A Topographical model of the Beit Surik area with different possible walls drawn on it, in the office of Adv. Muhammad Dahla. Photo: Eyal Weizman, 2008.

3

The Best of All Possible Walls

In a diary entry written during his time as an Austrian soldier in World War I, Ludwig Wittgenstein noted the following incident. In a trench on the Russian front he found a magazine that described a court case in Paris involving an accident between a truck and a baby's pram. At the trial a scale model was presented. The relation between the truck, the pram and the people involved was represented by miniatures and dolls. Wittgenstein, who was, a few years later, to engage in architecture, became fascinated by this model. Because the representative elements in it – the street, houses, cars and people – bore a scale relation to things in reality, Wittgenstein thought that the model was a good example of the structure of language. Not only did it illustrate the language by which the trial was conducted, the model was a proposition; that is, a description of a possible state of affairs. The only thing missing, he thought, was the pain. It then occurred to Wittgenstein that one might reverse the analogy – that a proposition might itself serve as a model that could structure reality.[1]

Wittgenstein's reflection on the way a model was able to illustrate legal language might help shed some light on the story that follows, a story that is itself engaged with acts of translation, undertaken in court, from reality to its representation on a physical model, and vice versa.

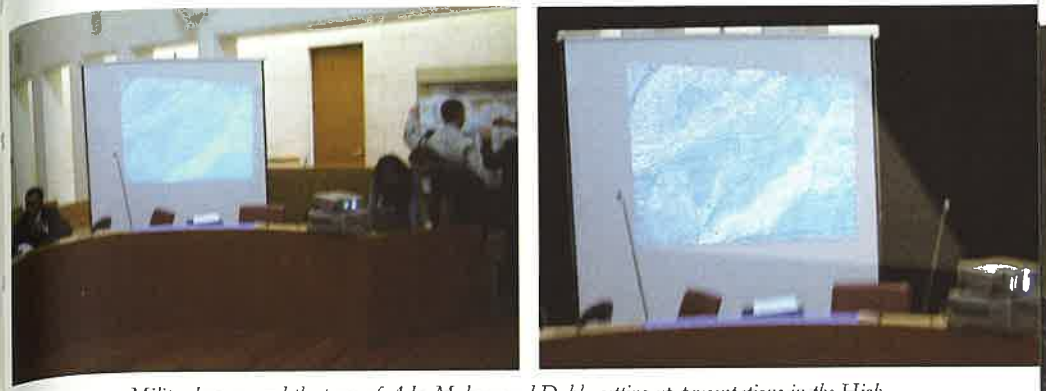
The series of legal challenges against Israel's separation wall in the Israeli High Court involved cross-examinations conducted around a territorial scale model. These processes have already been exhaustively analyzed by legal experts. But in what follows, the story is told from the perspective of its object-participant – the model itself. Significantly, the

legal processes involving the wall were trials not of people, but rather of an apparatus – it was the wall itself that was on trial. The model was thus not presented as evidence to help establish the guilt or innocence of the actions of the wall's planners and builders – rather, it helped arrive at a verdict on the 'behaviour' of the wall itself. Proportionality was the principle employed to evaluate this behaviour. In this process the different material aspects of the apparatus were regulated and fine-tuned within the legal forum and according to the terms of proportionality. The process helped establish what the state later regarded as a 'correct' proportion between conflicting principles – security requirements for Israelis as argued by military lawyers, and issues of 'livelihood' to Palestinians as argued by humanitarian representatives. In other words, the trials were concerned with moderating the violations and violence perpetrated by the wall in the name of the principle of the 'lesser evil'.

In the winter of 2004 Muhammad Dahla, a prominent Jerusalem-based Palestinian lawyer, was involved in two major court cases. One took place under the aegis of the International Court of Justice (ICJ) in The Hague, where as a legal adviser to the Palestinian team he helped appeal against the authority of the state to build a wall on the occupied West Bank; the other, at the Israeli High Court of Justice (HCJ) in Jerusalem, where, on behalf of several landowners from the Palestinian village of Beit Sourik, an agricultural village north-west of Jerusalem, he helped appeal against the segments of the route that were to leave them separated from about 300 acres of their fields.[2] In both cases, I should add, I had a minor involvement – a map I produced was presented as an evidence.

The second commission arrived as a result of the first. Seeing Dahla interviewed on Al Jazeera, Beit Sourik villagers rang him on his mobile phone while he was still in The Hague. Dahla did not immediately consent to represent them. The case posed an age-old dilemma: was working with the Israeli legal system to alleviate the excesses of the occupation worth the price in legitimizing it?

Dahla is one of the most influential of a generation of Palestinian legal activists to emerge from within areas of Palestine lost to Israel in 1948. He is one of the founders and former chair (1997–2000) of Adalah, the legal centre for Arab rights.[3] He has represented such prominent political



Militry lawyers and the team of Adv. Muhammad Dahla setting up presentations in the High Court of Justice in Jerusalem, a few minutes before proceedings begin. Photo: Bimkom, 2004.

figures as Azmi Bishara, the founder and leader of the National Democratic Alliance, a party of which he is a member. The Alliance was formed in 1995 in opposition to the Oslo Accords. Its platform is to struggle to transform the state of Israel into a democracy for all its citizens, and not only for its Jewish majority. Through Adalah and his private office, Dahla's decision to work with the institutions of the Israeli state is based on a rational-instrumental decision. He selected his cases on the grounds that they constitute precedent-setting legal challenges that expose paradoxes between the state's democratic pretence and its colonial realities.[4] It was an attempt to exercise a form of immanent critique in which the law itself becomes the object of political contestation. But this often backfired.

On his return to Jerusalem Dahla took the villagers' case. And so it happened that 'at the same time,' as he explained, 'I had to appeal against the illegality of the entire wall in The Hague and against the details of its execution in Jerusalem.'[5] Whereas in The Hague the issue had been argued in relatively abstract terms, and the advisory process established the illegality of the wall *tout court*, in the High Court of Justice in Jerusalem the case had to engage with the physical details of planning and implementation. Dealing with the project segment by segment, the case examined such details as prefabricated concrete elements, barbed wire and wire meshes, the layout of villages, the slopes of hills and road works, irrigation basins, fields and orchards, lines of sight and ranges of different weapons.

The robotic CNC computer milling of a topographical model. Photo: Eyal Weizman, 2008.

To argue their position both parties used different means of representation: topographic maps, plans, aerial and satellite imagery, photographs and video documentation together with their associated means of display. Frustrated by not being able to comprehend the crucial details of the case, the judges suspended the trial for ten days, demanding – much as an architecture professor might do of her students – that the petitioners return with physical scale models.

Aided by a group of planning-rights activists, Dahla's team, unskilled in the art of model-making and initially unsure about how to proceed, had the model produced by a company that specialized in making terrain models for the military. The model-maker explained the benefit of the inversion: 'having worked for the military we understood the logic of how they think . . . [The trial] was a war game, with the two sides, playing on the same terrain, each seeking to beat the other.'[6] The model's production would be the first in a series of inversions. It was made in a computer-controlled milling process in high-density foam. It was then painted, 'emphasising the topography, fields and orchards'[7] that were the concern of the petitioners, and delivered to Dahla's office. And so, the first model of the wall to have ever been produced was not made by the party erecting the wall, but rather by those opposing it.

On the weekend before the proceedings recommenced, Dahla met with a group of retired Israeli security officials called the Peace and Security Council (PSC). A few weeks earlier they received the status of *amici curiae* – 'friends of the court' – a term which designated volunteers offering expert information to assist the court in deciding matters before it.[8] They tried to help Dahla understand some 'practical security necessities' of barrier design, in order that he could effectively argue for an alternative to the wall as designed by the state. 'It was like a military seminar', Dahla recalled. 'I was taking a crash course in military and security terminology, learning terms like "controlling elevation", which is a high place that poses a threat, "ballistic weapons" as opposed to "flat trajectory weapons" . . . it was very complicated but at the end I felt I could become a general in the Palestinian army!'[9]

As they set about advising Dahla, the former officers drew different lines on the model. In red, they drew the line along which Israeli security contractors had started to erect the wall. In blue, they drew another line, an alternative wall whose route was less invasive than the red one but nevertheless still a wall – 'a lesser evil alternative' they called it, which left a larger proportion of fields in Palestinian hands. Dahla, who didn't agree that the line drawn by the officers sufficiently minimized the Israeli state's infringement on the Beit Sourik villagers' lands, or simply averse to accepting the position of former generals, drew yet another blue line, one running even closer to the Green Line: the border of 1967. In our conversation Dahla stressed that his line should not be mistaken for 'an actual proposal for another wall,' but rather as a tactical move: 'we drew the other line in order to show the court that even according to the security concept presented by the army there exists the possibility for a "less drastic mean" – another possible route that can cause less harm to the villagers . . . and that on the basis of this the court should declare the red [state] route illegal.'

On one or two occasions the blue line that he drew crossed the Green Line into Israeli territory. 'The army said that the Green Line is irrelevant, that the route of the wall is dictated only by security and topographical considerations, and I wanted to render this argument absurd, and in some areas I drew the blue line on the Israeli side of the Green Line because the topography there was better from a security perspective. If the international border is irrelevant, it must be irrelevant both ways . . . and the state

A topographical model of the Beit Surik area with different possible walls. In red is the route built by the government, in blue is the "lesser evil" line. Note that the blue line crosses the green line. Photo: Eyal Weizman, 2008.

should confiscate land from Israelis [in order to build it] – in fact, why not?'[10]

When, ten days later, the court reconvened, Dahla brought the model into court. The Supreme Court Building in Jerusalem had been completed in the early 1990s. With its abundant allusions to the biblical, mystical and Jerusalem vernacular, it has won much national and some international acclaim with those who favour the excesses of postmodernism. It is a well-appointed building, but it has made no special provision for the presentation of architectural models, perhaps because the juridical role of the high court is usually not in the examination of evidence.

Dahla recalled that the porters who carried the model in 'went around in circles not knowing where to place it'. Somebody had an idea: a table was hurried in from the building's cafeteria and placed in front of the judges' bench. Dahla recalled that because the judges' bench was too high and the

Porters bringing the model into the High Court of Justice in Jerusalem, Beit Surik case 2004. Illustration: Christine Cornell [with Eyal Weizman] 2008.

table too low, the judges could not see the model from where they sat, and that they had to step down to look at it properly. The judges also called the lawyers from both parties to join them. Petitioners, respondents and judges assembled around the model. Some people approached from the audience to better hear the discussion. The court descended into momentary disorder. The physical presence of the model disturbed the legal protocol, and introduced its own rules of language. Later, Dahla recalled, 'All of a sudden, no one was using terms such as "your honour" or "my learned friend".' Shulamit Hartman, one of the activists who helped Dahla with the production of the model and was present in court that day, observed: 'the presence of the model introduced very dramatic changes to the courtroom. The usual structure and "order" was disrupted and there was an unordered conversation.' People like

Parties to the process leave their places and assemble within the centre arena. Illustration: Eyal Weizman, 2008.

models. Models are like toys – reduced worlds under control. Hartman also thought that the model caused the Israeli jurists 'to recall their youth in military service.'[11] By these means and others it was now the model that was the most important agent in the discussion that followed. As a form of legal document, the model both provided the object of debate and instigated the specific language with which this debate could take place. The procedural change introduced by the model forced and thereby determined the parameters of the discussion. The legal process came to resemble a design session, with the parties making their points on the model, sometimes balancing their pens on its miniature topography to try out alternatives.[12] Legal positions were thus translated into variations in the route of lines, and these routes became diagrams plotting the tensions, debates and force relations. These processes

Parties assemble around the model.
Illustration: Christine Cornell [with Eyal Weizman], 2008.

could later be read by studying the route. As such, Wittgenstein's observation regarding the model is productive to understand the situation at hand: the model presented at court generated the geographical grammar for 'the law' to shape physical reality, in a similar way that a chessboard dictates the possibilities of a game of chess.

Material Proportionality

The ruling was delivered on 30 June 2004. It was based on the court's interpretation of the principle of proportionality. Chief Justice Aharon Barak, who wrote and delivered the verdict, explained that the 'route was

Justice Aharon Barak examines the different routes.
Illustration: Christine Cornell [with Eyal Weizman], 2008.

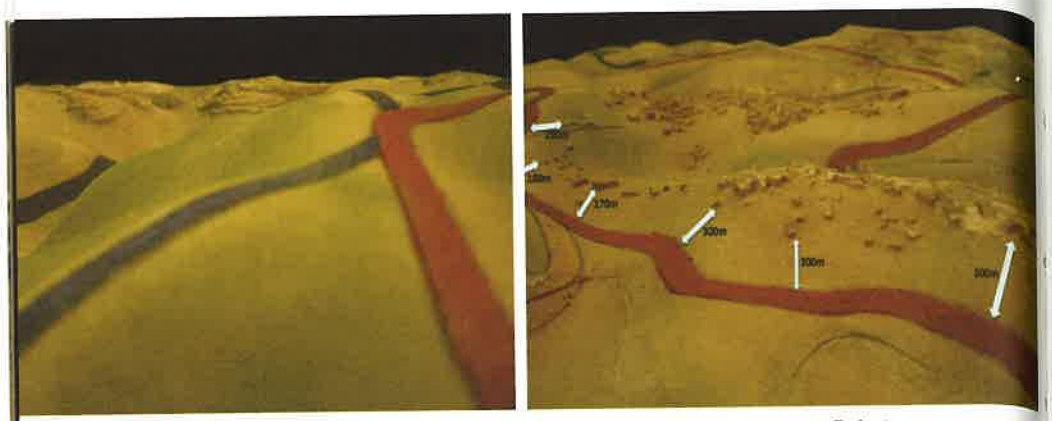
examined according to a possible alternative that was presented to us'. The judgement, therefore, would be made on whether 'the increased security that is achieved in relation to the alternative presented to us is equivalent against a specific harm done in this case.'[13] The court answered in the negative: the route, it believed, was disproportional to the harm done to the lives of the villagers of Beit Sourik. But what was the proportional line? How many acres of occupied land, litres of olive oil, tonnes of wheat, or hardship or wasted time could be balanced against the optimum visibility from a military vehicle taking a left turn, say? This question will obviously be answered differently by those who drive the vehicle (or who ordered them to do so) and those who cultivate and harvest. In the view of the judges at the High Court, though, the common good of the proposed route accrued to one population – the Israeli Jewish colonizers – and was

Military: *'The route drawn by petitioners is unacceptable because it does not take into account the threat to settlements. Placing the fence so close to settlements might put them under constant fire . . . the fence must run on top of the hills to generate topographic surveillance in the valley, as you drew it here, it would be constantly exposed to sniper fire.'*

Military: *'Besides the route you proposed is too steep and raises complex engineering problems the fence has roads along it and the route should be no steeper than 6–7 per cent'* Dahla: *'The further the barrier is from the village the safer it is.'*

measured against the lesser evil done to individuals – the Palestinian farmers along the path.

The court seemed to have been convinced that the wall drawn by the Peace and Security Council – the middle line – on Dahla's model was the least harmful one. One of the retired generals of the PSC stated, after 'legal victory' was announced in a subsequent case, that the alternative

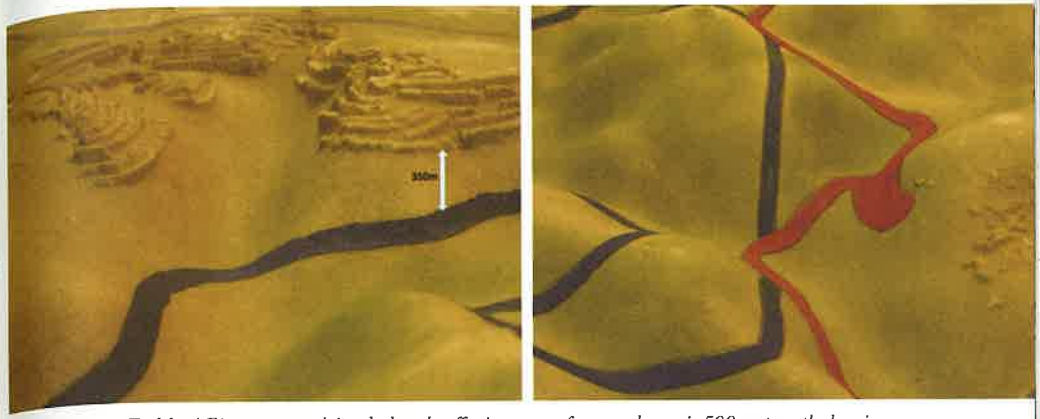


Council for Peace and Security: *'The proximity [of the route] to the houses in the Palestinian villages was not only unnecessary from a security perspective but, due to the serious injury to the local population and the consequent friction, actually detrimental to security.'*

route is 'from the point of view of the Palestinian petitioners, the least of all possible evils.'[14] And so it was that the diffused system mediated by the proportionality principle performed the Panglossian function in creating for the Palestinians 'the best of all possible walls'.

The critical legal scholar Aeyal Gross later convincingly explained that the court's interpretation of the principle of proportionality was not in fact adequate. Moreover, he stated, the trial illustrates the way in which the High Court of Jerusalem uses the doctrine of proportionality to legitimize Israel's occupation of the Palestinian territories.[15] Rather than simply acting as retroactive justification of action already perpetrated, the High Court has become an instrument in regulating the occupation by slightly alleviating the worst effects of military violence. Its verdict on the Beit Sourik case was released a few weeks before the International Court of Justice in The Hague published its own advisory opinion. In what Gross called the 'shadow of The Hague on Jerusalem', the HCJ's judgement, and the timing of its announcement, meant to pre-empt that of the International Criminal Court – and in doing so to aid the Israeli state's argument that it applies the rule of law fairly and indifferently in all cases, including those of occupied Palestinians.

The very essence and presence of the wall is the obvious, material embodiment of state ideology and its conception of colonial, territorial and



Dahla: '*Given, as you claimed, that the effective range of personal guns is 500 meters, the barrier should be placed further away from the last homes in the villages so as to protect the soldiers patrolling along it.*'

demographic security. It is of course only the most visible element within an assemblage of walls, separated roadways and checkpoints, as well as the invisible web of permit systems, which enact the politics of separation across the entire length and depth of Palestine. The details of the route are, however, not the direct product of top-down government planning. The route's folds, stretches, wrinkles and bends plotted the relative force of different participants brought to bear on it by the different parties and the relative force of their arguments. It is in this context that the wall started appearing as a 'political plastic' – a spatial product made and remade as political forces assume physical form, a diagram of the balance between the forces that shape it. Danny Tirza, the wall's main planner and the representative of the Ministry of Defence in the Beit Sourik trial, called the legally inspired fluctuations of the route 'a political seismograph gone mad'.

Shaped by a legal process, the wall could be said to have been forensically engineered. It has given the principle of proportionality a material and spatial dimension. Material proportionality, then, must be the name of the process by which proportionality analysis helps configure structures and territorial organization. It is the process by which an ethical/legal economy intersects with the science of engineering and the making of things. Through it, the law is mobilized in material action, arranging the distribution of rights across architectural formations and technological

systems. Material proportionality gives a new meaning to the concept of security. Security is no longer understood as existing on one side of an equation, on the other side of which sits livelihood and humanitarian issues. Rather, it forms an integrated logic that includes issues like livelihood, human rights and humanitarian concerns within the logic of security. Rather than pitting itself against the agricultural needs of Palestinian farmers, this conception of security aims to embrace and assimilate their concerns over agricultural productivity.

Through the idea of proportionality, differences and disagreements, conflicts and contradictions become 'productive'. In processes concerning proportionality, in which questions of normative moderation arise, the contradictory aims of different actors – military representatives, independent contractors, the media, human rights lawyers, NGOs, social movements and also the victims themselves, those exercising violence and those acting to contain it – add up to a diffused security system that shapes physical reality.

In political terms, the elastic nature of the wall, its capacity to self-modify in response to forces and negotiations, undid the clear conflict and opposition from across a rigid line. The High Court became the arena of negotiations about degrees, measure and balances.

Because the process took place during the high years of the intifada, negotiations shifted from the political realm to the juridical domain, and were conducted not by political representatives, but by lawyers appointed by private villagers. If the wall does ever come to designate the borders of a shrunken temporary Palestinian state, it will be the first such border to have been co-designed by humanitarian lawyers. It is in this way that the Beit Sourik trial provides a reflection on the limits of the process of 'participatory design' – an otherwise banal process based on pseudo-consultation within predefined limits that in this case allowed people to participate in the design of one of the instruments of their most brutal violation, repression and dispossession. And so, case by case, segment by segment, concentrating on problem-solving, moderation and consultation, a major geopolitical question was dismantled and transformed into a humanitarian issue.

Michael Sfard is an Israeli human rights lawyer and one of the most prominent voices of political opposition to Israeli colonialism. He has represented Palestinian landowners in most court cases that followed

A map of the Beit Surik area with the alternative walls drawn on it. Illustration: Bimkom, 2004.

concerning the wall at the High Court of Jerusalem. He explained the nature of his participation in the design and route of the wall like an engineer describing the way a force-field acts on material form:

> The human rights lawyers who petition against the barrier are in fact and in practice one force that designs together with other forces the final route of the wall . . . we find ourselves helping the authorities design a better wall, a wall that goes through a route that is more sustainable. We alert the authorities to the many different problems that the route they designed is causing to livelihood . . . This is the role the army wants me to carry out because it does not know . . . They need me as a go-between to help them create a system that operates better and can last longer. It is very difficult for me to say it but there are several places where I designed the actual route of the wall. It has become clear to me that in fact I am one of its architects.[16]

There is definitively no lack of critical self-awareness in prominent practitioners such as Dahla or Sfard. In fact, most participants in legal struggles against the occupation have reflected, in one way or another, on their collusion with it. In 2007, on the occasion of the occupation's fortieth anniversary, Sfard helped set up a working group of Israeli and Palestinian lawyers, including representatives of most human- and civil rights groups, 'to jointly examine the decades-long struggle against the occupation through petitions to the High Court and other litigation work.' In a situation where the justice system seems to have been enlisted by the defence establishment, they felt it was time for Israeli lawyers to consider alternative forms of action to that of simply petitioning the High Court. Their ideas included connecting local legal struggles to international legal action, boycotts of local courts and a complete shift from technical legalist activism to an overtly political one. These alternatives have yet to be enacted by the participants of the working group – largely because, as they themselves have observed, it would mean 'sacrificing the individuals that seek their help', and might also lead to closing down the organizations they run, which demonstrate the fact that the livelihoods of the Palestinian landowners in the seam area are inversely connected to the livelihoods of the lawyers representing them.

Wallfare

The 'wall' could not, of course, be reduced merely to its physical structure and its route. It is a heterogeneous and interwoven assemblage of interconnected systems of fortification, architectural constructions (the 'terminals'), sensing technologies, automatic weapons, aerial and (in case of Gaza) marine systems that are operated by a multiplicity of institutions according to ever-changing administrative procedures, calculations, tactics, ethical, legal and humanitarian propositions (that capture something of the meaning of what Foucault referred to as 'an apparatus').[17] The organizations that operate the wall participate in the monitoring, control and modulation of everything that passes through it – nutrition, fuel, electricity and medical aid.

While the elastic route of the wall slowly hardens into a definitive form, the permeability of its sister system of fortification, the Gaza perimeter

fence, will still be modulated by the proportional mechanisms of the lesser evil. Whereas the case of Beit Sourik dealt with the elasticity of the West Bank wall's route, the following case addresses its permeability: the extent to which it admits essential provisions.

The tightening of the siege of Gaza is the culmination of a process that saw Israel's control of the enclave transformed from a physical 'occupation' – the territorial system of control grounded in a network of military bases, roads and settlements, which was dismantled in the 2005 evacuation – to 'humanitarian management', exercised as the calibration of life-sustaining flows of resources through the physical enclosure, one meant to keep the entire population close to the minimum limit of physical existence.[18]

In September 2007, several weeks after Hamas took control of the Gaza Strip, citing the organization's ongoing rocket fire on Israeli towns, Israel's political-security cabinet declared Gaza a 'hostile entity'. It was a statement that amounted to a declaration of war – short of giving Gaza the status of a state – and outlined Israel's aim: 'to limit the movement of goods into the Gaza Strip, reduce the supply of fuel and electricity, and limit the movement of persons to and from the Strip.' It also described the implementation of a system to regulate and moderate these restrictions. These limitations, the declaration continued, 'will be applied following a legal examination, taking into account the humanitarian situation and with the intention of preventing a humanitarian crisis.'[19] Israel has thus shifted its strategy from trying to hurt Gaza's economy to destroying it altogether and replacing it with a system of humanitarian government. In this it had a participating partner in the Mubarak regime that controlled Egypt's short border with Gaza in Rafah in coordination with Israel's siege.

Although thresholds like that of starvation are scientifically determined by various international organizations and food agencies,[20] the limit of the 'humanitarian minimum' does not exist as a category in international humanitarian law.[21] It was, however, established in a process of juridical adversarial scrutiny, in response to a petition – Case HCJ 9132/07 – submitted on 28 October 2007 to the High Court by Adalah together with eleven other human rights and humanitarian organizations from Israel and Gaza.

The petition protested the siege policy but added, 'even if the closure is meant to serve some appropriate aim, this act could certainly not face the test of proportionality and as such is illegal.' They noted that provisions already fell well short of what the UN said was necessary – a total of 140 megawatts of electricity, 900 truckloads of supplies per week, including 625 loads of foodstuffs and medical supplies, and 275 loads of 'other necessary items' such as personal and home hygiene needs, house cleaning materials and other provisions.[22] The petitioners claimed that there had thus been a humanitarian crisis in Gaza since the early 2000s if not before,[23] and argued that the process of reducing supplies must be stopped and reversed. In response, the Israeli military insisted that the threshold below which 'the residents of the Gaza Strip would be harmed beyond what is necessary' had not yet been breached.[24] For the military, there was still space for further reduction. On a later occasion, when confronted over allegations that the state was deliberately using starvation as a means of collective punishment, the Israeli government press office emailed reporters with copies of the English menu of the restaurant in a Gaza hotel frequented by internationals.[25] It was a travesty as blatant as contesting the severity of the famine in Ethiopia in 1985 based on the menu of the fanciest restaurant in Addis Ababa.

The central task of the legal process was first to define the threshold of the humanitarian minimum, and then find the mechanism to keep to it. In court, military representatives promised that the task of reducing provisions will 'be discharged with the utmost responsibility and seriousness', gradually, and following weekly assessments by experts in security, international law and humanitarianism and electrical engineering. These experts would also maintain 'contacts with UN agencies, international NGOs and Palestinian health officials', who would help determine whether there were 'any indications of a humanitarian crisis developing.' If any signs of such humanitarian crisis were to be detected, the military assured the court that 'the flow of electricity [as of other provisions] will increase.'[26]

The humanitarian minimums were defined in relation to different types of provisions. The team assembling this data for the Ministry of Defense consulted research undertaken in the academy and by the different organizations operating to alleviate famine in relief missions across the world. In the case of nutrition, thresholds were established with the help of physicians and humanitarian nutrition specialists. Another important source for the

method of calculating and monitoring provisions in relation to a policy of siege were studies undertaken for the purpose of evaluating the effects of the American-led sanction regime imposed on Iraq after the first Gulf War, which itself was based on calculations of nutrition and medicine.[27] Like the sanctions on Iraq, the siege of Gaza took months to create and perfect and similarly involved a vast network of military and civilian institutions; it was similarly presented as a way of exercising control in its most subtle and cheapest form; and was, most significantly, similarly argued to be an alternative to the far worse scenario of military invasion – we must remember that one of the peace camp's most popular and misguided slogans in the lead-up to the Iraq war was 'Give sanctions a chance', and this regardless of the fact that sanctions led to the death of more than half a million Iraqi children.[28]

The existence of a military document titled *Red Lines* was first revealed in *Ha'aretz* by Yotam Feldman and Uri Blau in June 2009. In October 2010, related files were released in their entirety following a successful freedom-of-information petition submitted by the Israeli NGO Gisha (the Legal Center for Freedom of Movement). The *Red Lines* document outlined the minimum number of calories required to sustain Gaza's population of 1.5 million at a level just above the UN definition of hunger. Using humanitarian standards, officials declared the requirement for adult males to be 2,100 daily calories, females 1,700, and children variable amounts, depending on gender and age. They calculated the foodstuffs produced in Gaza and the number of people in the strip. The total number of calories arrived at was then divided into cereals, fruits and vegetables, meat, milk and oil. These in turn were translated into tonnage and the number of trucks of international agencies – Israel would not finance these deliveries – to be allowed into Gaza. Dov Weisglass, adviser to Prime Minister Ehud Olmert, explained the rationale: 'The idea is to put the Palestinians on a diet, but not to make them die of hunger.'[29] According to a constantly shifting scale, certain foodstuffs were defined as 'essential', such as persimmons, bananas and apples – and, usually, whatever unsold stocks Israeli wholesalers were stuck with at any given time. Other foodstuffs considered 'luxury' – such as apricots, plums, avocados and grapes – were forbidden.[30]

Baruch Spiegel, a reserve general in the Israeli military, best embodies Israel's attempts to govern the strip by 'managing' the humanitarian situation

as an instrument of state policy. His career in recent years encapsulates Israel's strategic transition from a territorial system of domination to humanitarian government. Previously, Spiegel headed up a team dealing with 'civilian and humanitarian issues caused by the wall and checkpoints' in the West Bank. He worked closely with Palestinian and Israeli NGOs and international organizations in their efforts to reroute the wall or to open what the military called 'humanitarian gates'. Since Dahla's team secured the 'legal defeat' of the state in the Beit Surik case, his work saved the military much time and money, avoiding lengthy and costly legal processes, as he was in charge of enacting alternatives to the route in out-of-court settlements. Spiegel's next posting, to which he was appointed during the 2008–9 attack in Gaza, was as head of a makeshift 'humanitarian war room' located in one of the terminals on the Gaza perimeter. The war room was a meeting place for Israeli military officers and humanitarian agents, among them UN agencies such as UNRWA (UN Relief and Work Association, which deals with Palestinian refugees), WFO (World Food Organization) and WHO (World Health Organization), the ICRC, USAID and occasionally representatives of the EU and of various international NGOs. The forum's task was, of course, to solve the humanitarian problems created as a result of the inability to transfer even a minimum of humanitarian provisions under fire, to determine need and crisis and responses to them. Spiegel explained, 'The model of a combined humanitarian centre reflected shared interest and understanding . . . It was very helpful for the IDF, Israel and the international agencies.'[31]

The siege was in fact a military operation that relied on endless daily calculations, themselves modified in relation to the constant monitoring of the situation in Gaza as reported by international organizations. Numerical formulas with upper and lower thresholds defined what the military called the 'breathing space' – which is to say the time left before hunger starts killing people. In the *Red Lines* documents uncovered by Gisha, the military orders for calculating food provision were defined by the following formulae, meant for those managing the crossing, and reminiscent of primary school algebra lessons.

> If the daily consumption per capita, per product as calculated by the Palestinian Central Bureau of Statistics is A, the population of the Gaza Strip is B, then daily consumption C should be calculated as C = A*B.

> If the quantity of food reserves in the Gaza Strip is Z, the breathing space in days [D] should be calculated as D = Z/C.
>
> If the daily quantity of produce entering the Gaza Strip is X and the existing reserves in the Gaza Strip is Y, the quantity of reserves in the Gaza Strip should be calculated as Z = X+Y–C

In simple language: if you divide food in the Strip by the daily consumption needs of residents, you will get the number of days it will take before people run out of basic provisions and start dying.

The Israeli theorist Ariella Azoulay explained in 2003 that although it has brought the Occupied Territories to the verge of hunger, the Israeli government tries to control the flow of provisions in such a way as to prevent the situation from reaching a point of total collapse, all because of the unpredictable international reaction that might follow.[32] Similarly, the scholar and human rights researcher Darryl Li points out that the term 'disengagement' – usually used to refer to the Sharon government's 2005 withdrawal from the colonies in Gaza – should rather be used to refer to a new type of regime of controlled abandonment. 'Disengagement', writes Li, 'is a form of rule that sets as its goal neither justice nor even stability, but rather survival – as we are reminded by every guarantee that an undefined "humanitarian crisis" will be avoided.'[33] Adi Ophir describes Israel's policy towards Gaza as 'catastrophization': 'When catastrophization becomes a set of governmental policies, a measured and restrained means of governance, the presence of an imaginary, ghost-like threshold of catastrophe often becomes a warning sign . . . These forces should not cross the imaginary line lest they lose the legitimization of those who support them [in order] to keep the catastrophe itself in suspension.'[34] In an article expanding on his journalistic account of the *Red Lines* documents, Yotam Feldman refers to the rationing of calories into Gaza as 'the ethic of red-lines,' an operational mode which, he explains, 'allows the security forces to undertake all action as long as this line is not breached.'[35]

However, the elasticity of such thresholds means that in reality not much is held in suspense. Rather than the red line functioning as a minimum threshold with the level of provisions fluctuating over it, at the moment it was accepted by the high court, the line began designating the maximum cap on provisions. Although the military ceaselessly propagates the idea that it monitors and adheres to the humanitarian minimums, at

no point did it provide the same amount or more electricity, medical aid and nutrition than the minimum to which it was committed. Moreover, in a downward spiral, every time a new lowest level was recorded, it immediately became the benchmark to define a new 'normal state' against which further reductions could be implemented as punishment. The siege reached a stage where widespread hunger could be held at bay only by the constant and audacious operations that imported food from Sinai through the hundreds of supply tunnels dug under the Egyptian border.

Furthermore, the tragedy of Gaza cannot be wholly evaluated by the number of recorded deaths from violent reasons or from causes related to hunger. Rather, it needs to factor a slower, more cumulative process in which deaths that might have been averted were actively not prevented. Relative to other conflicts worldwide, the Israel–Palestine one does not produce a high number of direct or violent deaths, while those deaths that do take place are relatively visible.[36] But another, rather more subtle form of killing has become commonplace: one that is undertaken through degrading environmental conditions to affect the quality of water, hygiene, nutrition and healthcare; by restricting the flow of life-sustaining infrastructure, forbidding the importation of water purifiers and much-needed vitamins (mainly B12), by restrictions on planning and by making it difficult for patients to travel. This form of killing – almost Malthusian in its conception – deliberately sought to control the living conditions, and is part of current Israeli policy in relation to Gaza. Figures of 'excess mortality' – those related to avoidable death that have not been avoided or intentionally allowed – are difficult to establish; they are buried in comparative statistical calculations of trends in mortality rates. This might also account for the reason that indirect mortality rates have rarely been used, not even by those mobilizing world opinion against all forms of Israeli domination.[37]

Milgram in Gaza

The legal petition against the further reduction of provisions into Gaza was rejected at the end of January 2008. 'This is the difference between Israel, a democracy fighting for its life within the framework of the law, and the terrorist organizations fighting against it,' the High Court stated,

as if it were a state spokesperson. The court performed the task of an administrator rather than an adjudicator, a partner in the calibration of how much pain Gazans are to be made to legitimately feel. As such, acts of torture and terror aimed at forcing civilians into political compliance conferred on their makers a dignified image. Those proportionaly administering the level of pain could now see themselves as being responsible for the necessary and tragic task of calculating and responsibly choosing the lesser of all possible evils.

Unlike other provisions, imported through the hundreds of tunnels between Egypt and Gaza, which threw out Israel's modulations and calculations, Israel has complete control over the supply of electricity. Examining the fluctuations of electrical current therefore yields a revealing picture of how Israel forced the designated thresholds to the breaking point.

The ability to exercise control through the modulation of flow – in which the checkpoints and terminals within the wall function as valves and switches – has made Israel's warfare on Gaza resemble an inverse Milgram experiment. In reflecting upon the willing participation of individuals in the functioning of repressive regimes, the Yale professor Stanley Milgram's infamous 1961 experiment sought to investigate the extent to which ordinary people would obey the orders of figures in authority to inflict pain on others. On one side of a room divided by a one-way mirror, a scientist ordered a volunteer to deliver electrical shocks of ever-increasing strength to a person strapped to a chair on the other side of the room whenever she or he gave wrong answers to questions read from a questionnaire. In the experiment, the person answering the questions was an actor: there was no current in the system and the effects of the shocks were simulated. Those administering the 'shocks' were, unknowingly, the subjects of an experiment in the limits of their obedience to a figure of scientific authority. Most were willing to inflict pain beyond the threshold marked as life endangering, when ordered to do so.

An analogous process happened in the context of administering the siege of Gaza, with the crucial difference that the current in Gaza was real enough and the response to bad political choices by the Hamas government was not to increase the current but rather to reduce it gradually – and thereby destroy the strip's life-sustaining infrastructure and eventually bring its population to the brink of physical existence. In this inverted

Milgram experiment, the authority figures are the scientists, engineers and humanitarian experts advising the Israeli High Court, which ultimately decides on the level of current. Although those administering the reduction guarantee to provide current at a threshold above that at which a 'humanitarian crisis will be created', this threshold was constantly tested – much like the upper limits of the electric shock in the Milgram experiment.

Nearly all of Gaza's energy is supplied by Israel, both directly, from its electric grid, paid for by tax revenues collected by Israel on behalf of the Palestinian National Authority (PNA), and indirectly, through fuel supplies paid for by the European Union and supplied by the Israeli company Dor Alon to Gaza's only electrical power plant. Nine high-voltage power lines from Israel and one from Egypt supply Gaza with a maximum of about 140 megawatts (MW). From 2 February 2008 – days after the legal judgment on the humanitarian minimum – the military reduced the current supplied by each of the power lines in turn by 5 per cent every week for the next several months.[38] Another 140 MW were provided by the Gaza Power Plant, a structure built by Enron and which opened a few weeks after the company's collapse at the end of 2001. Israel reduced the power plant's capacity by gradually reducing the supply of industrial diesel. The power plant requires a supply of 3.5 million litres of industrial diesel weekly to work at its full capacity. The high court accepted as the humanitarian minimum a quota of 2.2 million, which would reduce its operation to about 68 per cent of capacity. At this level the Gaza Electricity Company had to initiate regular blackouts, and spread the burden of the power outages over the different distribution areas of each power line in order to keep hospitals and other vital services running.

On 9 April 2008, two Israeli citizens were killed by militants at an Israeli-controlled border crossing where this very industrial diesel is piped into Gaza. Israel saw this as ingratitude for the minimum level of fuel provided, and a Ministry of Defence spokesperson declared that from that point on, the opening of the crossings 'will be evaluated on a day to day basis'. Israel immediately reduced the flow of diesel to 1.5 million litres per week, 42 per cent of what was required for the Gaza Power Plant's full capacity, and 24 per cent below the threshold of the legally defined red line. Electricity production dropped to 45 MW. Power cuts

now affected fresh water pumping from the coastal aquifer, thereby aggravating the water shortages. Crop irrigation was interrupted, destroying fruit and fodder production, which in turn reduced egg and dairy output. When the current was further reduced, fish started dying in the Beit Lahiya fish farms because the pumps needed to filter or oxygenate water stopped functioning. Sewage pumping also decreased. In some cisterns the level of sewage rose to the point where the concrete banks of container pools collapsed. Raw sewage started flooding onto streets and agricultural fields, seeping into the aquifer's drinking water. In May 2008 the sewage treatment plant overflowed: more than 50 million litres of raw waste poured into the Mediterranean every day, further affecting public health and reducing the fishing catches. Slowly, it also started affecting Israeli beaches. Israeli coastal municipalities north of Gaza started complaining, asking for more current to be supplied to Gaza. In June 2008 Israel increased the flow of diesel close to the level of the 'humanitarian minimum', allowing the power station to reach 60 MW again and for the sewage farms to be repaired and restarted. Depending on the political calculation at any given time, the military reduced or increased the supply of diesel, seeking to achieve an optimum of maximum political impact with minimum intervention. Although there were small demonstrations against Hamas' rule during times of drastic reduction, Hamas' control of Gaza was generally strengthened during this period due to the fact that it was the only supplier of emergency services.

When, on 5 November 2008, after Israeli forces killed six Hamas gunmen in a raid into the territory, breaking the ceasefire that had held for several months, all diesel supply to Gaza was swiftly cut off, together with all other provisions. On 5 November the Israeli government sealed every way into and out of Gaza. Egypt did the same on its border to the strip.[39] On 5 November the capacity of the power plant went to 18 per cent of the 'humanitarian minimum', but then supplies dried up again and the entire plant shut down three days later. When a single fuel truck arrived on 18 November, the turbine batteries failed to start up, and the plant's engineers worked frantically to hook up 170 twelve-volt car batteries from cars in the plant parking lot to restart the plant's turbines. They succeeded but the plant soon shut down again for lack of diesel. For half the days in November and December, the

plant was unable to produce any electricity whatsoever. Overstretched generators collapsed. In hospitals, computers and medical equipment fell into disuse. Surgeries and medical lab services were cancelled. Refrigeration outages rendered stockpiles of drugs useless; even the morgues shut down. Just as it seemed things could not get any worse, on 27 December the first bombs started falling. But considering Israel's more invisible and lesser-known humanitarian attack – exercised across the wall of Gaza – the war of 2008–9 was all over before it had even begun.

A Legislative Attack

> If, therefore, conclusions can be drawn from military violence, as being primordial and paradigmatic of all violence used for natural ends, there is inherent in all such violence a lawmaking character.[40]
>
> Walter Benjamin

Israel's bombing and invasion of Gaza in the winter of 2008–9 marked the culmination of its violence against the Palestinians since the Nakba of 1948, and resulted in widespread international allegations that Israel had committed war crimes. It was also the assault with which Israeli experts in international humanitarian law – the area of the law that regulates the conduct of war – had their closest involvement to date. Since the 2006 Lebanon War the Israeli military has become increasingly mindful about its exposure to international legal action. Preparations for the next conflict included those in the domain of law, and new 'legal technologies' were introduced in military matters.

This development gives rise to a series of related questions. Might it be that these legal technologies contributed not to the containment of violence but to its proliferation? That the involvement of military lawyers did not in fact restrain the attack – but rather, that certain interpretations of international humanitarian law have enabled the inflicting of unprecedented levels of destruction? In other words, has the making of this chaos, death and destruction been facilitated by the terrible force of the law?

* * *

In more domains than one, the elastic and porous border has become the contemporary pathology of Israel's regime of control. It manifests itself in a variety of different ways – one such being the elasticity that military lawyers identify and mobilize in interpreting the laws of war.

The laws of war pose a paradox to those protesting in their name: while they prohibit some things, they authorize others. And thus another borderline is established between the 'allowed' and the 'forbidden'. This line is not stable and static, rather it is dynamic and elastic and its path is ever changing. An intense battle is conducted over its route. Much like the route of the separation wall, the thresholds of the law will be pulled and pushed in different directions by those with different objectives. The question hinges on which side of the legal/illegal divide a certain form of military practice is to be located. International organizations such as the UN and the ICRC, large NGOs and human rights groups, and also some highly regarded academic authorities on international humanitarian law, have the means to push the line in one direction – to place controversial military practices on the prohibited side – while state militaries and their apologists seek to push it in the opposite direction. International law can thus not be thought of as a static body of rules but rather an arena in which the law is shaped by an endless series of diffused border conflicts.

According to the legal scholar and adviser for the ICRC in Israel Eitan Diamond, 'the architecture of international humanitarian law is typified by "rigid lines of absolute prohibition" and "elastic zones of discretion."' The rigid prohibitions are derived, he states, from the law's origins in the nineteenth century, 'a time when legal thought was dominated by a positivist-formalist approach that conceived of law as a closed system distinguished from politics and ethics'. Today, he fears, 'states and their advocates are using arguments based on the logic of the "lesser evil" to subvert the law's absolute provisions and to subject them to malleable cost-benefit calculations.'[41] Diamond and the ICRC – allergic to the 'creativity' of state lawyers – would prefer to see a more rigid legal structure and absolute prohibitions. A deontological legal system demanding the strict application of the law is useful in the kind of backroom discussions the ICRC is involved in with the military.

New frontiers of military practice are being explored via a combination of legal technologies and complex institutional practices that are now

often referred to as 'lawfare', the use of law as a weapon of war. Lawfare is a compounded practice: with the introduction and popularization of international law in contemporary battlefields, all parties to a conflict might seek to use it for their tactical and strategic advantage. The former American colonel and military judge Charles Dunlap, who was credited with the introduction of this term in 2001, suggested that 'lawfare' can be defined as 'the strategy of using – or misusing – law as a substitute for traditional military means to achieve an operational objective.'[42] In the hands of non-state actors, Dunlap says, the 'lawfare effect' is created by an interaction between guerrilla groups that 'lure militaries to conduct atrocities' and human rights groups that engage in advocacy to expose these atrocities, and who use what available means for litigation they have to hand. In a similar vein, Israel now often claims that it is facing an unprecedented campaign of lawfare, which threatens to undermine the very legitimacy of the state. Lawfare is also used tactically by state militaries themselves. In this context it refers to the multiple ways by which contemporary warfare is conditioned, rather than simply justified, by international law.[43] In both cases, international law and the systems of courts and tribunals that exercise and enact it are not conceived as spaces outside the conflict, but rather as being among the battlegrounds internal to it.

Anarchists Against the Law

It is within the 'elastic zones of discretion' that Israeli military lawyers find enormous potential for the expansion of military action. A former chief international lawyer for the Israeli military, Daniel Reisner, argued that because international humanitarian law is not so much a code-based legal system but a precedent-based legal corpus, state practice can continuously shift it.

> International law is a customary law that develops through an historic process. If states are involved in a certain type of military activity against other states, militias, and the like, and if all of them act quite similarly to each other, then there is a chance that it will become customary international law.[44]

It is in this sense that international law develops through its violation. In modern war *violence legislates*: 'If the same process occurred in criminal law, the legal speed limit would be 115 kilometres an hour and income tax would be 4 per cent.'[45]

Reisner is proud to have been the first international lawyer to have defended, at a specific request of then–prime minister Ehud Barak, the policy of 'targeted assassinations' towards the end of 2000, when most governments and international bodies considered the practice illegal. 'We invented the targeted assassination thesis and we had to push it. At first there were protrusions that made it hard to insert easily into the legal moulds. Eight years [and, as he said subsequently in this interview, referring to 9/11, "four planes"] later it is in the centre of the bounds of legitimacy.'[46]

Asa Kasher, a professor of ethics at Tel Aviv University, has worked with Reisner to provide an ethical and legal defence for targeted assassination. He talks in similar terms about the nature of law and the ways in which it might be transformed: 'We in Israel have a crucial part to play in the developing of this area of the law [international humanitarian law] because we are at the forefront of the war against terror, and [the tactics we use] are gradually becoming acceptable in Israeli and in international courts of law . . . The more often Western states apply principles that originated in Israel to their own non-traditional conflicts in places like Afghanistan and Iraq, then the greater the chance these principles have of becoming a valuable part of international law. What we *do* becomes the law.'[47]

After the Goldstone fact-finding mission on Gaza, Israel's prime minister emphatically called for a radical rewriting of international humanitarian law. 'Paradoxically,' Benjamin Netanyahu said, 'it is possible that the firm response of important international leaders and jurists to [the Goldstone report] will accelerate the re-examination of the laws of war in an age of terror.' His Minister of Defence, Ehud Barak, added: 'We cannot change the law but we can help develop it.'

The actions of the Israeli state against Gaza may become acceptable in law. The siege, ongoing since 2007, the 2008–9 invasion, and the 2009 attack on an international flotilla carrying supplies into the enclave, have all been carried out with relative impunity, and do not appear to have significantly affected Israel's international standing. Each of these forms of aggression contains within it a multiplicity of small-scale practices and

incidents: restricting the supply of food to the threshold of starvation; targeted assassinations; sending advance warnings that then allow the military to kill those civilians who choose not to evacuate;[48] attacks on activists in international waters; the use of white phosphorus in inhabited areas – the list goes on. In these acts – if Israeli lawyers have their way and continue to play with the law as if it was a toy – lie the seeds of new legislation.

Working on the margins of the law is one way to expand them. For violence to have the power to legislate it needs to be applied in the grey, indeterminate zone between obvious violation and possible legality, and then to be defended diplomatically and by legal opinion. Indeed, the legal tactics sanctioned by military lawyers in Israel's invasion of Gaza in 2008–9 were framed in precisely this way. 'When something's in the white zone, I'll let it be done, if it's in the black I'll forbid it, but if it's in the grey zone then I'll take part in the dilemma, I don't stop at grey,' said Reisner. Proportionality might indeed be thought of as one of the mechanisms for the reshaping of juridical space in a way that increases the extent of and makes use of the grey zone.

The invasion therefore did two simultaneous and seemingly paradoxical things: it both violated the law and aimed to shift its thresholds. This kind of violence not only transgresses but also attacks the very idea of rigid limits. In this circular logic, the illegal turns legal through continuous violation. There is indeed a 'law making character' inherent in military violence. This is law in action, legislative violence as seen from the perspective of those who write it in practice.

This use of the law has much in common with that of the George W. Bush administration's misappropriation of the Office of Special Counsel in the Justice Department, in order to figure out a way to legalize the use of torture. Inherent in this was the clear intention to stretch the law as far as possible without actually breaking it.[49] In this example, US Department of Justice Attorney John Yoo used balancing of interests to authorize certain forms of torture. His famous torture memos were grounded in an Israeli precedent: relying on what is essentially a proportionality analysis, the 1987 Israeli commission of inquiry into the methods of investigation in the General Security Service (the Landau Commission) arrived at the conclusion that the prohibition on torture is not absolute, but is rather based, using the commission's words, 'upon the logic of the lesser evil'.

Thus, 'the harm done by violating a provision of the law during an interrogation must be weighed against the harm to the life or person of others which could occur sooner or later'.[50] Some legal scholars have suggested that such legal advice in itself might be considered a crime.

Similar lines of legal argument are inspired by a strand of legal scholarship known as 'critical legal studies', an approach that emerged together with other post-structuralist discourses at the end of the 1980s. Critical legal studies scholars aimed to expose the way the law is made, the workings of power in the making and enactment of law, to challenge law's normative account and to offer an insight into its internal contradictions and indeterminacies. It was, broadly speaking, a critical, left-leaning practice, which otherwise attempted to deploy law at the service of a socially transformative agenda. But when international law stands as an obstacle in the way of state militaries it is easy to see why military lawyers would adopt the attitude of those scholars seeking to challenge rigid definitions and expose the law as an object of critique and contestation. Today, when the creative interpretation of the law is exercised by state and military lawyers, it is primarily human rights and anti-war activists that insist on the dry letter of the law. This creative treatment of the law, as exercised by the military and its advocates, led Michael Sfard to play on the phrase 'anarchists against the wall' – a group of anti-occupation activists – to describe Israeli military lawyers as 'anarchists against the law'.[51]

The appeal, by military lawyers, to international humanitarian law to justify wars could easily be dismissed as cynical propaganda. Most human rights groups have correctly pointed out that international humanitarian law was not properly observed in Gaza, in the sense that it was used too permissively. Evidence and testimonies, including soldiers', collected by the Goldstone investigation and human rights groups reveal in baroquely nightmarish details some of the most gruesome and egregious violations. There were about twenty reported instances of Israeli soldiers firing at women and children carrying white flags; reports of the denial of medical aid and ambulances to reach wounded Palestinians who bled to death; the wanton destruction of homes and neighbourhoods; and the use of white phosphorus – and more besides.[52] But in the age of lawfare, the elastic nature of the law, and the power of military action to stretch it, those appealing for justice in the name of the law need to be aware of its double edge.

Gaza is a laboratory in more than one sense. It is a hermetically sealed zone, with all access controlled by Israel (except the Egypt border, now controlled by a still yet-to-be-defined post-Mubarak regime). Within this enclosed space, all sorts of new control technologies, munitions, legal and humanitarian tools, and warfare techniques are tried out on its million and a half inhabitants. The ability to remotely control large populations is also tested, before these technologies are marketed internationally. Most significantly of all, it is the thresholds that are tested and pushed: the limits of the law, and the limits of violence that can be inflicted by a state and be internationally tolerated. This limit, newly defined with every attack, will become the new threshold of what can be done to people in the name of 'war on terror'. When the legislative violence directed at Gaza unlocks the chaotic powers of destruction that lie dormant within the law, the consequence will be felt by oppressed people everywhere.