IDF effectively changed the status of all civilian objects by alleging that they might be used by Hezbollah. Further, the Commission is convinced that damage inflicted on some infrastructure was done for the sake of destruction.

The report can be criticized for adopting a broad brush approach since the legality of attacks needs to be examined on a case by case basis that considers whether the requirements of distinction necessity and proportionality have been met. The specific findings are,

(320) All attacks on civilian infrastructure, including roads, bridges, airport and ports, water facilities, factories, farms and shops, in particular far from the confrontations in the South, even in cases of “dual use”, cannot be justified in each instance under military necessity and was disproportionate to the military advantage they provided. They constitute a violation of Israel’s obligations under international humanitarian law to distinguish between military targets and civilian objects.

On specific issues, the commission found that the attacks on the airport and the TV and radio stations to be attacks on civilian objects. In doing so the commission rejected Israeli arguments that the TV station and the airport were dual use targets and that the attacks were necessary.

The report was particularly critical of the bombing of the Jiyeh power station, which took place on 13 July and again on 15 July. The facility is located on the coast some 30 km south of Beirut. The attack was on the storage tanks, which collapsed spilling between 10000 and 15000 tons of oil into the Mediterranean causing a 10 km oil slick that polluted 170 km of coastline.

(23) The Commission considered the devastating effect the oil spill from the bombing of the Jiyeh power plant has had and will continue to have in the years to come. The Commission is convinced that this attack was premeditated. The spill affected two thirds of Lebanon’s coastline. IDF’s failure to take the necessary precautionary measures violated Israel’s obligations to protect the natural environment and the right to health. In particular it caused significant damage to the Byblos archaeological site, included in the UNESCO World Heritage list.

The report finds that the attack was disproportionate and in breach of Article 35(3) of Additional Protocol 1 that prohibits attacks that can be expected to cause widespread, long-term and severe damage to the natural environment.

Human Rights Watch (HRW) is also severely critical of Israel's broad definition of legitimate Hezbollah targets and provides another critical perspective on the legality of the Israeli operations. *The September 2007 HRW report, Why They Died; Civilian Casualties in Lebanon during the 2006 War*²⁶, examines the Israeli conduct of the war, and finds that Israel breached the requirements of distinction by assuming that anyone associated with Hezbollah was a combatant,

Israel's broad definition of legitimate Hezbollah targets is particularly evident in the pattern of attacks on the densely populated southern suburb of Beirut, Dahieh. In their attacks on this largely Shi'ite district of high-rise apartment buildings, Israeli forces attacked not only Hezbollah military targets but also the offices of Hezbollah's charitable organizations, the offices of its parliamentarians, its research center, and multi-story residential apartment buildings in areas considered supportive of Hezbollah. Human Rights Watch research did establish that Hezbollah maintained a weapon storage facility in at least one civilian apartment building in the Dahieh, and that armed Hezbollah fighters sheltered together with civilians in at least one civilian basement in the Dahieh, but did not find widespread evidence of such unlawful Hezbollah practices which would have justified the extent of Israeli bombardment of this civilian area²⁷.

The report highlights the targeting of the Al-Manar TV station, arguing that the dissemination of Hezbollah propaganda did not make it a dual use target, and that the attack was unlawful.

Adopting a similar perspective to that of the Soares Report, HRW criticizes the attacks on Southern Beirut:

Statements by Israeli officials strongly suggest that the massive IDF attacks in southern Beirut were carried out not against Hezbollah military targets, as required by the laws of war, but rather against entire neighborhoods because they were seen as pro-Hezbollah. Some statements by Israeli officials, including Israel's Defense Minister Amir Peretz and the IDF chief of staff Dan Halutz, suggest that some of the attacks on southern Beirut may have been unlawful retaliation for Hezbollah attacks against Israel²⁸.

²⁶ Human Rights Watch, *Civilian Deaths in the NATO Air Campaign*, February 2000, Vol. 12, No. 1 (D). Available at <http://www.hrw.org/legacy/reports/2000/nato/>. [Last accessed 11 March 2011].

²⁷ *Ibid*, p.74.

²⁸ *Why They Died*, p.10.

Another area of severe criticism is the intense use of cluster munitions in the final days of the conflict that left unexploded ordinance in the fields of southern Lebanon.

The Human Rights Watch report focuses on specific instances of Israeli attacks that involved civilian casualties. The report links Israel's reliance on warnings to civilians, damage to the civilian infrastructure and attacks on village locations to account for loss of civilian life,

Our research into more than 94 attacks shows that Israel often, even though not deliberately attacking civilians, did not distinguish between military objectives and civilians or civilian objects as required by humanitarian law. The chief cause of this wrongful and deadly selection of targets was Israel's assumption that Lebanese civilians had observed its warnings to evacuate all villages south of the Litani River, and thus that no civilians remained there. As a result, Israel targeted any person or vehicle south of the Litani River on the grounds that they were part of the Hezbollah military apparatus. Israel also engaged in widespread bombardment of civilian areas that was indiscriminate, which endangered many of the civilians who had remained behind. In addition, in the Dahieh section of southern Beirut, this danger of this presumption was compounded by the Israeli tendency to treat all people and buildings associated with Hezbollah, however vaguely, as legitimate military targets.

The HRW findings paint a picture of ineffective warnings to civilians that led to Israel adopting a false presumption that there were no civilians in the area and that the IDF was operating in a free fire zone²⁹.

The official Israeli response to these allegations, promoted by the Israel Ministry of Foreign Affairs³⁰, can be summarised as: Israel was acting in self-defence, Hezbollah was using Lebanese civilians and their property as shields³¹, Israel targeted only military objects and any civilian damage was proportionate in terms of the intelligence available at the time. The

²⁹ *Why They Died*, pp.63-66

³⁰ Israel Ministry of Foreign Affairs, *Preserving Humanitarian Principles While Combating Terrorism: Israel's Struggle with Hizbullah in the Lebanon War*, 1 April 2007, available at, <http://www.mfa.gov.il/NR/rdonlyres/74D04C9D-FA73-4A54-8CBA-BCB1152C82E/0/DiplomaticNotes01.pdf>. [Last accessed 7/3/11].

³¹ See, Reuven Erlich, 'Hezbollah's use of Lebanese civilians as human shields: the extensive military infrastructure positioned and hidden in populated areas', *Intelligence and Terrorism Information Center at the Center for Special Studies*, November 2006, available at, http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/human_shields.pdf. (Last accessed 7/3/11).

crux of the Israeli defence of its targeting lies in its assertion of the right to attack Hezbollah operatives embedded in civilian towns and villages where civilians have been warned by the IDF to leave.

The fundamental IHL principle of distinction limits lawful targeting to military objects. Article 52(2) Additional Protocol I of the Geneva Conventions, defines military objectives as, ‘those objects which, by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage’. As was noted in chapter three, the concept of ‘dual-use’ objects highlights the breadth of the definition. Civilian structures, even hospitals and mosques become lawful military targets when munitions are stored or fired from there. Hence, Israel was anxious to explain civilian damage to Shiite villages of southern Lebanon in terms of rocket storage and launch, either in or close to civilian areas, with Hezbollah not Israel bearing the responsibility for civilian harm. Conscious that there is a fine line between blaming Hezbollah and admitting callous disregard for the consequences of targeting embedded combatants, Israel made clear its commitment to proportionality,

However, it is the IDF’s position that the callous disregard of those who hide behind civilians does not absolve the state seeking to respond to such attacks of the responsibility to avoid or at least minimize injury to civilians and their property in the course of its operations. In particular this raises the complex issue of proportionality³².

Israel maintains that,

Notwithstanding the above, it should be noted that even when civilians were in the vicinity of military objectives, Israel made significant efforts to avoid, and in any event to minimize, civilian casualties. Every operation was considered on an individual basis to ensure that it met the requirements of international law, including the test of proportionality. Frequently, this meant the rejection of proposed military operations when the likelihood of collateral damage to civilians and their property was considered too high. On other occasions, it meant that operations were conducted in such a way as to reduce the likelihood of incidental damage, in terms of the timing or operational aspects of the attack. Finally, whenever possible without jeopardizing the operation, Israel issued advance notice to the local residents through various media, including dropping leaflets, radio broadcasts and contacts with local leaders, to

³² Israel Ministry of Foreign Affairs, *Preserving Humanitarian Principles* , p.5

distance themselves from areas in which Hizbullah was operating and from places in which its weaponry was being stored³³.

The Israeli Ministry of foreign affairs has released videos and photos of missile launches from Lebanese villages and the Israel based Terrorism Information Centre³⁴ has released a raft of data showing Hezbollah operating from civilian areas. However, the stated precautions are difficult to reconcile with the well publicised fact that the Israeli response to a detected rocket launch was no more than one minute³⁵.

Jerusalem has also been keen to distance the legal analysis of the infrastructure targeting from any suggestion that Israel acted with the intention of punishing the civilian population of Lebanon for its government's failure to disarm Hezbollah. Inconvenient statements to the contrary by politicians and generals are to be regarded as posturing rather than statements of Israeli intent. Specifically, the allegations of indiscriminate destruction of Lebanon's industry, agriculture and essential services are denied. According to the Israeli Ministry of Foreign affairs, bridges and roads were only targeted to the extent that they contributed to Hezbollah's military operations. Since Hezbollah was understood to be transporting rockets and munitions throughout southern Lebanon and resupplying from Syria through the Beka'a valley, bridges and roads could be seen as of fundamental military importance and lawful targets,

The guiding principle adopted by the IDF was to target only infrastructure that was making a significant contribution to the operational capabilities of the Hizbullah terrorists. This meant that, for the most part, Israeli attacks were limited to the transportation infrastructure. Most of the other infrastructure (medical, cultural, railroad, tunnels, ports, banking, manufacturing, farming, tourism, sewage, financial, electricity, drainage, water and the like) was left almost completely untouched³⁶.

³³Israel Ministry of Foreign Affairs, *Preserving Humanitarian Principles* , p.6.

³⁴ Erlich, 'Hezbollah's use of Lebanese civilians'.

³⁵ Erlich, 'Hezbollah's use of Lebanese civilians'.

³⁶Israel Ministry of Foreign Affairs, *Preserving Humanitarian Principles* , p.6

Israel's defends the allegation that Beirut international airport was a civilian target with the argument that Israel only destroyed the runways and not the facilities and that the attack was necessary to prevent the resupply of Hezbollah's arsenal. The attack on Al Manar TV station is seen as lawful because it was the Hezbollah television station and 'was used to relay messages to terrorists and to incite acts of terrorism'. Fuel reserves were targeted because terrorists cannot operate without a regular supply of fuel. The attack on the power station is justified in terms of its production of electricity for military consumption and Israel eased its naval blockade to allow treatment of the oil spill. The use of cluster bombs in agricultural areas of southern Lebanon was a lawful and proportionate response to the rocket launching in open areas.

The Israeli narrative of the war weaves together the war against Lebanon with the war against Hezbollah terrorists and blurs the distinction between Hezbollah and Lebanese civilians, particularly Shiite civilians. As a terrorist organisation rather than a military force in service of a civil administration, there is no distinction between the civil and military so that both become lawful military targets. This means that the targeting of Hezbollah's administrative infrastructure and personnel in Beirut becomes a lawful military operation facilitated by a belief that all civilian personnel have fled in response to Israeli warnings. This legal framework enables the construction of a permissive legal view of what constitutes a military object and who is a civilian, let alone what is proportionate. This gives credence to the Human Rights Watch allegation that Israel's expansive view of Hezbollah led to a high incidence of civilian deaths.

Analysis of the legal critiques that challenge and defend Israel's military operations show the debate framed in terms of rival understandings of what is required of a state military fighting non-state actors on foreign soil. The Israeli defence does not deny the application of the key provisions of IHL, rather there is a shifting of the balance between civilian protection and

military efficiency that is grounded in the use of warnings to the civilian population. In this context warnings are used to allow an assumption that people in the line of fire are combatants or voluntary human shields. To be sure the attacks on the infrastructure targets are controversial, but it is the assumption that civilians who have been warned and not moved away are combatants that is the real contribution of the Israeli military lawyers to targeting decisions and the subsequent defence of their legitimacy.

5) Conclusion

The Second Lebanon war was the first war in which the lawyers were closely involved in operational decision-making. The military strategy relied heavily on pre-selected banks of targets. This meant that many of the targeting decisions were made in advance and subject to a legal veto. It follows that the controversial decisions to attack the Dahiyeh quarter of southern Beirut, Beirut airport, the Jiyeh power station and the Lebanese infrastructure were approved by the lawyers. Likewise the strategic decision to respond to rocket activation with immediate fire and the targeting of suspected arms caches located in civilian buildings. An examination of these operations enables conclusions to be drawn about the legal position adopted by the IDL and whether the legal advisors functioned to constraining or enable the IDF.

The political, ethical and military context for the construction of the IDF's legal advice demanded that the Israel be allowed to use sufficient military force to deter the Lebanese government by punishment and destroy Hezbollah's capacity to sustain a rocket barrage on Israel. These aims were to be achieved by post-heroic methods of warfare that did not cost the lives of Israeli soldiers. Crucially, Hezbollah was not to be allowed immunity from attack by strategies of concealment among civilians. If this resulted in civilian casualties, it was

Hezbollah's responsibility not Israel's. This was to be a war against terrorists in the context of a war against Lebanon.

There is no dispute that the IHL principles of proportionality, distinction and military necessity apply to Israel's conduct of the war, whatever the target. The starting point of any analysis must be whether a target is a military object and it is only when this has been established that proportionality becomes relevant. The Soares and Human Rights Watch reports maintain that Israel deliberately attacked civilian targets. If their legal analysis is accepted and not dismissed as the product of political bias, the IDF lawyers were either ignored or gave the wrong advice on what constituted a lawful attack.

Assuming that Israel did not deliberately attack civilian Lebanese villagers, and given that civilian homes become military objects when used for military purposes, proportionality becomes the issue- specifically how it was applied when responding to a Hezbollah strategy of firing from among civilians. Once the war had begun, the Israeli political definition of success rapidly became the halting of rocket attacks without significant loss of Israeli lives. This demanded the destruction of Hezbollah's capabilities whether or not they were located in a civilian environment, even though immediate artillery response lacks accuracy. Could this be achieved by the proper application of the proportionality constraints of international humanitarian law?

A balanced assessment of the legality of Israel's operations requires a close examination of each operation and access to detailed accounts of the events and the intelligence available at the time that the decision to attack was taken. In the absence of such information, conclusions are necessarily general and contingent. Nevertheless, it can be said that the legal imprecision, the grey area of legality in respect of both distinction and proportionality, allows conflicting legal conclusions to be drawn on the legality of particular operations. There were legal grounds that would have enabled the IDF lawyers to veto operations against the Lebanese infrastructure and

military targets located in civilian environs but the lawyers chose not to do so. Rather, they applied a permissive construction of international humanitarian law that relaxed the requirements of proportionality when dealing with 'terrorists' fighting from among civilians, which enabled Israel to pursue post-heroic military strategies against a terrorist militia operating from a neighbouring state. This can be seen as a frame of legal analysis that had been developed by the IDF lawyers during the Second Intifada. It amounts to condoning operations against terrorists fighting from among their civilian host community that, in other circumstances, would be seen as a disproportionate use of force- a concept that has come to be popularly referred to in Israel as the 'Dahia doctrine'. The problem, of course, is that to get full deterrent value from the Dahia Doctrine, is to threaten a disproportionate military response to attack, or to quote Tzipi Livni, 'going wild'³⁷. This leaves the lawyers having to square the circle- explaining why a disproportionate response is not disproportionate and why they allowed it, which is exactly what the Israeli legal justifications are doing. The problem is more than semantics and amounts to a disconnection between the political and legal discourses.

It follows that the IDF lawyers performed two functions during and after the war. Firstly, they constructed a permissive legal framework that allowed the military to conduct the war adopting a strategy that resulted in substantial civilian harm and secondly, they were deployed to legitimise the operations in legal terms by explaining why a disproportionate response to Hezbollah military provocation was proportionate. In so doing, they were continuing a process whereby, in Israel, law and morality combine to produce a powerful force for the legitimisation of the use of post-heroic military force against an opponent that conceals itself among its own civilians.

³⁷ Tzipi Livni's formulation has received much attention, 'We have proven to Hamas that we have changed the equation. Israel is not a country upon which you fire missiles and it does not respond. It is a country that when you fire on its citizens it responds by going wild – and this is a good thing' and is quoted in the Goldstone Report at para.1206.

In summary, the point to be emphasised is that the IDF lawyers appear to have given the military a free hand in the Second Lebanon war- not in terms of allowing the legally indefensible but rather by applying a construction of IHL that was designed to meet the needs of the military and provide a legal model for fighting Israel's modern wars. Perhaps it is instructive that the Winograd Commission, which was looking to criticise the legal involvement in the war, was unable to find any instance of the military complaining about legal interference in their plans³⁸.

Returning to the hypotheses, the case study provides support for the hypothesis that the IDF military lawyers exercise choice in the construction of their advice and apply a permissive construction of international humanitarian law to IDF targeting decision making. In the absence of general state condemnation of the war, it can be assumed that the legal constructions designed to allow military action against Hezbollah in Lebanon find favour with states fighting insurgents sheltering within sovereign territory. Research into state use of warnings after 2006 can be expected show that there is a developing consensus position among states fighting insurgencies that adopts a more permissive proportionality/distinction regime where non-state actors are concealing themselves among their host population.

There are three hypotheses raised in this thesis to account for the increased involvement of military lawyers in IDF operational decision-making:

- 1) The application of international law by the Israeli Supreme Court.
- 2) The threat of foreign prosecutions of Israeli decision-makers for war crimes.
- 3) The increased use of International Humanitarian Law as a measure of the legitimacy of military action.

³⁸ See chapter 1

Unlike during the Second Intifada, the IDF was not subjected to Israeli Supreme Court scrutiny and there has not been the clamour for Universal Jurisdiction prosecution. Internally, Israel has been concerned with the perceived military failures exposed during the war, and the focus of the Winograd Commission was on military and political strategy rather than the legality of the operations. In fact the Commission had to be persuaded that IHL matters and that it was not being taken too seriously by the military. Internationally, the political support for a war against Hezbollah as Iran's proxy tended to mute the criticism of Israel's operations. In these circumstances, the Soares report and NGO reports such as those of Human Rights Watch and Amnesty International, assume greater importance by employing the powerful legal, rather than political, discourse to delegitimize Israel's conduct of the war. As such, the case study illustrates the importance of the third hypothesis.

The Israeli response makes great play of the IDF's compliance with IHL. More directly, the IDL lawyers were fielded to explain the legality of the operation. When Human Rights watch launched its report in Jerusalem in 2007, Daniel Reisner, former head of the IDF International Law Department responded on behalf of the Israeli government and defended the legality of the Israeli operations with the assertion that the lawyers from his department had reviewed the banks of targets selected in advance and vetoed any that failed to meet the requirements of international humanitarian law³⁹. Consequently, only military targets were attacked and any civilian damage was proportionate. This illustrates the value to the IDF and Israel of having lawyers taking part in the operational decision-making process and subsequent defence of the military operations as, in Clarke's terms, a strategy of legitimisation.

To summarise, the case study reveals the growth of IDL involvement in IDF operational decision making in times of war. Their involvement provided a permissive construction of IHL that enabled a style of warfare that engaged non-state actors concealed among their civilians. The intense NGO

³⁹ The author attended the presentation at the Hebrew University in Jerusalem on 6, September 2007.

criticism of Israel's conduct of the war framed political objections in a powerful legal discourse that required a legal response from Israel. The fact that the IDL lawyers had been demonstrably involved in operational decision making enabled Israel to mount a legal defence and to use IDF lawyers in the presentation of that defence. This amounted to deploying the IDF lawyers to promote the legitimacy of Israel's military strategy and provides powerful support to the hypothesis that the increased involvement of lawyers in Israeli military decision-making is an institutional reaction by the IDF to the increased use of humanitarian law as a measure of the legitimacy of military actions.

Chapter 8: Case Study 3: Operation Cast Lead

1) Introduction

Israel's Operation Cast Lead against Hamas in Gaza began on 27 December 2008 and continued until 18 January 2009. The operation employed military force with the express purpose of stopping Hamas rocket attacks on Israel, rockets having replaced suicide bombing as Hamas' weapon of choice. This was not to be a law enforcement operation within an occupied territory. Israel had withdrawn from Gaza in 2005 as part of Ariel Sharon's disengagement plan, allowing Israel to argue that it was relieved of the obligations of an occupier. The subsequent Hamas takeover of Gaza in June 2007, the campaign of rocket attacks on Southern Israeli towns and the ongoing captivity of Gilad Shalit, the IDF soldier who had been kidnapped in June 2006, had led Israel to label Gaza a 'hostile entity' that could be held responsible for acts of aggression emanating from its territory without recognition of state sovereign rights⁴⁰. Gaza was effectively placed in a legal no-man's land somewhere between occupation and self-determination with the obligations of a state without the benefits of sovereign rights. This novel legal construction helped Israel to abandon the duties of an occupier and impose a virtual siege, claim the right of Article 51 self-defence and accept only the limited constraints of International Humanitarian Law (IHL) when planning its strategy and tactics in response to Hamas rockets.

Israel's conduct of the war came under intense legal criticism that was powerfully articulated in the UN Human Rights Council Goldstone Mission Report⁴¹ of September 2009, which found

⁴⁰ Former head of the IDF International Law Department, Col (Rtd.) Daniel Reisner admitted in telephone conversation with the author on 20 September 2007 that this term had no legal significance and was used to avoid any suggestion that Hamas was in control of a state while allowing Israel to impose economic sanctions.

⁴¹ United Nations Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories, Report of the United Nations Fact-Finding Mission on the Gaza Conflict, A/HRC/12/48*, 28 September 2009, [hereafter: the Goldstone Report] available at,

Israel to be guilty of breaches of IHL amounting to war crimes. Having chosen not to cooperate with the mission, Israel defended the legality of its operation in its own report, the Operation in Gaza 7 December 2008 – 18 January 2009 Factual and Legal Aspects (the Israeli Report)⁴². Comparison of the reports in respect of the key areas of legal controversy reveals the extent that Israel applied a particular construction of IHL to the conflict.

The IDF International Law Department (IDL), which had become involved in operational matters during the Second Intifada and had been involved in targeting decisions during the 2006 Second Lebanon War, played an unprecedented part in target selection during Cast Lead. It will be argued in this case study that this close legal involvement provided a legal framework for a permissive construction of the key IHL principles of distinction and proportionality in warfare against Hamas that had deliberately embedded its fighters and military assets among its own civilians. This can be understood as an application of law designed to meet the needs of Israel's offensive counter-terrorism strategy; in teleological terms, it was conceived during the Second Intifada, found clear expression in the Second Lebanon war and was taken to its logical conclusion during Cast Lead. It follows that the military lawyers adopted a permissive construction of IHL when advising on the legality of the IDF's military operations during Cast Lead.

It will be further argued that the involvement of the Israeli Supreme Court in accepting petitions from NGO's while the fighting was still continuing, the calls for prosecutions under the

<http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/a-hrc-12-48.pdf> [last accessed 12 January 2011].

⁴² Israel Ministry of Foreign Affairs, *The Operation in Gaza Factual and Legal Aspects*, 29 July 2009, [hereafter: the Israeli report], available at: http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+and+Islamic+Fundamentalism-/Operation_in_Gaza-Factual_and_Legal_Aspects.htm. [Last accessed 11 March 2011].

Universal Jurisdiction and the unprecedented prominence given to the Goldstone Report, give powerful support to three hypotheses raised in this thesis to account for the increased involvement of military lawyers in IDF operational decision-making:

- 1) The application of international law by the Israeli Supreme Court,
- 2) The threat of foreign prosecutions of Israeli decision-makers for war crimes and
- 3) The increased use of International Humanitarian Law as a measure of the legitimacy of military action.

2) The Israeli conduct of the war

Since the 2006 Second Lebanon War Israel had concentrated resources on the training and restructuring of its land army. Cast Lead was not going to repeat the mistakes of 2006 by relying on air power alone to destroy Hamas' capability to launch rocket attacks on Israel. Instead, Cast Lead required the careful deployment of ground forces in conjunction with air and artillery firepower. Israel's total control of the digital environment and the deployment of precision guided attack systems allowed the maximum use of remote observation of the battlefield and the apparently accurate delivery of ordinance. Israel's communications and human intelligence acquired through long years of occupation and the barely disguised assistance of Fatah, allowed for a rich variety of pre-determined targets. Nevertheless, the density of civilian occupation meant that there was a high risk of civilian harm in terms of loss of life, injury, destruction of homes and damage to the infrastructure. Set against that was the understanding of Hamas as a terrorist organisation with no respect for the rules of war; Hamas was expected to rely on IED's and to conceal its fighters among the civilian population. This raised the familiar problem of the extent to which the lives of Israeli ground troops were to be put at risk in order to reduce the risk of civilian harm.

The initial phase of the war was a surprise air strike on 27 December 2008, which was followed on 3 January 2009 by the second stage of the operation with the deployment of ground forces supported by a heavy artillery barrage. The ground troops made an unprecedented use of technology to avoid booby traps and the risk of capture, deploying robot and precision technology⁴³. Advances in co-ordination of communications linked ground forces, artillery, air support and intelligence that enabled the ground forces to operate in the densely populated areas of Gaza city during the third phase of the operation⁴⁴. The use of white phosphorous is further controversial aspect of the operation which was condemned by the Goldstone Mission and defended by Israel on the grounds that it was used to create a smoke screen.

Following the surprise attacks of the opening hours of the operation, Israel used a sophisticated system of warnings designed to clear targets of civilians. It will be recalled that warnings played a big part in the 2006 Lebanon War. The system was further refined in Gaza. In addition to leaflets and radio broadcasts, residents received recorded messages on their mobile phones warning them to leave specific locations. In an effort to learn from the mistakes of Lebanon, civilians were directed to specific locations. The Israeli's employed a 'knock on the roof' procedure whereby non-explosive munitions were fired to alert residents of an impending attack⁴⁵. Nevertheless, as was to be expected there were civilian casualties, including several high profile tragedies.

⁴³ See David Eshel, 'New Tactics Yield Solid Victory in Gaza', *Aviation Weekly*, 11 March 2009, available at, http://www.aviationweek.com/aw/generic/story_channel.jsp?channel=defense&id=news/GAZA031109.xml (last accessed 3 January 2011) and Barbara Opall-Rome, 'Adapting Artillery to Urban War', *DefenceNews*, 23 March 2009, available at, <http://www.defensenews.com/story.php?i=4001228> (last accessed 3 January 2011).

⁴⁴ Eshel, 'New Tactics', 'Cast Lead was the first Israel Defense Forces (IDF) operation in which unmanned aerial vehicles (UAVs), helicopters and fighter jets were allocated to ground forces directly without IAF central command authorizing sorties. This went even further, with air-support controller teams operating alongside brigade commanders at the front, passing along whatever surveillance data from UAVs and other assets they needed'.

⁴⁵ The associated Press, 'IDF phones Gaza residents to warn them of imminent strikes', *Haaretz*, 2 January 2009.

Hamas, like Hezbollah, knew the value of captured Israeli soldiers and IDF avoidance of capture was an important element of force protection. The Israelis relied on technological innovation and intelligence to minimise losses from suicide attack and IEDs; Israeli ground forces had embedded intelligence officers, demolition teams, and direct communications with air and artillery response using shared GPS and drone technology. Israel's rules of engagement remain classified but the memoirs of serving soldiers suggest that in practice the IDF commanders warned their troops against taking chances. Indeed, the soldiers' narratives published by the Israeli NGO Breaking the Silence, describe instructions to soldiers to take no chances with approaching civilians and suspect buildings⁴⁶. As was discussed in chapter one, this is consistent with the decline in the Israeli republican ethos of sacrifice and the political demand for post-heroic styles of warfare, even where, as was the case with Cast Lead, there was overwhelming domestic support for the operation. The increased risk of harm to the civilian population was seen as a consequence of Hamas' style of combat not Israel's strategy of force protection.

As Jeffrey White has observed,

IDF measures to protect its soldiers undoubtedly translated into additional destruction or damage to civilian property. Tactics that included using bulldozers and other armored vehicles to clear axes of advance, breaking through exterior and interior walls of structures to avoid exposure to observation and fire, and clearing rooms for use by IDF personnel. These measures, though, were taken in response to Hamas's preparation of the battlefield with mines and improvised explosive devices intended to impede Israeli movement and inflict casualties, as well as to the group's tactical employment of snipers and antitank weapons. In effect, Hamas had already prepared the civilian environment for military purposes. IDF commanders felt it was an acceptable trade-off to open an approach through civilian houses or greenhouses rather than risk being ambushed and taking losses.⁴⁷

⁴⁶ Breaking the Silence, *Soldiers' Testimonies from Operation Cast Lead, Gaza 2009*, available at, http://www.shovrimshatika.org/oferet/ENGLISH_oferet.pdf (last accessed 3 December 2010).

See also, Donald Macintyre, 'Israeli Commander: We Rewrote the rules of war for Gaza', *The Independent*, 3 February 2010, available at, <http://www.independent.co.uk/news/world/middle-east/israeli-commander-we-rewrote-the-rules-of-war-for-gaza-1887627.html> (last accessed 3 December 2010).

⁴⁷ Jeffrey White, 'Examining the Conduct of IDF Operations in Gaza', *The Washington Institute for Near East Policy*, 27 March 2010, available at, <http://www.washingtoninstitute.org/print.php?template=C05&CID=3034> (last accessed 3 December 2010).

This is not to say that the Israeli Supreme Court remained aloof. The Supreme Court reviewed the humanitarian position at the height of the operation and at one stage case managed in real time an Israeli cease fire to allow the delivery of humanitarian aid⁴⁸. Amichai Cohen regards this as an impressive demonstration of judicial power with the judges effectively ran the humanitarian operation from the court demanding the presence in court of the officer in charge and made decisions in real time⁴⁹. As a direct result of these petitions the IDF declared a cease fire to assist aid deliveries. As the President of the Supreme Court, Judge Beinisch put it,

[I]t is the role of the court, even in times of combat, to determine whether within the framework of the combat operations the obligation to act in accordance with legal guidelines — both within the context of Israeli law and within the context of international humanitarian law — is being upheld⁵⁰.

This legal involvement of the Supreme Court in the IDF's conduct of operations can be seen as the continuation of a process that had developed during the Supreme Court Presidency of Judge Barak during the Second Intifada.

Cast Lead came to an end when Jerusalem decided not to continue phase three of the war. Faced with the opportunity to expand the operation to destroy Hamas and regain control of Gaza, Prime Minister Olmert chose instead to declare a unilateral cease fire on 18 January 2009. The tight operational aims, early deployment of ground forces and low Israeli casualties represented an improvement on the IDF's performance in Lebanon. Nevertheless, Israel's claim to have acted in accordance with IHL remains controversial, despite or perhaps because of the involvement of the IDF lawyers.

⁴⁸ *Physicians for Human Rights et. al. v. The Prime Minister et. al.*, HCJ 201/09 and HCJ 248/09, 19 January 2009.

⁴⁹ Author's interview with Amichai Cohen, 20 May 2009 at Modi'in, Israel.

⁵⁰ *Physicians for Human Rights et. al. v. The Prime Minister et. al.*,

3. The Involvement of the Lawyers

Colonel (Rtd.) Pnina Sharvit-Baruch commanded the IDL during Cast Lead. Sharvit-Baruch confirms that the involvement of the lawyers in operational matters increased following the 2006 Lebanon war⁵¹. Although, the Winograd Commission that investigated Israel's conduct of the Lebanon war was unenthusiastic about the involvement of lawyers in operational matters, by 2009 the IDF lawyers were present at headquarters, command and divisional levels⁵². This relationship did not extend below divisional level to brigade level. During Cast Lead, the brigades such as the Givati and Golani brigades were operating with their commanders in the field and lawyers were not present at that level⁵³. This means that when units responded to fire, such as that coming from the Imra school, it was a decision on the ground and lawyers were not involved. Consequently, when assessing the influence of the IDL on operational decision making, a distinction needs to be made between pre-planned attacks and rapid response fire.

The Gaza legal involvement was far greater than during the 2006 Lebanon War when the lawyers were at Northern Command but not at divisional level. Prior to the Lebanon conflict, the legal advisor for the Northern Command had sat at Haifa with her main focus on disciplinary matters. The lawyers were mainly at headquarters meetings and the presence at Northern Command was less close. This was a relationship that was still finding its feet. By Cast Lead the lawyers had built up a much closer relationship at command level. According to Sharvit-Baruch the increased involvement was encouraged after the Lebanon war by the then Attorney General with the informal, but very influential, support of the former President of the Supreme Court Aaron Barak.

⁵¹ Author's interview with Colonel (Rtd.) Pnina Sharvit Baruch at Tel Aviv University on 21 May 2009. Unless otherwise indicated the factual information contained in this section is provided by Sharvit Baruch in interview.

⁵² The IDF is split between Northern Command, Central Command, Southern Command and Homefront Command.

⁵³ Col (Rtd.) Daniel Reisner former head of the IDL confirms this institutional arrangement. See, Author's interview with Reisner in Jerusalem 24 May 2009.

During Cast Lead the IDL consisted of 20 full time officers who were reinforced from other parts of the JAG unit and by reservists. This raised the numbers by six or seven, enabling the unit to have a round the clock presence at headquarters where the operational decisions were being made. The Military Advocate General was in meetings with the Chief of Staff at high level forums and there was a close legal connection with the air force and the navy. There was also a legal advisor at the co-ordinator's office where humanitarian aid was coordinated with NGOs and international bodies. Sharvit-Baruch and her deputy were constantly available to give advice.

IDL lawyers were involved in the advance planning of Cast Lead at the Headquarters forums. This included targeting decisions that were taken after input from the intelligence, air force and planning officers and the legal advisors. Sharvit-Baruch makes a distinction between the decision to include a location in the banks of targets, the decision to attack a target from the bank and short-cycle targets,

There are two different levels of targeting decision. The banks of targets are created in advance and here the lawyer plays a part. This is operational planning. But during an operation we have to decide whether to attack a target from a bank. So then there is another decision of whether to attack or not. This then is a target that has already been discussed and included in a bank and now we are at a second stage of a decision making on whether or not to actually carry out the attack at the time. This is a discussion of when to attack and how to attack. Also there are new targets that have been created in the course of the operations. But here there is time to plan the same attack for the next day. Here again lawyers are part of the process. The lawyer will mainly be discussing the legal aspects of the target to be attacked; here we are considering the principal of distinction.

In our operations we are frequently dealing with civilian areas that are being used for military operations. When operating against the Palestinians and also the Hezbollah it is rare to have purely military targets. We must see whether somewhere indeed has lost civilian status and become a lawful target. This involves the consideration of what use is being made of the target building or area. Then there is a further consideration. This is the question of proportionality. Here the whole analysis is made on the basis of the information you have available at the time of making the decision. The proportionality and the precautions will include questions of when to attack- in the night or in the day. There are questions of what size of bomb to use to cause the minimum collateral damage and then the decision as to who is to carry out the attack the next day. It is usually the air force.

There is another type of target. This is the short cycle targeting. These are situations requiring fast response. It may be that the enemy is shooting at our forces from a particular location and they ask the air force to come in and bomb that building. These decisions do not go past the

lawyers. Here there is no legal adviser in the loop. These are urgent decisions that have to be taken at the moment with less knowledge. This may be because the forces are being attacked or because they have discovered a target that seems to them to be a good target and the opportunity may pass very quickly. An example of this would be to call in air support to attack a certain truck because they think that the truck is carrying missiles. Then of course it could turn out that the truck is carrying oxygen or gas bottles- which in fact it happened⁵⁴. You have to make the decision on the information you have.

Although Sharvit-Baruch is unable to discuss operational decisions, this description of her department's involvement indicates that the lawyers were certainly involved in the major targeting decisions that would have included the controversial strikes on the Hamas organs of government and the Gaza police. Sharvit-Baruch is adamant that her department had the full support of the Judge Advocate General and that their legal advice was accepted.

The IDL had been closely involved in advising on warnings during the 2006 Second Lebanon war and was aware of the international criticism that the warnings had been ineffective and both confusing and threatening. The department was again involved in drafting the warnings during Cast lead when greater efforts were made to ensure clarity and direction to safe places.

Sharvit-Baruch is adamant that her department's legal advice was followed and that where her lawyers expressed an opinion that an operation was not lawful it had not proceeded⁵⁵. She disagrees with the suggestion that there was an excessive concern with force protection and expressly disagrees with Asa Kasher's view that soldiers should not be put at risk for the sake of enemy civilians. From her perspective, her department did not tailor their advice to help the IDF avoid its legal obligations, seeing herself as a state lawyer rather than on the side of the IDF,

'I am not there to find a way for them to do anything they want and to justify everything they want to do. I am there to try to find legal ways to achieve the goals of the army. If there is a legal way I am there to show it to them or help them find it. I am not there only to say what they can't do. I am also there to say what they can do and how to do what they want to do in a legal way. This does not mean that I will tell them how to do something unlawful'.

⁵⁴ This is a reference to a well documented incident during the 2006 Second Lebanon War.

⁵⁵ Author's interview with Sharvit-Baruch, 'I personally know of targets that were cancelled or changes were made in methods of how to attack them because of decisions of lawyers'.

Colonel (Rtd.) David Benjamin, who spent most of his military career as a lawyer in Gaza and Southern Command, confirms Sharvit-Baruch's view of the IDL role during Cast Lead⁵⁶,

The legal advisor is posted to a division. When an operation is planned the planners present proposals in a multi-tiered process. Issues discussed are strategic, operational and technical. The sort of questions put to lawyers are what targets can be hit legally. This becomes very difficult when you are in an asymmetric mode. The lack of reciprocity is not what the enemy is doing to your side but what they are doing to their own civilians. This presents grey areas where the answer is not clear.... Grey areas include proportionality and collateral damage. This is the tricky legal area and the number one issue that comes up.

Benjamin maintains that his advice was always followed and that he knew of no instance during Cast Lead where any IDL advice was ignored. Nevertheless, there were clear institutional pressures where 'the legal advisor eats, sleeps and runs with the army military. The military is about pleasing the commander. The atmosphere can get very ugly when soldiers start getting killed.' Benjamin points to the crucial importance of intelligence in identifying targets as military,

This makes it very difficult to defend advice because I cannot say what I knew. The military is often operating in a situation where everything looks civilian- the people and the buildings. In Gaza buildings and whole streets were wired up with explosives, not just in buildings but also under roads. This is the nature of asymmetric warfare. It is the tactics rather than state/non-state involvement.

Benjamin is clearly sympathetic to the problems faced by the IDF. Each of the IDL lawyers interviewed was keen to emphasise that this institutional identification did not lead to their turning a blind eye to illegality. However, an examination of the legally controversial targeting decisions is required before any conclusions can be drawn about the nature of the IDL legal advice during Cast Lead.

⁵⁶ Author's interview with Colonel (Rtd.) David Benjamin, Jerusalem, 18, May 2009.

4. The Legal Controversies: the Goldstone Report and the Israeli legal defence

There is very little about the Israeli conduct of Cast Lead that has not provoked legal controversy. 'Legal controversy' is used in the present discussion in its general rather than legal sense to mean a prolonged public dispute about the legality of Israeli operations. The opposing positions are clearly articulated in the Goldstone Report and the Israeli Report. A comparative analysis of the two reports sheds light on the breadth of legal opinion that has been applied to the Israeli targeting decisions and the advice that the IDF lawyers must have given to the military. However, any conclusions are dependent on:

- 1) legal advice having been given on the operations in question,
- 2) the advice having been followed and
- 3) recognition that, in the absence of details of operations that did not proceed or the text of the rules of engagement, the method of analysis cannot identify legal advice that set the limits on what was legal.

Since the vast majority of the operations were rapid response close air and artillery support, which would not necessarily have been considered by the lawyers, and since the IDF rules of engagement have not been disclosed, the best indicators of the stance of the legal advisors are the pre-planned attacks that took place in the first days of the operation and the sophisticated system of warnings that were delivered to the civilian population. Consequently, this case study will focus on the pre-planned attacks on the Legislative Council, the Ministry of Justice and the Gaza police and the use of warnings. The analysis is assisted by the detailed legal criticism in the Goldstone Report and by the legal defence in the Israeli report. This is not to suggest that comparison of two reports reveals the multiplicity of legal positions that can be taken with respect to the Israeli conduct, but they do serve to present in concise form the parameters of the

legal discussion among two sets of elite actors and the Israeli Report is an authoritative statement of the Israeli position.

The Goldstone Mission, which was established by the UN Human Rights Council on 3 April 2009, was headed by Justice Richard Goldstone, a former South Africa Constitutional Court Judge and former prosecutor for the International Criminal Tribunals for the former Yugoslavia. The balance of the mission was made up of LSE professor of international law Christine Chinkin, Hina Jilani Pakistan Supreme Court advocate and Colonel (Rtd.) Desmond Travers of the Irish Defence Forces. The terms of reference were negotiated by Goldstone, 'to investigate all violations of human rights law and international humanitarian law' in the context of the military operations in Gaza. The original mandate had been to investigate Israeli war crimes and the re-interpretation by Judge Goldstein had been an effort to demonstrate even-handed objectivity divorced from the politicised discussions that had preceded the resolution⁵⁷.

The mission interpreted its mandate as a direction to review the legality of the suffering endured by civilians during the conflict. Since there was little dispute about the illegality of Hamas rocket fire at Israeli population centres, the Mission mainly concerned itself with determining the legality of the death, injury and loss visited upon the citizens of Gaza by the Israeli military operations. Despite the best efforts of the Mission, the Israeli government reaction was one of non-cooperation. This was consistent with Israel's dealings with UN fact finding missions and, as will be recalled from case study two, the Soares mission to investigate Israel's conduct of the Second Lebanon war was also denied Israeli cooperation. Consequently, instead of assisting the mission, the Israeli government launched a pre-emptive legal defence in July 2009 with the publication of its own report, *The Operation in Gaza 7 December 2008 – 18 January 2009*

⁵⁷ UNHCR Resolution S-91 had called for, 'an urgent, independent international fact-finding mission, to be appointed by the President of the Council, to investigate all violations of international human rights law and international humanitarian law by the occupying Power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory, particularly in the occupied Gaza Strip, due to the current aggression'.

Factual and Legal Aspects, (the Israeli Report)⁵⁸. The Report of the United Nations Fact-Finding Mission on the Gaza Conflict, (the Goldstone Report) was published in its final form on 25 September 2009⁵⁹. The two reports come to very different legal conclusions about Israel's missile strikes on the Gaza police and the Hamas government infrastructure and on the legal consequences of issuing warnings to the civilian population.

It is common ground between the two reports that the IHL principles of distinction, proportionality and military necessity apply to Cast Lead. It will be recalled that the principle of distinction, which is a requirement of customary law in both international and non-international armed conflicts, has been codified in Article 52 of Additional Protocol I in the following terms,

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.
2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.
3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

Article 48 of the 1977 Additional Protocol I to the 1949 Geneva Conventions provides that,

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

Additional Protocol I specifically addresses civilians in Article 51.2 by providing that, '[t]he civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian

⁵⁸ The Israeli report: Israel Ministry of Foreign Affairs, *The Operation in Gaza: Factual and Legal Aspects*, available at <http://www.mfa.gov.il/NR/rdonlyres/E89E699D-A435-491B-B2D0-017675DAFEF7/0/GazaOperationwLinks.pdf> (last accessed 12 January 2011)

⁵⁹ Supra note 2 the Goldstone report.

population are prohibited.’ These provisions undoubtedly replicate customary law and thus bind even states that are not party to the treaty, such as Israel and the United States. Analogous prohibitions, also customary in nature, exist for non-international armed conflict.

The provisions are intended to prevent the deliberate destruction in war of the civilian infrastructure. However, as was discussed in chapter three, the concept of dual-purpose targets muddies the waters by allowing targeting of objects that have both civil and military uses. In simple terms, dual use targets are those that are used by the military in addition to their civilian use. As was seen in Case Study 2 The 2006 Lebanon War, this enabled the Israeli government to justify its targeting during the 2006 Second Lebanon war of Lebanese roads, bridges, power supplies and TV stations.

On 31 December 2008 the Palestinian Legislative Council Building and the Ministry of Justice in the centre of Gaza city were attacked by air and hit by missiles. At first sight, this argument that these were dual-use targets does not seem to apply to the attack on the Legislative Council Building and the Ministry of Justice. They are part of the Tel El-Hawwa government complex and there has been no suggestion that the buildings were used by fighters or for the storage of weapons. The Goldstone Mission, which investigated the attacks, was satisfied that this was an unlawful deliberate attack on civilian targets, finding,

389. There is an absence of evidence or, indeed, any allegation from the Israeli Government and armed forces that the Legislative Council building, the Ministry of Justice or the Gaza main prison “made an effective contribution to military action.” On the information available to it, the Mission finds that the attacks on these buildings constituted *deliberate attacks on civilian objects* in violation of the rule of customary international humanitarian law whereby attacks must be strictly limited to military objectives. (Emphasis added)

390. In the Mission's view these facts further indicate the commission of the grave breach of extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly, as defined in article 147 of the Fourth Geneva Convention.

The mission took a similar view of the attacks on the Gaza police which killed over 90 police at the Arafat City police headquarters alone. Gaza police stations were among the first targets to be attacked at the start of the operation on 27 December. Twenty four police stations were hit in the first minutes of the attack and a further fourteen the following day. These were the *Shura* or 'civil police' and included 99 who were killed at Arafat City police headquarters while attending training exercises⁶⁰. According to information presented to the mission, of the 248 Gaza police killed during Cast Lead the majority were intentionally killed in the attacks on the police stations⁶¹. Under IHL, police forces are to be regarded as civilian unless they have been incorporated into the military. If they have been incorporated they assume combat status. The Goldstone Mission found no evidence that this had been the case or that there was dual membership with a military cadre. Like any civilian they had protected status and could not be targeted 'unless and for such time as they take a direct part in hostilities'⁶². The Goldstone Mission found that the Gaza police did not fall into any of these categories. Despite this clear finding, the Mission proceeded to consider the position if it were to be established that some of the police were also members of the Izz ad-Din al-Qassam Brigades (the military wing of Hamas). This raised the question of whether, in those circumstances, the attacks would have been proportionate.

It will be recalled that proportionality only becomes relevant where the intended target is a military object. Hence, proportionality is only relevant if the civilian police officers were unintended casualties of an attack on a military object. If there were some police officers who were military targets by virtue of their membership of the al-Qassam Brigade, this would make them lawful military targets providing that the incidental civilian harm is not disproportionate. It will be recalled that the customary international law principle of proportionality is expressed in

⁶⁰ It had been thought that this was a graduation ceremony for new police recruits, but statements given to the Goldstone Mission confirm that it was a training event.

⁶¹ The Goldstone Report, para.424.

⁶² Pursuant to article 51 (3) of Additional Protocol I, civilians enjoy immunity from attack 'unless and for such time as they take a direct part in hostilities'. This is understood to reflect customary international law.

its codified form in Article 51(5)(b) of the Additional Protocol to the Geneva Conventions of 1977 (First Additional Protocol) as, ‘An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.’

In the view of the Mission, even if the intended targets were those officers who were combatants by virtue of their dual membership of the police force and the al-Qassam Brigade, the large number of officers present who were not so affiliated made the attack disproportionate and unlawful. In short, the attack failed to meet the requirements of distinction, and, even if it did not, it was disproportionate. According to the Goldstone Report, on any viewing, the decision to target the police was legally wrong and the attacks were unlawful. If this is right, as in the case of the destruction of the Parliament Building and the Ministry of Justice, the IDF lawyers authorised an unlawful attack. However, this is not the position articulated in the Israeli report.

The Israeli report, *The Operation in Gaza 27 December 2008-18 January 2009 Factual and Legal Aspects* sets out Israel’s legal justification for its operations during Cast Lead. The report locates the context of the operation as a defensive response to Hamas rocket and suicide terrorist attacks. The operation is described as part of a long-running military conflict between the state of Israel and Hamas that has continued since the start of the Second Intifada in October 2000⁶³. This section of the report should not be written off as narrative background because the characterisation of Hamas as a terrorist organisation is key to understanding the nuances of the Israeli legal defence of the IDF targeting decisions.

⁶³ The Israeli Report, paras.28 and paras.36-66.

The Geneva Conventions and some of the First Protocol⁶⁴ are recognised as applying to the conflict and Israel specifically claims to have complied with the requirements of distinction, proportionality and military necessity. However, as we have seen previously, the imprecision at the heart of IHL arising from the uneasy balancing of military and humanitarian principles results in grey areas where lawyers exercise choice in how they construct their advice. As will be seen, the characterisation of Hamas is key to understanding an Israeli legal approach that applies IHL to the conflict and, indeed, to conflicts between states and non-state actors. The main difference, as was emphasised by Benjamin, is the extent to which non-state actors disregard IHL by concealing themselves and their attacks amongst their own civilians. The Israeli Report devotes a lot of time to describing in detail Hamas' employment of these tactics⁶⁵.

As we have previously noted, distinction and proportionality are linked to military necessity, which is the primary controlling principle. Only necessary destruction is allowed. Clearly, military necessity is linked to the objectives of the campaign, which are set out in the Israeli Report as:

230. Consistent with its rules of engagement, IDF Forces sought to maintain equilibrium between two competing considerations: *military necessity and humanitarian considerations*. In the course of the Gaza Operation, IDF's military necessities included first and foremost the prevention of rocket and mortar fire against Israel and Israelis, as well as the dismantling of terrorist infrastructure, but also the protection of IDF forces operating in the Gaza Strip.

The point to be emphasised here is that the military necessity of 'the dismantling of terrorist infrastructure' requires a definition of terrorist infrastructure and specifically where the boundary lies between terrorist infrastructure and civilian infrastructure. In fact, this is the key conceptual battleground between the Goldstone Report and the Israeli Report. The discussion in

⁶⁴ As was discussed in chapter 3, Israel in common with the US is not a party to the First Protocol but recognises those articles that are an expression of customary international law, including the statements of the requirements of proportionality, distinction and military necessity.

⁶⁵ The Israeli Report para.142-208

the Israeli Report begins with a disarmingly conventional claim in respect of Israeli targeting while continuing the narrative of Hamas' use of civilians and civilian property as shields,

Consistent with the principle of distinction, IDF forces attacked military targets directly connected to Hamas and other terrorist organisations' military activities against Israel. For instance, IDF forces targeted Hamas rocket launchers, weapons stockpiles, command and control facilities, weapons factories, explosives laboratories, training facilities and communications infrastructure. That these objects were often concealed or embedded in civilian facilities such as residential buildings, schools, or mosques did not render them immune from attack. In accordance with the Law of Armed Conflict, civilian facilities that served military purposes did not enjoy protection from attack. Thus, a residential building that doubled as an ammunition depot or military headquarters was a legitimate military target for attack⁶⁶.

At first sight it is unclear how the attacks on the Parliament Building and the Ministry of Justice come within these parameters. The attacks are described in the following terms,

Hamas' main headquarters compound in Gaza City (struck on 27 December): This compound served as Hamas' Gaza City headquarters, and the office of Ismail Haniya, head of the Hamas administration, is located in the compound. The headquarters also served as a point for Executive Force patrols to gather before they went out into the city. In addition, there were police cars and armoured patrol cars confiscated by Hamas when it took over the Gaza Strip.

Ismail Haniyah's office in the Hamas compound in Gaza City (struck on 31 December): The office of Ismail Haniyah, attacked by Israeli Air Force on the nights of 30-31 December, was used for planning, supporting, and funding terrorist activities against Israel⁶⁷.

Clearly, justifying the destruction of the Parliament building on the grounds that Executive Force Patrols met up in the government compound and that there were some confiscated vehicles there amounts to a weak claim to military necessity. The real explanation is to be found in the following passage,

It should be noted that Israeli forces have come under criticism from various international organisations for attacking a number of Hamas targets, such as various —ministries operated by Hamas, which were alleged to be civilian in nature. While Hamas operates ministries and is in charge of a variety of administrative and traditionally governmental functions in the Gaza Strip, it still remains a *terrorist organisation*. Many of the *ostensibly civilian* elements of its regime are in reality active components of its terrorist and military efforts. Indeed, Hamas does not separate its civilian and military activities in the manner in which a *legitimate*

⁶⁶ The Israel Report para.233

⁶⁷ The Israel Report para.234

government might. Instead, Hamas uses apparatuses under its control, including quasi-governmental institutions, to promote its terrorist activity⁶⁸. (Emphasis added)

It will be recalled that the IHL principle codified in Article 52(2) of Additional Protocol provides that,

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those *objects which by their nature, location, purpose or use make an effective contribution to military action* and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. (Emphasis added)

It can readily be seen that the Israeli characterisation of Hamas as a terrorist organisation and not a legitimate government is behind the decision to target the Parliament Building and the Ministry of Justice. If there is no civil element of the Hamas government of Gaza then all aspects of government ‘by their nature’ make an effective contribution to military action and their destruction is likely to offer a ‘definite military advantage’. This amounts to an assertion that, in practice Hamas mixes its civil and military government functions rather in the way it mixes its fighters with civilians and, as was seen in Case study 2, is consistent with the statements made about Hezbollah during the 2006 Lebanon War. The essence of the approach is to look at the nature of the organisation rather than the function of its specific parts.

The Israeli legal analysis is in complete contrast with the Goldstone view that, ‘Hamas is an organization with distinct political, military and social welfare components’⁶⁹. The Goldstone Mission explicitly rejects the Israeli assertion that the distinction between the civilian and military parts of the Hamas government is no longer relevant as ‘a dangerous argument that should be vigorously rejected as incompatible with the cardinal principle of distinction’. This disagreement is at the heart of the legal controversy, and reflects a fundamental disagreement

⁶⁸ The Israel Report para.235

⁶⁹ The Goldstone Report para.382

about the extent to which the nature of terrorist organisations results in a more relaxed application of the constraining principle of distinction. Undoubtedly, the Israeli analysis makes all Hamas government institutions valid targets; from the Goldstone perspective, this resulted in unlawful and unnecessary destruction of the Gaza civil infrastructure.

The Israeli Report's legal defence of the targeting of the Gaza police relies on a factual analysis to establish that the police were part of the Hamas 'internal security' apparatus with standing orders to fight Israeli forces⁷⁰. At first sight, the differing approaches of the two reports seem to amount to differing views of the available evidence about the nature and functions of the Gaza police. While the Goldstone Mission accepts the statements of its Hamas witnesses that the police carried out exclusively civilian duties, the Israeli Report relies on the history of the force and statements made by its members during the conflict that the police officers were under a duty to fight the invaders. The Israeli Report also takes a different view of the proportion of police officers that were also members of the militias. There is evidence to support both views and perhaps it is the wider narrative that informs the assessment of the available information. Although, the report does not rely on the previously expressed view that Hamas has no civil function, this is clearly the context within which the evidence is assessed,

At that point [the Hamas take over in 2007], Hamas restructured the Executive Force and subdivided it into several units, including the 'police'. *The newly established police force thereafter assumed many traditional law enforcement functions, to the extent enforcing the unlawful rule of a terrorist organisation over a population could be termed 'law enforcement'*. As the leader of the Executive Force emphasised in an August 2007 interview, however, the force's members were also —resistance fighters, a common term for Hamas' military wing. Their weaponry continued to include machine guns and anti-tank weapons — not the tools of a regular civilian police force.⁷¹ (Emphasis added)

It is accepted by both reports that the normal position under IHL is that police forces are civilian institutions that may not be targeted. Israel argues that in practice the Gaza police had a military

⁷⁰ The Israeli Report para. 237-248.

⁷¹ The Israeli Report para. 241.

function to engage the IDF invasion and on the face of it, this is a factual rather than a legal dispute. However, the Israeli framing of its legal defence suggests that there would have been little ethical objection to a legal position that found in favour of the attack. However, newspaper reports indicate that in the run up to Cast Lead there was an ongoing struggle between the IDF and the IDL over the legality of targeting the police. This appears to have caused by what was probably faulty intelligence that the target at the event at the Police Station was a graduation ceremony rather than a training session.

Israel's use of warnings to the civilian population is another area of controversy. This is not because there is anything exceptional about giving warning of an attack. Indeed warnings are required by customary international law, which is restated in codified form in Article 57(2) (c) of Additional Protocol I, which provides that, 'effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.' The controversy is about the proper implications to be drawn from the use of warnings when applying the rules of distinction and proportionality. As was discussed in Case Study 2 The Second Lebanon war, Israel had issued warnings to the villagers of southern Lebanon and the Shiite suburbs of Beirut to leave the areas before carrying out attacks in civilian neighbourhoods. The UNHRC Soares Report criticised Israel for the often vague wording of the warnings, the lack of directions to safe areas and the fact that there was no safe means of leaving. However, the force of the criticism was that it allowed the conclusion that Israel had adopted a false presumption that the civilians had obeyed instructions and left the battlefield, which completely subverted the IHL restraints on targeting.

As might be expected, the Goldstone Report and the Israel Report have different views of the significance of the Israeli system of civilian warnings. During Cast Lead, Israel institutionalised the use of warnings to an unprecedented degree, notifying the population in advance of planned

targeting of neighbourhoods and individual buildings and directing the citizens to safer areas. These warnings were delivered by written notices, calls to mobile phones and landlines and the innovative 'knock on roof procedure' whereby non-fatal fire was directed at the roofs of buildings in advance of the attack to encourage the occupants to leave⁷². The Israeli Report claims that about 165,000 phone calls were made and some 2,500,000 leaflets were dropped. In addition, Israel broke into Radio Hamas, the Palestinian Islamic Jihad Radio and Radio PFLP transmissions to issue warnings to the civilian population⁷³. From the Israeli perspective, the warnings are evidence of a humanitarian conduct of the operation that was designed to minimise the harm to civilians. The Goldstone Report criticises the warnings as overly generic and unhelpful in directing the population to the centre of cities where there had already been extensive attacks. The 'knock on roof' procedure is seen as reckless and a form of attack rather than warning. In short, Goldstone finds that Israel had failed to comply with Article 57(2) (c)⁷⁴. This finding can be understood within the wider Goldstone position that Cast Lead was designed to punish the people of Gaza for their support for Hamas that required the deliberate targeting of civilians, their homes and infrastructure⁷⁵. Indeed, from this perspective, it would be surprising if the warnings were not designed to terrify rather than protect.

In fact there is good reason to suppose that the issue of warnings is of greater significance than either report reveals. As has been argued throughout this thesis, legal positions on operations are informed by ethical positions on the correct balance to be struck between humanitarian and military considerations. Whether or not civilians have been warned of intending attack influences the ethical position on whether or not the anticipated civilian harm is morally acceptable. This is not just a matter of assuming that the civilians have left the battlefield in

⁷² The Israeli Report, para.262-265

⁷³ Israel Ministry of Foreign Affairs, *Israel Issues warnings to the Civilians of Gaza*, 7 January 2009, available at, http://www.mfa.gov.il/MFA/Government/Communiques/2009/IDF_warns_Gaza_population_7-Jan-2009.htm. (Last accessed 2 December 2010).

⁷⁴ The Goldstone Report, para.1920

⁷⁵ The Goldstone Report, para.1920

response to warnings. Rather, it is a question of the degree of consideration to be given to the civilians who have chosen to remain there. In strictly legal terms, the question can be put as: in a conflict against a non-state actor whose military operations are concealed among its own civilians, can an operation that would otherwise be disproportionate be viewed as proportionate by virtue of the fact that the civilians had been warned to leave vicinity? While neither the Goldstone Report nor the Israeli Report argues this point, it is certainly part of the ethical debate that informs Israeli positions on the right way to fight terrorism.

As was noted in chapter four the influential Israeli ethicist Asa Kasher has worked with Major General (Rtd.) Amos Yadin, former head of Israeli Military intelligence, to promote a particular ethical position on the responsibility of an attacking force when presented with an opponent that uses its own civilians as human shields. Kasher and Yadin worked on the IDF code of conduct and their views are thought to be generally accepted in Israeli military circles⁷⁶. The essence of Kasher's position is that there is no moral basis for endangering the life of a soldier to avoid killing the neighbour of an enemy or a terrorist⁷⁷. Kasher reaches this position by the application of social contract theory to prioritise the duty of the state to protect its citizens, including its soldiers.

A recurring theme of Kasher's work is the idea that Israel is developing customary international law to allow states to combat terror by warfare and that Western democratic countries are adopting Israeli tactics and, by implication, the Israeli view of what is legally permissible:

We in Israel are in a key position in the development of the customary international law of war because we are on the front lines in the fight against terrorism. The more often Western states apply principles that originated in Israel to their own non-traditional conflicts in places like Afghanistan and Iraq, the greater the chance these principles have of becoming a valuable part of international law.....

Our doctrine mandates that whenever possible, you must warn noncombatants that they are residents of a neighborhood where it is dangerous to stay. The responsibility for minimizing

⁷⁶ Amos Harel, 'The Philosopher Who Gave the IDF Moral Justification in Gaza', *Haaretz*, 2 June 2009, available at, <http://www.haaretz.com/print-edition/news/the-philosopher-who-gave-the-idf-moral-justification-in-gaza-1.269527>. (Last accessed 1 November 2010).

⁷⁷ Ibid, quoting Kasher, 'There is no army in the world that will endanger its soldiers in order to avoid hitting the neighbors of an enemy or terrorist'.

injury to noncombatants entails the responsibility to separate them from terrorists and to remove them from the area of combat. In Gaza, the IDF employed a variety of effective efforts meant to minimize collateral damage, including widely distributed warning leaflets, more than 150,000 warning phone calls to terrorists' neighbors, and non-lethal warning fire (the so-called "knock on the roof") – unprecedented efforts in every respect.

In a state of effective control, the responsibility for distinguishing between terrorists and noncombatants is placed upon Israel's shoulders. We do have effective control over Tel Aviv, Jerusalem, the Golan Heights and many other places, so there we do jeopardize the lives of police when necessary to prevent criminal acts without harming the neighbors. That is their duty.

But there is no army in the world that will endanger its soldiers to avoid hitting the *well-warned* neighbors of an enemy or terrorist. When Israel does not have effective control over a territory, the moral responsibility for distinguishing between terrorists and noncombatants is not placed upon its shoulders. Gaza was not under our effective control...

In sum, Israel should favor the lives of its own soldiers over the lives of the well-warned neighbors of a terrorist when it is operating in a territory that it does not effectively control, because in such territories it does not bear moral responsibility for properly separating between dangerous individuals and harmless ones, beyond warning them in an effective way.
⁷⁸(Emphasis added)

Kasher's argument is designed to preserve Israel's capacity to use deadly military force against an enemy that locates its military among its civilians, while minimizing the risk to IDF soldiers. The traditional application of proportionality is skewed by the notion that responsibility for harm shifts from the attacker to the 'well warned neighbour' and the enemy forces themselves. The application of this ethical reasoning is reinforced by a widely held Israeli belief that the traditional rules of IHL are unsuited to modern warfare so that Israeli legal scholars such as Amichai Cohen argue for a more permissive application of proportionality in armed conflicts against non-state actors. As with all things concerning proportionality, there is no clear expression of where to locate the dividing line between the legal and the illegal but there appears to be a developing consensus in Israeli legal and ethical scholarship that is in favour of giving the military greater latitude in wars against terrorists.

⁷⁸ Asa Kasher, Analysis: A moral evaluation of the Gaza War, *Jerusalem Post*, 2 July 2010, available at, <http://www.jpost.com/Israel/Article.aspx?id=168061>. (Last accessed 12 December 2010).

The Goldstone Report paints a picture of intentional attacks on Gaza civilians who have been deliberately terrorised by warnings, while the Israeli report describes proportionate attacks where civilians have largely left the battlefield. However, it is argued here that a more nuanced view of the conflict regards the warnings as genuine and the attacks as having been constrained by only a permissive construction of proportionality that put the limit somewhere short of deliberate targeting of civilians.

The foregoing discussion has revealed that Israel' framing of Hamas as a terrorist organisation that mixed its civil and military functions weakened the constraint of distinction, enabling the targeting of government institutions. The Goldstone Report saw this as a dangerous development that undermines IHL. By linking the purpose of government to the function of government Israel stretched the definition of military object to suit its aims of targeting all aspects of Hamas' administration. This was achieved by a particularly permissive legal construction of distinction. The use of warnings enabled an elaborate ethical justification for a permissive view of proportionality, which accounts for the construction of legal advice that enabled Israel to employ its military might in the crowded residential areas of Gaza.

The point to be emphasised is that, the Israeli conflation of Hamas' military and civil administration and the expansive view of the significance of warnings underpin a construction of IHL that enabled the IDF to launch operations that were judged by the IDL to be legal. These same operations were found by Goldstone to be unlawful through an application of IHL that characterised Hamas civil infrastructure targets as civilian institutions and Israeli warnings as at best irrelevant and at worst a form of unlawful attack in themselves.

5) The aftermath

The Goldstone Report had run to over five hundred pages of condemnation of Israel's conduct of Cast Lead with the legal findings of fact contained within a powerful narrative of Palestinian oppression and dispossession. It was not only Cast Lead that was condemned as illegal but Israel's whole security policy towards the Palestinians in general and the citizens of Gaza in particular. The findings of the report coupled with the lingering images of Israeli warplanes over Gaza and the scenes of devastation formed a potent mix that challenged the legitimacy of the operation. Israeli spokespersons mounted a legal defense of Cast Lead while alleging that Goldstone and his colleagues had let their political beliefs colour their legal findings- in legal terms *jus ad bellum* considerations had affected *jus in bello* judgments. The legal discourse was understood by the Israeli government as a tool for the delegitimation of the operation that had to be countered in similar terms. As Israeli PM Netanyahu, was reported to have told his cabinet, 'The deligitimisation [of Israel] must be delegitimized'⁷⁹. The legal discourse was the political discourse of delegitimation. Law and lawyers became centre stage and, in an effort to promote the legality of the operation, the Israeli Report made great play of the involvement of the IDL in IDF operational decision making.

Having reached its legal conclusions, the Goldstone Report called for prosecution of the Israeli military under the Universal Jurisdiction. While reference was made in Case Study 1 to the creation of a team within the Israeli Justice Ministry to defend universal jurisdiction cases, this development had more to do with the fallout from Goldstone than the Shehadeh case. It is interesting to note that the involvement of the IDL in operational decision making puts the lawyers at risk of such prosecutions. Sharvit-Baruch recognises that she is a likely target, 'These

⁷⁹ Barak Ravid, 'Delegitimization of Israel must be delegitimized', Haaretz, 23 October 2010, available at, <http://www.haaretz.com/news/delegitimization-of-israel-must-be-delegitimized-1.5970>. (Last accessed 2 December 2010).

cases are a political way to harass Israeli officers. I also can't go to London probably at the moment because there is also a responsibility on the lawyers. My involvement adds me to the list but doesn't really take the commanders off the list'⁸⁰.

In the meantime, Benjamin is facing calls from Palestinian groups for his prosecution in South Africa by virtue of his joint Israeli and South African citizenship.⁸¹ While it is correct to say that Cast Lead attracted strong public support within Israel, it was by no means universal, as Sharvit-Baruch found on her retirement from the army to take up a teaching post in the law department of Tel Aviv University⁸². Some prominent members of the faculty objected to the appointment of a lawyer who could have given legal advice in support of Cast Lead and threatened strike action. For a time this threatened to pit the military and political elites against left wing elements of the legal institution and the dispute was the subject of a special cabinet meeting before the objectors melted away. Nevertheless, the incident was unprecedented and shows the possibility of legal institutional pressure being brought to bear on the IDL in opposition to the military institutional pressures.

6) Conclusion

In order for Israel to employ military power to counter Hamas' strategy of launching rocket attacks on Israeli population centres from Gaza without reoccupying Gaza or losing soldiers in the process, a way had to be found to engage Hamas combatants who concealed themselves and their weaponry among the civilian population, homes and institutions of Gaza. Israel had the technology and intelligence to employ accurate stand off power and a careful ground offensive. There was in place an ethical justification for minimising the risk to IDF soldiers where Hamas had the responsibility for placing them in danger. What was needed was a permissive

⁸⁰ Author's interview with Sharvit-Baruch

⁸¹ Yotam Feldman, 'ICC may try IDF officer in wake of Goldstone Gaza report', *Haaretz*, 24 September 2009.

⁸² Ofri Ilani, 'Protests as IDF colonel who ruled for attacks on Gaza civilians starts as TAU lecturer', *Haaretz*, 5 March 2009.

construction of IHL that enabled a credible legal defence of targeting decisions. This was provided by the IDL, whose involvement had been expanded since the 2006 Lebanon war to include lawyers at HQ, Southern Command and divisional level. Close examination of the Goldstone Report and the Israeli Report show that the IDL relied heavily on an effective system of warnings to allow an assumption that the battlefield had been cleared of unwilling participants in the conflict and a legal analysis of Hamas that relied on the terrorist purpose of the organisation to expunge the distinction between its civil and military institutions. In this way the IDL made use of the grey areas in IHL to apply the lessons of Lebanon 2006 so that a war on Hamas terror could be fought within the principles of IHL. An examination of the Goldstone Report shows how far the Israeli construction of IHL differed from the IHL recognised by the mission. This led to an unprecedented public demonization of Goldstone in Israel and an international campaign by Israeli supporters to smear the report as a politically biased application of law. In the process lawyers and their rival constructions of IHL were deployed to challenge and defend the legitimacy of the operation. In this regard, the Goldstone Report and the Israeli Report do more than illustrate the rival constructions of IHL. They also show the extent to which legal discourse was employed in the battle for legitimacy.

It will be recalled that there are three hypotheses raised in this thesis to account for the increased involvement of military lawyers in IDF operational decision-making:

- 1) The application of international law by the Israeli Supreme Court,
- 2) The threat of foreign prosecutions of Israeli decision-makers for war crimes and
- 3) The increased use of International Humanitarian Law as a measure of the legitimacy of military action.

There is some support for the first hypothesis in that during Cast Lead the Israeli Supreme Court heard petitions from NGOs. In particular, the experience of the Court directing the suspension of hostilities to allow increased humanitarian aid to the citizens of Gaza reinforces the need for the IDL to be involved in contesting and implementing the court decisions. Furthermore, the Goldstone Report demanded that Israel mount its own legal investigations of wrongdoing during Cast Lead. There is certainly support for the second hypothesis given the Goldstone's explicit call for international jurisdiction prosecutions.

The intensity of the international legal condemnation following Goldstone and the deployment of Israeli lawyers and legal argument in what Clarke calls strategies of legitimisation suggests support for the third hypothesis that increased use of International Humanitarian Law as a measure of the legitimacy of military action. Given the intensity of the Israeli domestic criticism of the decision by the Israeli government not to cooperate with the Goldstone Mission it seems likely that UN commissions of enquiry will develop into even more important sites of legitimisation through legal discourse, driving a greater IDF reliance on their lawyers. These missions are not going to go away; as the Goldstone Report puts it, 'The Mission is firmly convinced that justice and respect for the rule of law are the indispensable basis for peace. The prolonged situation of impunity has created a justice crisis in the Occupied Palestinian Territory that warrants action'⁸³.

It will be recalled that it was also hypothesised that the IDF military lawyers exercise choice in the construction of their advice and apply a permissive construction of international humanitarian law to IDF targeting decision making and that their choice of IHL accords with a consensus among states conducting military actions against non-state actors and conflicts with legal positions adopted by communities of NGOs and UN commissions of enquiry. The analysis

⁸³ The Goldstone Report, para. 1958.

of the reports shows that a choice of law was made that met the needs of the IDF. Goldstone's 'unjustifiable impunity' amounts to a legal and ethical regime that serves Israel's security agenda, but not just Israel's agenda. This legal frame work meets the needs of states conducting military operations against non-state actors that conceal their combatants and their military objects among their own civilians. Such states can be seen as constituting a community of purpose that is likely to adopt, rather than criticise, the Israeli construction of IHL, with a consensus position that weakens rather than strengthens civilian protection. Viewed from this perspective, the US criticism of Goldstone has less to do with a knee jerk defence of Israel's interests and more to do with a shared purpose in combating insurgents without the constraints associated with traditional inter-state warfare. The Goldstone position can be seen as an expression of a European liberal strand of a regime of IHL that promotes the protection of the individual as a civilian and finds favour among NGOs and states that are not engaged in fighting insurgencies – not a position that has any attraction for the IDF.

Chapter 9: Case Study 4: The 2010 Turkish Flotilla- the Mavi Marmara Affair

1. Introduction

The golden era of Israel's bi-lateral relations with Turkey spanned the 1990's to decline gradually with the collapse of the Oslo peace process and the electoral success of Erdogan's AKP in 2002. Ankara's increasingly uneasy combination of close commercial and military links with Israel while embracing popular support for the plight of the Palestinians began to unravel during Cast Lead, reaching a tipping point with the *Mavi Marmara* (Blue Marmara) Affair. While Israel the crisis can be analysed in the context of Israel's bi-lateral relations with Turkey, a broader perspective sees the affair as central to the legitimacy of Israel's closure of Gaza.

As has been discussed throughout this thesis, legal and moral positions inform judgments of legitimacy, and it is not surprising that the legitimacy of Israel's naval operations is contested within both legal and humanitarian discourses. In Israel, the dominant moral position is that the personal and economic security of Israelis living in the South trumps the needs of the Palestinian residents of Gaza. This informs a construction of International Humanitarian Law (IHL) that validates both the closure of Gaza and the naval blockade of the Gaza coast. Israel's international critics, who take a different moral position on the suffering of the residents of Gaza, identify a humanitarian catastrophe that produces a moral imperative for the lifting of the 'siege' and a legal position that deems the Israeli naval blockade illegal.

Each of the actors deploys their legal arguments to contest the legitimacy of Israel's naval action against the *Mavi Marmara*, its passengers and crew. Within the IDF, the corps of the Military Advocate General (MAG) played an important part in providing legal advice to both the military and the political echelon that lead to the imposition of a naval blockade and the

military operations arising from it. Subsequently, the MAG acted to defend the legality of the interception of the *Mavi Marmara* through the publication of legal opinion and in evidence to the Turkel Commission, the Israeli Commission of Enquiry into the affair.

The following sections of this chapter comprise a detailed case study designed to reveal the role of the IDF's lawyers in the affair and their use of IHL.

2. The interception of the flotilla

What has come to be known as the 'Turkish Flotilla' comprised six ships en route to Gaza that were intercepted by Israeli naval forces on 31 May 2010. This was not just a matter of Turkish human rights activists setting off from Istanbul. In fact, this was an international flotilla co-ordinated by the Free Gaza Movement and the Foundation for Human Rights and Humanitarian Relief (IHH), a Turkish human rights organisation. The Free Gaza Movement is nominally based in Cyprus and operates as an international campaigning group with many organisational affiliates. Its web site mission statement is succinct,

We want to break the siege of Gaza. We want to raise international awareness about the prison-like closure of the Gaza Strip and pressure the international community to review its sanctions policy and end its support for continued Israeli occupation. We want to uphold Palestine's right to welcome internationals as visitors, human rights observers, humanitarian aid workers, journalists, or otherwise.

We have not and will not ask for Israel's permission. It is our intent to overcome this brutal siege through civil resistance and non-violent direct action, and establish a permanent sea lane between Gaza and the rest of the world¹.

As far as the Free Gaza Movement is concerned, the provision of humanitarian aid to Gaza by sea is a means to an end- breaking the siege. Their methods are avowedly non-violent. For the first six months following their formation in 2008 they organised five successful sailings to Gaza. Each mission comprised two small boats that the Israeli navy allowed in. From December 2008 there were three unsuccessful missions: December 2008 (rammed by the

¹ Available at: <http://www.freegaza.org/en/about-us/mission>. (Last accessed 10 January 2011).

Israeli navy and diverted), January 2009 (diverted), and June 2009 (boarded and diverted to Ashdod). On each occasion there was only non-violent resistance to the Israeli military.

There is no suggestion that the IHH had involvement in any sailings to Gaza before the *Mavi Marmara* and it is the participation of the IHH that was the first sign that this flotilla would be a different enterprise from those that had gone before. The IHH appears to have responded to a strategic decision by the Free Gaza Movement to work with partner organisations to construct an expanded flotilla. While not an exclusively IHH operation, the IHH certainly played a leading role, purchasing the *Mavi Marmara* as well as the *M.V. Defne Y* and *M.V. Gazze 1*. The flotilla comprised eight vessels², of which the *Mavi Marmara* was the largest and the lead ship, carrying 600 passengers and crew. In fact at the time of the interception there were only six ships, the *Rachel Corrie* having been delayed by a late sailing from Malta and the *Challenger 2* having withdrawn with engine trouble. The six ships, set off separately from Malta, Greece and Turkey in late May 2010 and, after rendezvousing in the Mediterranean, set sail for Gaza on 30 May 2010 from a position 65 nautical miles west of Lebanon. The Israeli navy intercepted the flotilla the following day in international waters approximately 80 miles off the coast of Gaza.

The flotilla refused Israeli orders to change course to Ashdod for the cargo to be unloaded in Israel, inspected and transferred by road to Gaza- effectively challenging the Israeli navy to either let them through or stop the ships by force. Details of the Israeli strategy and events at

² *M.V. Mavi Marmara* – a passenger ship registered in the Comoros⁶⁴ and owned by IHH;

M.V. Defne Y – a cargo boat registered in Kiribati and owned by IHH;

M.V. Gazze 1 – a cargo boat registered in Turkey and owned by IHH;

M.V. Sfendoni or Sfendonh – a passenger boat registered in Togo and owned by Sfendonh S.A. based in the Marshall Islands.

M.V. Eleftheri Mesogios or Sofia – a cargo boat registered in Greece and owned by the Eleftheri Mesogios Marine Company based in Athens.

Challenger 1 – a pleasure boat registered in the United States of America and owned by the Free Gaza Movement;

Challenger 2 – a pleasure boat registered in the United States of America and owned by Free Gaza Movement; and

M.V. Rachel Corrie – a cargo ship registered in Cambodia and owned by the Free Gaza Movement.

sea were presented in evidence to the Turkel Commission by Gabi Ashkenazi, IDF Chief of General staff³. All accounts agree that the first attempt to board the *Mavi Marmara* was by Zodiac boats simultaneously from the port and starboard at the rear of the vessel. The Israeli naval commando force, using non-lethal weapons, failed to scale the hull in the face of water hoses and other objects used to repel the boarders. Almost immediately, Israeli forces were landed from helicopters onto the top deck using fast ropes, where they encountered violent resistance from up to twenty passengers. The first Israeli force of fifteen was joined over a fifteen minute period by similar landings of twelve and fourteen soldiers⁴. During the fighting on the top deck three injured Israeli soldiers were removed by passengers losing control of their weapons. During the operation, which lasted close to one hour, nine passengers were killed and over twenty passengers injured by live ammunition. Once under Israeli control the ship was diverted to Ashdod along with the rest of the flotilla. The other ships had been boarded with only passive resistance and no significant injuries. Subsequently, the passengers were repatriated and the humanitarian cargo delivered to Gaza.

3.The legitimacy of the naval operation

Domestically, there was widespread support for the blockade and acceptance of the legitimacy of an operation understood as designed to prevent arms smuggling to Gaza and impose economic pressure on the Hamas administration. Within Israel the dominant

³Ashkenazi, Gabi. Testimony to the Turkel Commission, *Public Commission to Examine the Maritime Incident of May 31, 2010*, Session Number 4, 8 November 2010, available at, <http://www.mfa.gov.il/NR/rdonlyres/3618ED21-0E84-40E1-AD3B-18548E137F85/0/TurkelCOSAug11.pdf>. [Last accessed 11 March 2011].

⁴ Ibid, Ashkenazi's testimony to Turkel describes the landing of the first soldiers who deployed on the second rope (the first having been disabled by the passengers) in the following terms, 'The second rope is dropped and the soldiers begin rappelling. All of the soldiers rappel to the roof within a minute of the start of rappelling. Over the course of the first minutes, a violent conflict develops on the roof. Each soldier that rappels is attacked by two to four activists, using knives, iron bars, and axes. The second soldier that rappelled was shot in his abdomen by one of the activists, and the soldiers encounter a threat to life, are forced to use live fire. In the course of the battle, five soldiers are wounded by stabbings, blows, and shooting. Three soldiers are thrown from the roof of the ship to the deck, and are taken below deck'.

discourse was security rather than humanitarian. Israeli domestic criticism was mainly directed towards the tactical blunders that apparently resulted in the humiliation of elite Israeli serviceman being thrown bodily from the deck and others facing a hostile mob. From this perspective, criticism was directed at the choice of tactics adopted rather than the strategic decision to intercept⁵. This resulted in both the Defence Minister Barak and Prime Minister Netanyahu⁶, in their evidence to the Turkel Commission, defending the strategy of maintaining a blockade while distancing themselves from the tactics employed. Meanwhile, in his testimony, Chief of General Staff Ashkenazi defended the strategy and the tactics, blamed the outcome on lack of intelligence while at the same time arguing that the outcome was inevitable once the passengers had embarked on violent resistance⁷. Defending his soldiers in forthright terms, he told the Committee, 'The soldiers were at risk, they fired where they needed, they did not fire where they did not need.'

Internationally, Israel's defence of the legitimacy of its operation has been framed in security and legal terms. The security justifications seek to depict the humanitarian aid as a cover for arms smuggling- either directly or to open a conduit for future use. This conflates the flotilla with Hamas controlled smuggling tunnels and rocket attacks on Israel, thereby using the security discourse to challenge the humanitarian discourse. In the aftermath of the operation,

⁵ Responding to intense public criticism of the tactics employed in the operation, on 7 June the IDF, Ashkenazi ordered the establishment of an internal IDF investigatory committee to examine the tactical execution of the operation. The Eiland Committee reported on 12 July 2007 exonerating the commandos from allegations of wrongdoing and attributed blame instead to a failure of intelligence communication between IDF intelligence and Naval intelligence as well as elements of operational planning. See also, Hanan Greenberg, 'The Eiland Report Finds Mistakes but no Failures', *YNet News.Com*, 12, July 2010, available at: <http://www.ynetnews.com/Ext/Comp/ArticleLayout/CdaArticlePrintPreview/1,2506,L-3918788,00.html>. (Last accessed 12 January 2010).

⁶ Israel Ministry of Foreign Affairs, *PM Netanyahu's statement before the Turkel Commission*, 9 August 2010, available at, http://www.mfa.gov.il/MFA/Government/Communiques/2010/PM_Netanyahus-statement_before_the_Turkel_Commission_09-Aug-2010. (Last accessed 12 January 2010).

⁷ See, Yaakov Katz, 'Ashkenazi, IDF Actions in Flotilla Raid were Proportional', *Jerusalem Post*, 11 August 2010, available at, <http://www.jpost.com/Home/Article.aspx?id=184389>. (Last accessed 12 January 2010). Also, Herb Keinon, 'Turkel Commission: Er, where does the buck stop?', *The Jerusalem Post*, 24 September 2010, available at, <http://www.jpost.com/Features/FrontLines/Article.aspx?ID=184620>. (Last accessed 12 January 2010).

the IHH was rapidly put on Israel's terrorist watch list and allegations made of IHH links to terrorism including al-Qaeda. This framing was used to make sense of the degree of violence encountered on the *Mavi Marmara* and to bolster Israel's claim that the ship had to be stopped. The defence was mounted within the wider narrative of Gaza as a hostile entity controlled by terrorists bent on the destruction of Israel, rightly subject to a defensive separation from Israel that requires the maintenance of a land and sea blockade⁸.

Of course, Israel cannot escape the humanitarian discourse. After all, the very purpose of the flotilla was to focus international attention on the humanitarian plight of the people of Gaza. Israel's assertions that, following inspection at Ashdod, the elements of the cargo that complied with the terms of the Israeli embargo were to be transferred by land to Gaza, failed to engage with the real issue of the morality of daily civilian suffering. With international attention switching focus from the operation to the land blockade of Gaza, Israel moved rapidly to ease restrictions by technical changes to the identification of items to be allowed through border checkpoints⁹. As the *Jerusalem Post* reported, 'The security cabinet on Sunday lifted nearly three years of restrictions on civilian goods allowed into the Gaza Strip, in the hope – according to senior diplomatic sources – that Israel would now have *international legitimacy for the more important naval blockade*, aimed at keeping out heavy weapons'¹⁰ (emphasis added).

⁸ See, for instance, Netanyahu's statement to Turkel, Israel Ministry of Foreign Affairs, *PM Netanyahu's statement*.

⁹ Janine Zacharia 'Israel eases restrictions on goods bound for Gaza Strip', *Washington Post*, 18 June 2010, available at: <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/17/AR2010061700952.html>, (last accessed 22 September 2010). This was in response of intense international pressure, particularly from the quartet to lift the restrictions on import of goods into Gaza.

¹⁰ Herb Keinon, 'Yes to Corriander no to Kassams', *Jerusalem Post*, 20/6/2010, available at <http://www.jpost.com/LandedPages/PrintArticle.aspx?id=178968>. (Last accessed 22 September 2010).

Within Ian Clark's terms of analysis of legitimacy, Israel can be seen as engaging in a political contestation of the morality of the operation and the wider morality of its security strategy towards Gaza. Here, the moral question is whether Israel's security requirements justify the continuing strategic isolation of Gaza from its external environment with all that that entails for the people of Gaza. Within Israel, the construction of Israeli security needs collapses the moral discussion to the morality of protecting Southern Israel from rocket attacks from Gaza and more generally from a resumption of Hamas attacks on Israel's centres of population. While there is a moral constituency for easing the prohibition on categories of embargoed materials, the policy itself receives widespread moral affirmation. Internationally, where there is popular sympathy for Palestinian national aspirations, framing the *Mavi Marmara* affair within a narrative of historical injustice to the Palestinian people produces a wide moral consensus against the operation. In these circumstances the avowed aim of securing increased legitimacy for the blockade by easing the restrictions on the entry of goods by land looked hopeful at best.

As Clark reminds us, morality is but one normative framework to be taken into account in the political process that produces a consensus on legitimacy. As we have observed, legality is another. It will be recalled that Clark's position is that legitimacy does not demand legality, but legality influences positions on legitimacy and is employed to both challenge and reinforce legitimacy. To be sure, both critics and defenders of the operation have deployed legal argument.

The IDF Military advocate General (MAG) statement of the legal position¹¹ relies for its definition of a blockade on Article 7.7.1 of the Commander's Handbook on the Law of Naval Operations, published by the U.S Navy on July 2007, which describes a blockade as,

Blockade is a belligerent operation to prevent vessels and/or aircraft of all nations, enemy as well as neutral, from entering or exiting specified ports, airfields, or coastal areas belonging to, occupied by, or under the control of enemy nation. While the belligerent right of visit and search is designed to interdict the flow of contraband goods, the belligerent right of blockade is intended to prevent vessels and aircraft, regardless of their cargo, from crossing an established and published and publicized cordon separating the enemy from international waters and/or airspace.

The Israeli MAG legal position promoted by the Israeli Ministry of Foreign affairs is based on the premise that Israel is 'currently in a state of armed conflict with the Hamas regime that controls Gaza'¹². This is important since it is the condition of armed conflict that gives rise to the right to impose the blockade. Legally a blockade may be imposed in international or territorial waters providing that it does not interfere with neutral coasts or ports and, within a regime of communication and warning, vessels breaching or intending to breach the blockade may be forcibly detained¹³. Israel declared the blockade during Cast Lead on 3 January 2009 at a distance of twenty miles off the coast of Gaza¹⁴.

Framed in these terms, the legal discourse becomes confined to issues of whether the regulatory detail of notifications and intentions had been correctly communicated. An additional attraction of the argument is that, by relying on the state of armed conflict, Israel is able to justify the measure without compromising Jerusalem's position that the occupation of

¹¹ IDF MAG Corps, *Interception of the Gaza flotilla-Legal aspects*, available at: <http://www.mag.idf.il/5924071-en/patzar.aspx>, (last accessed 22 September 2010).

¹² Israel Ministry of Foreign Affairs, *The Gaza flotilla and the maritime blockade of Gaza - Legal background*, 31, May 2010, available at: http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Gaza_flotilla_maritime_blockade_Gaza-Legal_background_31-May-2010.htm, last accessed 22/9/10.

¹³ Rule 1710.4, *ICRC Model Manual of the Law of Armed Conflict for Armed Forces*, 1999, indicates that: 'Merchant vessels believed on reasonable ground to be breaching a blockade may be captured and those which, after prior warning, clearly resist capture may be attacked'.

¹⁴ Marian Houk, 'Israel announces formal naval blockade of Gaza, surrounds Gaza City', *American Chronicle*, 22 September 2010, available at: <http://www.americanchronicle.com/articles/view/86723>. (Last accessed 12 January 2010).

Gaza ended with the 2005 withdrawal. The law relating to naval blockades has arisen through treaty and was restated in 1994 as the San Remo Manual on International Law Applicable to Armed Conflict at Sea¹⁵.

Section II of Part IV of the manual deals with the law relating to blockades. In particular paragraph 98, which is central to Israel's legal position provides that: 'Merchant vessels believed on reasonable grounds to be breaching a blockade may be captured. Merchant vessels which, after prior warning, clearly resist capture may be attacked'.

A more nuanced analysis of the legality of the naval blockade challenges the Israeli position on grounds of proportionality- joining the humanitarian narrative to the legal. Technically the argument relies on paragraph 102 of the San Remo Manual, which provides that,

The declaration or establishment of a blockade is prohibited if:

(a) it has the sole purpose of starving the civilian population or denying it other objects essential for its survival; or

(b) the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.

Assuming that the Gaza blockade is not for the sole purpose of starving the people of Gaza or of denying them the means to survive, the real legal argument relies on 102 (b) to allege that the suffering caused to the Gaza community is 'excessive in relation to the concrete and direct military advantage anticipated from the blockade'. This links to, but is not dependant on, a similar argument that the closure of Gaza is illegal in causing civilian harm that is excessive in relation to the military object- in other words disproportionate.

A further legal challenge to the operation addresses the killing of nine unarmed civilians. The legality of the use of lethal force is analysed in IHL in terms of distinction and

¹⁵ Available at, <http://www.icrc.org/IHL.nsf/FULL/560?OpenDocument>. (Last accessed 12 January 2010).

proportionality and in criminal law/law enforcement in terms of self-defence¹⁶. The Israeli Foreign Ministry has been quick to release images of the fighting on board the *Mavi Marmara* as well as intelligence assessments of IHH and the passengers in an effort to head off allegations of gratuitous violence.

4. The Hudson-Phillips Report

On 22 September 2010 the de Silva Mission (the Mission) released an advanced version its report¹⁷. The Mission had been appointed on 23 July 2010 by the 2 June 2010 resolution 14/1 of the Human Rights Council. Judge Karl T. Hudson-Phillips QC retired judge of the ICC and former AG of Trinidad and Tobago headed the Mission, the other members being Sir Desmond de Silva, QC former Chief Prosecutor of the Special Court for Sierra Leone and Mary Dairiam, a noted advocate of women's' rights.

It will be recalled that Judge Goldstone renegotiated the terms of his mandate before accepting the appointment to the Goldstone Mission. In an interesting parallel the Hudson-Phillips Mission expresses dissatisfaction with the terms of the UNHRC resolution that required the Mission to investigate, 'violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance'. Instead of setting out to investigate 'Israeli attacks on the flotilla' the Mission re-interpreted its mandate to investigate the 'interception' by Israeli

¹⁶ For a legal analysis that rejects the Israeli legal positioning see for example, Ben Saul, 'Israel's Security Cannot Come at Any Price', *NLG International Global News*, 2 June 2010, available at: <http://www.nlginternational.org/news/article.php?nid=313> (last accessed 12 January 2010)

¹⁷ UNHRC, *Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance*, A/HRC/15/21, 22 September 2010, available at, http://www.globalsecurity.org/military/library/report/2010/a-hrc-15-21_israel-flotilla_100922.htm. (Last accessed 8, March 2011).

forces¹⁸. In a further parallel to the Goldstone Mission, Israel refused to co-operate with the Mission¹⁹, which then largely relied on evidence given to the Turkel Commission for its understanding of the Israeli case. Nevertheless, the Mission did not wait for the Turkel Commission to conclude its investigation before reaching its own conclusions, despite requests from Jerusalem that the Mission do so²⁰.

The report presents a narrative history of Israel's conflict with Hamas and the imposition of restrictions on the movement of people and goods between Gaza and Israel²¹. The Mission relies heavily on the conclusions of the Goldstone mission, statements of the United Nations and the Human Rights Committee and information provided to the Mission by the United Nations Office for the Coordination of Humanitarian Affairs to reach the conclusion that there is a humanitarian crisis. The report refers²² to the recently published opinion of the influential International Commission of the Red Cross (ICRC) that the closure amounts to a collective punishment in breach of international humanitarian law²³.

Having reached these conclusions, the mission makes its main legal findings by applying the San Remo provisions to find the blockade to be in breach of international law. It will be recalled that under paragraph 102 a blockade is to be regarded as illegal if,

- (a) it has the sole purpose of starving the civilian population or denying it other objects essential for its survival; or
- (b) the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.

¹⁸ UNHRC, *Report of the international fact-finding mission* para 5-6.

¹⁹ UNHRC, *Report of the international fact-finding mission* para 16.

²⁰ UNHRC, *Report of the international fact-finding mission* para 17.

²¹ UNHRC, *Report of the international fact-finding mission* paras. 26-44.

²² UNHRC, *Report of the international fact-finding mission* para. 38.

²³ ICRC, 'Gaza Closure: not another year!', *ICRC News Release*, 10/103, 14 June 2010, 'The whole of Gaza's civilian population is being punished for acts for which they bear no responsibility. The closure therefore constitutes a collective punishment imposed in clear violation of Israel's obligations under international humanitarian law', available at, http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/palestine-update-140610?OpenDocument&style=custo_print. (Last accessed 10 January 2010).

Applying a particular interpretation of starving to include inducing hunger, the mission finds that the blockade is prohibited by paragraph 102(a). Further, the mission finds that the blockade causes disproportionate harm in breach of paragraph 102(b). The report states its main findings at paragraph 53 in a powerful synthesis of morality and law,

In evaluating the evidence submitted to the Mission, including by the Office for the Coordination of Humanitarian Affairs in the occupied Palestinian territory, confirming the severe humanitarian situation in Gaza, the destruction of the economy and the prevention of reconstruction (as detailed above), the Mission is satisfied that the blockade was inflicting disproportionate damage upon the civilian population in the Gaza strip and as such the interception could not be justified and therefore has to be considered illegal.

It follows that naval action in support of the blockade is equally in breach of international law unless it can be justified in the context of the wider armed conflict.

To be sure, parties to an armed conflict have the right in certain circumstances to board and seize neutral ships at sea. This raises the question of whether the Israeli operation was lawful even in the absence of a lawful blockade. In the absence of an immediate and overwhelming threat to the state justifying the use of force in self-defence under Article 51 of the UN Charter, the relevant law is found in paragraph 118 of the San Remo Manual that allows interception if there is reasonable suspicion that the vessel is 'was making an effective contribution to the opposing forces' war effort, such as by carrying weaponry or was otherwise closely integrated into the enemy war effort'. The mission has only to turn to Ashkenazi's evidence to the Turkel Commission to find confirmation that there was no such suspicion. All parties to the incident were clear about what was at stake- breaking the blockade, not arms smuggling. Indeed, the report finds at paragraph 58 that,

Given the evidence at the Turkel Committee, it is clear that there was no reasonable suspicion that the Flotilla posed any military risk of itself. As a result, no case could be made to intercept the vessels in the exercise of belligerent rights or Article 51 self-defence. Thus, no case can be made for the legality of the interception and the Mission therefore finds that the interception was illegal.

These findings have the further significance of broadening the legal discussion from the particulars of the *Mari Marmara* Affair to the generality of the naval blockade and indeed the Israel's strategic closure of Gaza. By framing the legal findings within a condemnation of the humanitarian consequences of the military strategy, the mission presents a powerful moral and legal argument for a consensus position that the interception of the flotilla, the naval blockade and the closure of Gaza together amount to an illegitimate application of Israeli power. Read with the Goldstone report this amounts to a powerful legal and moral discourse of delegitimation.

Of course, the mission does not neglect its function of investigating the specifics of the nine deaths and numerous injuries to the passengers. Having borrowed so much from Ashkenazi's evidence to the Turkel Commission, the mission had a detailed Israeli account of events on board. The mission's own enquiries revealed that senior IHH leaders were, 'prepared actively to defend the ship against any boarding attempt'. Passengers had used the ship's electric tools to cut lengths of metal railings to use as weapons and had armed themselves with lengths of metal chains and gas masks.

The mission rules out allegations that the soldiers fired live ammunition while descending by rope. It is accepted that,

Para 116. With the available evidence it is difficult to delineate the exact course of events on the top deck between the time of the first soldier descending and the Israeli forces securing control of the deck. A fight ensued between passengers and the first soldiers to descend onto the top deck that resulted in at least two soldiers being pushed down onto the bridge deck below, where they were involved in struggles with groups of passengers who attempted to take their weapons.

Para 125. During the initial fighting on the top deck three Israeli soldiers were taken under control and brought inside the ship. While some passengers wished to harm the soldiers, other passengers ensured that they were protected and able to receive rudimentary medical treatment from doctors on board. Two of the soldiers had received wounds to the abdomen.

One of the soldiers had a superficial wound to the abdomen, caused by a sharp object, which penetrated to the subcutaneous tissue.

The report analyses the evidence of the passengers to conclude that the soldiers used indiscriminate lethal force to gain control of the ship,

Para 167. Nevertheless, throughout the operation to seize control of the Mavi Marmara, including before the live fire restriction was eased, lethal force was employed by the Israeli soldiers in a widespread and arbitrary manner which caused an unnecessarily large number of persons to be killed or seriously injured. Less extreme means could have been employed in nearly all instances of the Israeli operation, since there was no imminent threat to soldiers; for example in relation to the operation to move down to the bridge deck and seize control of the ship and the firing of live ammunition at passengers on the bow deck of the ship. Even in a situation where three individual soldiers have been injured and detained, the objective of freeing these soldiers does not legitimate the use of force outside applicable international standards and soldiers must continue to respect and preserve life and to minimize injury and damage.

With a clear implications for universal jurisdiction cases against Israeli military and political elites the report finds:

Para 265...there is clear evidence to support prosecutions of the following crimes within the terms of article 147 of the Fourth Geneva Convention:

- wilful killing;
- torture or inhuman treatment;
- wilfully causing great suffering or serious injury to body or health.

The Mission also considers that a series of violations of Israel's obligations under international human rights law have taken place, including:

- right to life (article 6, ICCPR);
- torture and other cruel, inhuman or degrading treatment or punishment (article 7, ICCPR; CAT);
- right to liberty and security of the person and freedom from arbitrary arrest or detention (article 9, ICCPR);
- right of detainees to be treated with humanity and respect for the inherent dignity of the human person (article 10, ICCPR);
- freedom of expression (article 19, ICCPR).

It will be recalled that the Goldstone Mission concluded their report by recommending that Universal Jurisdiction cases be pursued. While the message from Hudson-Phillips is more circumspect, the implications for Israel elites travelling abroad remain clear. That said,

however, the real importance of the report is to be found within the context of Israel's struggle to maintain the legitimacy of its security policy.

Jerusalem's refusal to co-operate with the mission is at first sight surprising, bearing in mind the very powerful tide of criticism of the decision not to co-operate with Goldstone. However, the explanation is to be found in Israel's co-operation with the UN Panel of Inquiry announced on 2 August 2010²⁴. The panel is chaired by the former Prime Minister of New Zealand, Geoffrey Palmer, and the outgoing President of Colombia, Alvaro Uribe is Vice-Chair. The ground-breaking significance is to be found in the fact that Israel and Turkey both have representatives on the panel. Israel's Panel member is Joseph Ciechanover while Turkey's Panel member is Özdem Sanberk. Both representatives have foreign affairs experience. Ciechanover, whose selection was the joint decision of Netanyahu, Lieberman and Barak, is a currently major figure in the Israeli finance community. Although it has thus far escaped comment, it is significant that Ciechanover is a member of the Israeli and American bar associations and had previously provided legal advice to the Israeli Ministry of Defence²⁵. Whether or not this development is framed as a gesture towards reconciliation with Turkey, Israeli co-operation with a UN investigation into Israeli operations in Gaza represents a major departure.

²⁴ 'UN chief announces panel of inquiry into Gaza flotilla incident', *UN News Centre*, 2 August 2010, available at, <http://www.un.org/apps/news/story.asp?Cr=flotilla&Cr1=&NewsID=35607>. (Last accessed 10 January, 2011)

²⁵ See, 'Dr. Joseph Ciechanover Appointed as Israel's Representative on UN Secy.-Gen.'s Flotilla Panel', *Prime Minister's Office*, 8 August, 2010, available at, <http://www.pmo.gov.il/PMOEng/Communication/Spokesman/2010/08/spokepanel080810.htm>. (Last accessed 10 January, 2011). See also, Barak Ravid, 'Joseph Ciechanover to represent Israel at UN Gaza flotilla probe', *Haaretz*, 7 August 2010, available at, <http://www.haaretz.com/news/diplomacy-defense/joseph-ciechanover-to-represent-israel-at-un-gaza-flotilla-probe-1.306573?localLinksEnabled=false>. (Last accessed 10 January, 2011)

5. Israeli domestic enquiries and court proceedings

The Public Commission to examine the Maritime Incident of May 31, 2010, (the Turkel Commission) issued a partial report on 23 January 2011²⁶. This first part of the report examines the legality of the operation; intelligence and operational decision-making will be subject to a further report. The Commission has been subject to negotiation and domestic litigation since its announcement in June 2010.

The insistence of the Commission on an expansion of their powers to those of a state Commission of Enquiry with powers to compel the attendance of witnesses and the production of documents implies that the investigation may be more than a formality²⁷. Having made his dissatisfaction clear that the Commission had been given weaker rights than a state Commission of Enquiry the behind the scenes power struggle between the state and the Commission found its way to the Supreme Court. Here the lawyers hammered out a compromise while a petition from Israeli NGO, Gush Shalom, demanding a full state commission of enquiry added traction to the demands²⁸. The political agenda of the petitioners is revealed in the celebratory posting on the Gush Shalom website,

Uri Avnery, one of the signatories of the petition, said he sees the decision as a big victory. "For the first time, it was established that the High Court of Justice can interfere with government decisions regarding commissions of inquiry. Until today, the court avoided doing

²⁶ The Turkel Commission, *Report of the Commission for Examining the Maritime Incident of May 31, 2010 - Part One*, 23 January 2011, available at, <http://www.turkel-committee.gov.il/files/wordocs/8808report-eng.pdf>. [Last accessed 14 March 2011.]

²⁷ Roni Sofer, 'Cabinet okays extended jurisdiction for Turkel committee', *Y Net News*, 4 July 2010, available at, <http://www.ynetnews.com/articles/0,7340,L-3914719,00.html> (Last accessed 10 January 2011)

²⁸ Gush Shalom, *The IDF is not a state within the state; another Gush court victory*, 12 July 2010. Available at, <http://zope.gush-shalom.org/home/events/1279061538>. [Last accessed 11 March 2011].

that. Also, the dangerous attempt to turn the army into an enclave, immune to outside criticism, was blocked".²⁹

Negotiations produced a compromise that took the form of a court order. The fact that the Supreme Court was prepared to entertain petitions that demand Supreme Court intervention into the composition and powers of a commission of enquiry set up by the government in the first place is indicative of the lengths that the legal institutions are prepared to go to entrench civil control over the military. Further petitions successfully obtained an order from the Supreme Court that the Commission be expanded to include at least one woman³⁰. The fact that no woman has so far accepted the appointment is not the issue. The point to be emphasised here is that the Supreme Court is demanding and putting in place more rigorous control of the military and forcing the executive to go along with it.

This is not to say that the Israeli courts are wading in to challenge the military conduct of the affair. When presented with the opportunity to rule on the legality of the blockade and the Naval interception of the flotilla, the court ducked the issue. On 2 June 2010 The President of the Supreme Court, Justice Dorit Beinisch, published a decision on several petitions concerning the treatment of the foreign detainees from the flotilla. The petitioners had alleged that the Israeli action had been illegal, but citing lack of time and the urgency of the petitions the court dealt with the cases without ruling on the lawfulness of the action³¹. The point to be emphasised here are limits to the extent to which the court will involve itself in security issues. The Supreme Court is more comfortable putting procedures for regulation and review in place than it is on ruling on the legality of key areas Israel's security policies.

²⁹ 'Following Gush Shalom's appeal, Supreme Court opens way for Tirkel Committee to summon military personnel', *Gush Shalom*, available at, <http://zope.gush-shalom.org/home/en/events/1279017831>. (Last accessed 10 January 2011)

³⁰ Ben Hartman, 'High Court Turkel Must appoint a woman', *The Jerusalem Post*, 12 August 2010, available at, <http://www.jpost.com/Israel/Article.aspx?id=184518>. (Last accessed 10 January 2011)

³¹ For a concise discussion see, Ido Rosenzweig and Yuval Shany, 'HCJ Rejects Petitions related to Foreign Civilians who Participated in Gaza Flotilla [HCJ 4169/10] [2.6.2010]', *Terrorism and Democracy Newsletter*, Issue No. 18, June 2010, available at, http://www.idi.org.il/sites/english/ResearchAndPrograms/NationalSecurityandDemocracy/Terrorism_and_Democracy/Newsletters/Pages/18th%20Newsletter/2/2.aspx : (Last accessed 10 January 2011)

The Turkel Commission report conducts an exhaustive legal analysis before finding that Israel legally imposed a blockade and acted legally to enforce it. Without referring to the Hudson-Phillips report, Turkel covers the same arguments. The Commission heard powerful testimony from humanitarian NGOs to the effect that there was a humanitarian crisis in Gaza. The MAG argued that this was irrelevant to the legality of the blockade but this was explicitly rejected by the Commission, who adopted a similar legal framework to that of Hudson-Phillips. The difference lay in the conclusions, with Turkel concluding that the suffering of the population of Gaza was proportionate to the military advantage to be gained by preventing arms supply and by imposing economic sanctions on the Hamas administration. This recognition of economic warfare against Hamas required a careful framing in order to avoid admission of illegal collective punishment. While economic measures are recognised as part of warfare, a siege that acts to punish the population is not. By applying this analysis to a naval blockade, Turkel is adopting a harsh construction of IHL. As Cohen and Shany put it,

Allowing naval blockades to be extended in order to sustain economic warfare appears to us to run contrary to existing legal standards and to represent an undesirable shift in the equilibrium between military necessity, humanitarian considerations and the rights of third parties – a balance which the San Remo Manual attempts to strike³².

The IDF's official enquiry into the event was conducted by the Eiland Committee, which reported on 12 July 2010. The investigation headed by Major General (ret.) Giora Eiland, was ordered by IDF Chief of Staff Ashkenazi to look into the conduct of the operation by Israeli

³² Amichai Cohen and Yuval Shany, 'The Turkel Commission's Flotilla Report (Part One): Some Critical Remarks', *Blog of the European Journal of International Law*, 28 January 2011, available at, <http://www.ejiltalk.org/the-turkel-commissions-flotilla-report-part-one-some-critical-remarks/#more-2992>. [Last accessed 14 March 2011].

troops and was largely based on records of operational debriefings. This is a report on the technical aspects of the operation that exonerates the Israeli forces from any wrongdoing. Criticism is limited to intelligence failings that failed to anticipate violent resistance and the absence of a backup plan that could have been put into operation once the extent of the resistance became clear. These findings were made available to Turkel to avoid soldiers being required to give evidence to the Commission. The report was withheld from Hudson-Phillips as part of the policy of non-cooperation but will probably be given to the UN enquiry.

Paradoxically, the report suggests that even if intelligence had predicted violent resistance the outcome would probably have been the same. This echoes Ashkenazi's evidence to the Turkel Commission that violent resistance to the military seizure of a ship inevitably results in loss of life. At the time of writing, the second part of the Turkel Report has yet to be released.

6. Policy formation and execution; the legal input

Ashkenazi's statement to the Turkel Commission has some useful things to say about the decision to impose a naval blockade and the role of the lawyers in the process. Ashkenazi presents a very strong case for the blockade and does not waver throughout his evidence. This is not just a matter of a military commander defending a failed operation. Rather, he is claiming ownership of the policy and defending it to the hilt. The reason for this is that it was Ashkenazi that had pushed for the imposition of the blockade in the first place.

Ashkenazi's defended the blockade in terms of a response to Hamas reinforcement. He referred to the arms cargoes found aboard the Karin-A and the Francop to illustrate how massive high quality arms shipments can be smuggled by ship. His argument was that the 'maritime closure' was essential to prevent:

- 1) Smuggling of arms into Gaza.
- 2) Attacks coming out of Gaza on Israeli off-shore installations and the state itself.
- 3) Smuggling in expertise.
- 4) Smuggling in money.

Ashkenazi's evidence links the decision-making processes, which lead to the imposition of the blockade, to the start of the Free Gaza flotillas in 2008 that, 'essentially represent the trigger for the imposition of the maritime closure'. His personal commitment to the idea of a blockade stems from this time,

On this background [the flotillas], we began dealing with the phenomenon, and seeking or deciding to shape the political course of action, in our case, legal and operational, regarding how to stop it. From an analysis of the connotations stemming from the discussion of the flotillas, there formed for us, for me, the position according to which sailing vessels must be prevented from reaching the coast of Gaza. All of this, in light of the security consequences that I just described, that can stem from the description of the flotillas, and perhaps from a certain establishment of a sailing route, a line of ships from the Gaza coast to Cyprus, or to somewhere else. And essentially it would represent fertile ground for smuggling munitions, people, money, and perhaps even under the guise of humanitarian activity.

Ashkenazi describes how the IDF and the navy began staff work to prepare operational plans to deal with the flotillas. Working with the Military Advocate General Mandelblit, the IDF put together an operational recommendation for a maritime closure. There were alternatives to a maritime closure but,

what arose in a clear way, and so I also understood from the conversation and from reading the assessment and from the discussion, is that the royal road, as it is called, to prevent the passage of all vessels, and the powers required to prevent entry of sailing vessels.....is by means of a declaration of a maritime closure. There were other alternatives. Other legal sources that could have given us the ability to search, seize, divert from its route a sailing vessel that wants to reach the coast of Gaza. But the conclusion was quite clear that without a declaration of a maritime closure, there were regarding this doubts, limitations, and questions regarding the likelihood of implementing it.

Ashkenazi recalls working with the MAG and the MAG bringing in the Attorney General to support the legal arguments in favour of the blockade. Nevertheless, this lobbying was initially unsuccessful; the political echelon rejected the advice of the military and allowed in

shipping until the end of the year. This was not a welcome decision and the IDF continued to clamor for a blockade,

I thought that it was not correct to allow them to enter, and this has been my consistent opinion. I appealed in writing both to the Defense Minister and the Prime Minister, and recommended changing the existing policy and prohibiting the entry of the flotillas, once again, out of security concerns, in order not to open that sailing route between Gaza and Cyprus, or other places for that matter, while I detailed the recommended grades of action for the IDF for activities to stop the ships at sea.

Towards the end of 2008 Askenazi again deployed recommendations from the MAG in an effort to get the blockade imposed. This time the twin recommendations of Ashkenazi and the MAG were accepted by the Minister of Defence and the blockade was imposed. As Ashkenazi testified,

I received the recommendation and I brought up my recommendation together with the recommendation of the Military Advocate General to the Defense Minister. The Defense Minister accepted the recommendation, and authorized it, and directed us to impose a maritime closure on the Gaza Strip until further notice. We formulated the letter, the Defense Minister signed it, we appended to it the map and the tools demanded according to international law regarding how to publicize it.

Ashkenazi had succeeded in putting in place a regime of maritime closure in January 2009 that allowed for draconian measures to be taken against flotillas that sought to open a shipping route to Gaza. Interception no longer required suspicion of wrongdoing and boarding of flotillas was to become a standard operating procedure.

The legal opinion provided by the MAG to the Minister of Defense is not publicly available. The opinion currently displayed on the MAG web site maintains that the blockade is properly declared in the context of a military conflict with Hamas and is a proportionate measure that does not contribute to a humanitarian crisis. In his evidence to the Turkel Commission, Mandelblit confirmed Ashkenazi's evidence of the MAG's recommendations to government, maintaining that the blockade was legal and denying that there was a humanitarian crisis in

Gaza or that the suffering of its people were sufficiently severe to trigger the San Remo prohibitions³³. The ICRC's claim that there is a humanitarian crisis is simply incorrect.

As with so many areas of IHL, application of the law to specific operations is a matter of judging proportionality, or more precisely whether damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated. While the MAG argues that, 'According to the data presented to me, there has never been a humanitarian crisis in Gaza', the IDF will proceed on the understanding that the blockade is legal. Denial of any humanitarian crisis in Gaza is clear government policy. Indeed, Netanyahu's statement before the Turkel Commission makes the point very forcefully.³⁴

Mandelblit made a point of explaining to the Commission that his lawyers were closely involved in operational matters³⁵. In fact, IDF lawyers from the MAG corps would have been in close attendance during the planning of the operation as well as its execution- both with the commander at sea and at the headquarters in Tel Aviv. After all, it will be recalled that back in 1992 Daniel Reisman, then deputy head of the IDL, accompanied the Israeli naval commander to intercept a Palestinian ship of returning refugees. Asking what his role was, Reisman was told by the officer, 'I want you to tell me when I can fire at them'.

7. Conclusion

Analysis of the *Mavi Marmara* affair does not reveal a clear connection between the role of the military lawyers and the Israeli Supreme Court or the threat in prosecutions abroad but it

³³ Dan Izenberg, 'Mandelblit: Gaza Blockade is Legal', *Jerusalem Post*, 27 August 2010, available at, <http://www.jpost.com/Israel/Article.aspx?id=186160>. (Last accessed 10 January 2011).

³⁴ See, Israel Ministry of Foreign Affairs, *PM Netanyahu's statement*.

³⁵ 'IDF MAG: "Commanders' best interest is to act according to the law"', *IDF News*, 26 August 2010, available at, <http://dover.idf.il/IDF/English/News/today/10/08/2602.htm>. (Last accessed 10 January 2011).

does reveal a close involvement of lawyers in the construction of legal advice, the promotion of policy, the oversight of its operational execution and the promotion of its legitimacy.

The boarding of the *Mavi Marmara* can be traced back to the 2008 crisis decision-making in response to the Free Gaza flotilla campaign. The campaign strategy was designed to open a sea route to Gaza to break the siege, expose the humanitarian suffering of the people and thereby render Israel's closure of Gaza unsustainable. Existing Israeli policy was to regulate the transfer of people and goods by way of an effective economic blockade that served to prevent the arming of Hamas during a period of sustained rocket attack from Gaza. International organisations were almost unanimous in identifying a developing humanitarian crisis. Israel has consistently denied that the hardships caused by its security policy amount to a humanitarian crisis, pointing to the supply of goods and humanitarian aid through the land crossings. Prior to the imposition of the blockade, Israel discouraged shipping from approaching the Gaza coast by warnings of military operations in the area and by exercising its rights under maritime law as a party to an armed conflict; this enabled the Israeli navy to intercept neutral shipping reasonably suspected of carrying military supplies intended for use by Hamas and other armed factions operating from within Gaza. Other shipping was either allowed in or persuaded to unload at the Israeli port of Ashdod.

The change in policy came about as a result of sustained pressure by Chief of General staff Ashkenazi who was strongly personally committed to the land and sea closure of Gaza as essential to Israel's security. Indeed, his lobbying for the blockade went far beyond the conventional understanding that has the Chief of Staff presenting a number of possible strategic alternatives to the Defence Minister who then makes his choice³⁶. Ashkenazi wanted

³⁶ for a concise background piece on Ashkenazi see, Amos Harel, 'Twenty-One Sabbaths to Go', *Haaretz*, 22 September 2010, 'On the other hand, his attitude toward the political echelon - according to which the army must present several possible courses of action without recommending one in particular, and the ministers make the final decision - is controversial both within the government and on the General Staff'. Available at,

the extra powers that come with a naval blockade of the coast of Gaza, which would enable the flotillas to be deterred by a legal and military regime that allowed the use of military force.

Clearly Ashkenazi's recommendations to Government needed a strong legal opinion in support and this was duly provided by Military Advocate General Mandelblit whose own enthusiasm for the blockade is evident from his evidence to the Turkel Commission. Despite rejection by the Minister of Defence in August 2008, Ashkenazi stepped up his campaign with the Attorney General on board to confirm Mandelblit's advice. While the details of the legal opinion are not available, the basic legal position is discernable from subsequent statements of the MAG made in legal defence of the naval operation.

Whether a blockade was necessary to Israel's security is a matter of debate. What is clear, however, is that it was essential to the legal use of force against neutral shipping where there was no evidence of arms smuggling. Without the blockade any attempt to divert peaceful flotillas would amount to an unlawful use of force. The subsequent imposition of the blockade gave Ashkenazi power to use Israel's elite naval commandos against the *Mavi Marmara*, at least in the eyes of the Israeli lawyers.

This analysis suggests that the IDF armed with its own strategic analysis and a legal opinion from its enthusiastic MAG successfully applied pressure on a reluctant government to allow the use of military force to address what might otherwise be seen as a diplomatic problem.

The hostile international reaction to the affair has challenged the legitimacy of Israel's military operation. Clarke's understanding of legitimacy envisions areas of legal, moral and constitutional contestation. The constitutional contestation is about procedures and expectations of behaviour, which would include considerations of whether Israel should have

<http://www.haaretz.com/misc/article-print-page/twenty-one-sabbaths-to-go-1.315166?trailingPath=2.169%2C2.212%2C2.215%2C>. (Last accessed 10 January 2011).

adopted a diplomatic strategy to deal with the flotillas. The moral discussion is of the affair is framed in terms of the humanitarian needs of the people of Gaza and the use of force against a vessel whose declared aim is the peaceful provision of aid. The balancing of the right of Israelis living in the South of Israel to personal security unthreatened by rocket attack on the one hand, with the right of the Palestinian population of Gaza to a reasonable quality of life on the other, is central to the moral discussion.

The legal argument also has much to do with the harm the blockade causes to the people of Gaza and, by conflating the two discourses, becomes the focus for contesting a consensus position on legitimacy. This puts the lawyers at both the centre of the construction of the policy to impose the blockade and the defence of its legitimacy. The case study shows that the defence is increasingly taking place in the context of international and domestic fact finding forums that assume the processes and discourses of courts of law where lawyers and legal thinking assume a privileged status.

As has been noted, the legal challenge to the blockade focuses on the question of whether the harm done to the people of Gaza by the blockade is excessive in relation to the military benefit. This weighs the harm to the people of Gaza against the security of Israelis. In practice the balance depends on what view is taken of the harm caused to the people of Gaza and how much is excessive. It is reasonable to assume that Mandelblit and the human rights lawyers will disagree and it is that disagreement that puts Israeli constructions of the legality of the blockade and the seizure of the *Mavi Marmara* at odds with the Hudson-Phillips report and large sections of the international community. In effect, the case study locates the military lawyers at the centre of the defence of the legitimacy of Israel's security policy towards Gaza.

What then does this web of relationships reveal about the place of the military lawyers in the broader understanding of Israeli civil-military relations? To what extent are they actors or mere instruments of other power centres?

The case study illustrates the plurality and contested application of international law to military conflict, with the legality of the blockade and the interception of the *Mavi Marmara* varying depending on the balance struck when weighing Israeli security against the quality of life of the residents of Gaza. In these circumstances where Israeli military action is subject to constant legal scrutiny a well-constructed legal position is essential to the promotion and defence of strategic military decision-making. The Government and the IDF each demand legal cover in order to protect their legitimacy and the legitimacy of their military operations and the personal liability of the civil and military elites. As providers of the legal cover the military lawyers perform an essential role and are included among the decision-making elites at three important foci of power: the formulation of strategic military policy, the execution of military operations and the post-facto defence of military actions. There is a clear instrumental role that is essential to the exercise of state power. The extent to which they have agency independent of the military remains unclear. It is to be expected that as military officers they will be influenced by a military culture that seeks to empower the military and constrained by a legal culture that promotes a professional role that places limits on legal creativity. Additionally, it is to be expected that the institutional pressures within the MAG corps would tend towards an accumulation of power and influence. With the MAG and his legal team playing such an important role there is the opportunity for institutional conflict between the IDF, the MAG and the Minister of Defence over whose conception of security should inform the construction of the legal advice. In the case of the blockade it appears that Ashkenazi and Mandelblit were of one mind and, although the political echelon was reluctant to impose a blockade, they certainly would not have welcomed a legal opinion based on a

finding that the closure of Gaza was producing a humanitarian crisis. While the MAG legal opinion appears to have been pivotal, it must be remembered that the Government has the Attorney General to provide it with legal advice, and it is significant that in lobbying for the blockade Ashkenazi obtained his legal opinions from Mandelblit and the Attorney General.

Any conclusions about the independent exercise of power by the IDF lawyers remain tentative. However, it can be said with some certainty that military lawyers occupy an important political space at several foci of power and the ability to influence policy through the construction of legal advice independently of the wishes of their military masters allows at least for the possibility of independent agency.

Chapter 10: Conclusion

Speaking in June 2010, Daniel Reisner described international humanitarian law as ‘Swiss cheese where the holes are bigger than the cheese’¹. Adopting such a view of IHL maximises the agency of the lawyers to structure military behaviour and promote a new legality. The analysis adopted in this thesis identifies Reisner’s ‘holes’ as grey or unresolved areas, where multiple constructions of IHL compete within a complex legal and ethical regime. Here, law is pluralistic rather than absent. This does not deny agency so much as offer a textured explanation for its existence- not so much holes as political spaces where law is selected through institutional processes and political contestation. This selection of law creates a practice that promotes a construction of law forming an interactive relationship between agent and structure.

The analysis of the involvement of the Israeli military lawyers in targeted killing shows that the IDL did more than decide that it was legal; supported by Kasher’s ethical positioning, they created a legal regime that met the needs of the political, judicial and military actors, including preserving a political and legal veto on military operations that, on any view, were operating at the margins of the law. This was legal trail-blazing rather than norm-entrepreneurship. As Reisner puts it, ‘we invented it, now everyone is doing it’². This international perspective is important. In the post 9/11 landscape, despite the Euro-centric human rights discourse, the Israeli lawyers correctly perceived a consensus among states fighting terror that could accommodate Israeli style targeted killing, provided that it operated within a framework of legal and political oversight. This mind-set runs through the statements of the IDL interviewees.

¹ Presentation at Tel Aviv July 2010 attended by the author.

² Interview with author 24 May 2009.

In more general terms, the research has shown that Israel is developing constructions of IHL, supported by detailed Just War ethical positioning, that enables the Israeli state to apply military force to its fight against terrorists and non-state actors who conceal themselves among their civilians. The case studies allow a historical analysis of the development of the IDL from the Second Intifada to the Mavi Marmara Affair that shows an increasing involvement in operational decision-making backed by a legal veto. The studies reveal controversial legal constructions of IHL that, to adopt the popular slogan, 'allow the IDF to win', while meeting the political imperative of force protection. These legal strategies are promoted by the lawyers as allowing military behaviour that meets the needs of states fighting non-state actors, and can be seen in terms of communities of practice whose practice require a shared view of IHL. In fact, that shared view of IHL includes a shared view that the lawyers need to be involved in operational decision-making. As Yoram Dinstein, the noted Israeli commentator on IHL put it, 'there is an emerging norm of international law that lawyers must be involved in targeting decision-making'³. Whether this is an emerging norm or an expectation, it can certainly be identified in the international regime that influences the conduct of military conflict.

In addressing the questions why the lawyers have become so involved in Israel's military operations, this thesis examined the discussions between the Israeli Military Advocate General, the Israeli Attorney General and the eminent members of the Winograd Commission of Inquiry into the conduct of the Second Lebanon War. The analysis suggested three hypotheses to account for the increased involvement of military lawyers in IDF operational decision-making:

- 1) The application of international law by the Israeli Supreme Court.

³ Interview with the author 26 May 2009.

2) The threat of foreign prosecutions of Israeli decision-makers for war crimes.

3) The increased use of International Humanitarian Law as a measure of the legitimacy of military action.

Careful analysis of the case studies provided powerful support for each of the hypotheses, revealing a legal regime of IHL that is subject to political contestation within an institutional framework at both a domestic and international level with a demand for legal involvement from the military, political and judicial elites.

A key aspect to the methodology employed in this thesis is the recognition of IHL as a legal regime of pluralistic and contradictory constructions of law. This reveals the political choice in the recognition of legal restraints on the conduct of warfare. Further, by adopting an international level of analysis and applying IR scholarship to supplement legal scholarship, an inter-disciplinary approach recognises the role of constructions of law in conferring/denying and defending/contesting legitimacy where legitimacy is a measure of acceptance to international and domestic communities of purpose.

Clarke's legitimacy is influenced by legality, but is not dependant on legality. This means that law is influential but not itself determinant. Constructions of law are subject to political contestation and UN fact finding missions and their reports, such as the Goldstone Report and the oppositional Israeli Report, are sites of legal contestation. Constructions of law and their promotion can be understood as strategies in the defence/denial of legitimacy and gain traction by association with consensus positions of communities of purpose. Of course, communities of purpose are multiple and overlapping with differing shared values, expectations of behaviour and interests that generate differing constructions of what is ethically required by Just War doctrine and what is legal and what is not legal, as well as differing views of the role and importance of IHL. Indeed, it is the existence of multiple

communities of purpose that accounts for the legal pluralism of IHL and the element of choice that is often seen as the politicisation of IHL. It follows that, deciding whose IHL to apply has military utility but is itself a political decision with serious implications for Israel's domestic and foreign policy where security and legitimacy make conflicting demands.. Indeed, Israeli foreign policy community should not only be viewed in terms of hawks and doves. Rather, it can usefully be seen as split between those who value international legitimacy and constrain Israel's security policy accordingly and those who do not. This is well illustrated by the Mavi Marmara Affair where the political decision to impose a blockade and then to enforce it by force, required a balancing of the potential damage to Israel's legitimacy caused by enforcing the blockade against the perceived security imperative of maintaining the 'siege'.

The policy implications for this research, understood within a civil-military context, lie in the identification of the breadth of choice between constructions of law and the constraints on military lawyers in making that choice. Once this is understood, it can be seen that a political direction to the military to act in accordance with IHL lacks meaning. This thesis has shown that the IDL adopts permissive legal positions. Civil control of the military cannot be left to the preferences of the military enabled by helpful constructions of military law provided by their military lawyers- choice of law is a political decision and needs to be identified as such and overseen by the political echelon. Further, these are choices that are key elements of Israel's claim to legitimate military action and they need to be defended both at home and overseas; Israel's apparent reversal of its long-standing policy of non-co-operation with UN fact finding missions is recognition of this.

Clearly, it would be naive to suggest that the military lawyers are influenced only by the military. This analysis opens up possibilities of further research into the hierarchy of state and military lawyers and the relationship between the military lawyers and those of the Foreign

Ministry and the Attorney General. A broader perspective identifies the intersection of the military institution and the legal institution that generate contradictory institutional constraints on the behaviour of the IDL as has been revealed by the controversy surrounding Sharvit-Baruch's appointment to the University of Tel Aviv legal faculty. The research has demonstrated the power of a military culture on the military lawyers as a push towards 'letting the IDF win', but the controversy over Sharvit-Baruch's university appointment reveals the power of the legal institutions, whose constructions of IHL, and the professional standards governing the choice of law when advising, cannot be ignored by legal practitioners. It is not just the judiciary through their legal decisions but the profession itself that demands oversight of the quality of legal advice.

It has long been acknowledged that civil-military relations are more than a matter of charting whether civilians control the military or whether the military controls the civilians. Civil constraints on the military and the exercise of power by the military are a complex web of power relations and networks. The power relations and networks that make up legal-military relations have been under-researched, through the adoption of a framework of analysis that is overly reliant on the analytical value of court-based coercion. This thesis has fused legal and IR scholarship with original insights and presented original research into the involvement of lawyers in military operational decision-making that firstly, reveals the military lawyers to be influential actors occupying a political space at the intersection of legal and military regimes, secondly, provides a framework and methodology for further research and finally, and lastly has identified fruitful areas of further research that will breathe new life into legal-military relations.

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