Missing in Action: The Human Eye

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[This chapter was published in CONSTITUTIONALISM ACROSS BORDERS IN THE STRUGGLE AGAINST TERRORISM 283-304 (Federico Fabbrini & Vicki Jackson eds., 2016). The numbers in brackets are the page numbers of the published version].

[283] INTRODUCTION

In this chapter I argue that the growing involvement of lawyers in approving military operations, coupled with the disappearance of the soldier's unmediated gaze of the battlefield, increase the probability for the execution of a certain kind of manifestly unlawful orders.

In recent decades, western states have put their faith in jurists in their attempt to tackle the problem of human rights violations during warfare. Through setting up an international web of legal rules, now known as International Humanitarian Law (previously known as the law in war), and by enhancing the role of jurists as the most equipped experts to detect and prevent violations of this law, western states have tried to ensure a more humane battlefield.[1] In this chapter I argue that this effort has inherent limitations. I show that the growing reliance on lawyers to approve the legality of military operations makes every order executed according to a lawyer's "clearance" legal on its face. Militaries now prefer to expropriate the decision of legality from the combatants and view an order approved by lawyers to be legal. There are still grave concerns that even if militaries heeds the legal advice given by military [284] lawyers,

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[1] *See, e.g.*, RUTI TEITEL, HUMANITY'S LAW 4-8 (2011) ("The law and discourse of humanity law are penetrating the sphere of foreign policy decisionmaking, as can be seen in the increasingly frequency with which situations of conflict have hit a political impasse are being referred to court…"); FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI 319 (2001) (noting that in the U.S. after the My Lai massacre, "the Defense Department recognized that preventing similar incidents required a new approach to ensuring obedience to the Law of War. Requiring the Army's legal corps to take primary responsibility…was considered the best way to implement this goal.").

violations of humanitarian law will still occur because military lawyers are more prone to divert from accepted standards of legality.[2] In this chapter, I want to present a different approach and argue that legality that is based on a lawyer's reasoning is sometimes ill-equipped, through its language of expertise, to detect atrocities. At times, the eyesight and emotions of the combatant are the best metrics for determining that an order is manifestly unlawful.

Moreover, the existence of legal clearance for military operations causes a greater disassociation between the combatant and his victims, thus facilitating, in certain scenarios, an easier violation of the values that the legal endeavor was set up to defend. Giving jurists the authority to approve military operations has great potential to absolve the combatant of the responsibility to consider the legality and morality of the order, relying instead on the legal authorities to make such judgments. In broader terms, making the issue of the legality of military operations the sole responsibility of military lawyers, absolves society from having to think about the morality of these operations. It transfers these issues into the hands of "experts." Especially in societies in which military service is compulsory, leaving the question of whether an order is manifestly unlawful partly in the hands of combatants is a form of civilian accountability of military operations.

In the first section, I distinguish between two different versions of the criminal defense that requires soldiers to disregard manifestly unlawful orders. These two versions are conflated in judgments and scholarly writings. According to the first version, when the order's illegality is obvious, the soldier should refuse to obey. According to the second version, when the order is morally repulsive, the soldier should refuse to obey. Next, I explain that the history of military atrocities shows that unmediated eye contact plays a crucial role in breaking a soldier's disassociation from potential victims and thus creates an emotional reaction of repulsion towards certain orders. Yet, in the modern battlefield, more and more of the killings are carried out without the soldier seeing the battlefield with his own eyes, without him experiencing the battlefield. Rather, the killings are carried out by aerial vehicles operated from afar. I argue that these

[2] David Luban, *Military Necessity and the Cultures of Military Law*, 26 LEIDEN JOURNAL OF INTERNATIONAL LAW 315 (2013) (arguing that the "cultural divide" between "military lawyers" and "humanitarian lawyers" explains why militaries that rely on the advice of military lawyers may still violate international humanitarian law).

developments distort the legal criterion that determines whether an order is manifestly unlawful. Then, based on the [285] Israeli experience, I explain why the rise in legal scrutiny of military actions further contributes to this distortion, hindering the protection of human rights rather than enhancing it. Thus, I conclude that, taken together, these two developments render more and more obsolete the version of the manifestly unlawful order doctrine that allows for disobedience to an order based on a soldier's emotional repulsion. These changes increase the chances for obedience to a certain kind of manifestly unlawful orders that in the past might have been disobeyed.

I. THE TWO APPROACHES FOR DETERMINING THE EXISTENCE OF MANIFESTLY UNLAWFUL ORDERS

The superior order defense relieves a soldier of criminal liability for violating the law when he acted in compliance with the obligatory order of a competent authority. This defense applies as long as that order is not manifestly unlawful.[3] But if the order was manifestly unlawful, the defense will not apply. This structure of the defense exists in many national legal systems.[4] While in the international arena there has been a debate on the scope and nature of the superior order defense in customary international law,[5] the structure described above was reflected [286] in Article 33 of the Statute of the International Criminal Court (1998) (hereinafter: the ICC Statute).[6]

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[3] *See* YORAM DINSTEIN, THE DEFENCE OF 'OBEDIENCE TO SUPERIOR ORDERS' IN INTERNATIONAL LAW 8-9 (2012) (reprinted edition); Ziv Bohrer, *Clear and Obvious? A Critical Examination of the Superior Order Defense in Israeli Case Law*, 2 IDF L. REV. 193, 202 (2006).

[4] *See, e.g.*, Andreas Zimmermann, *Superior Orders* in THE ROME STATUTE OF INTERNATIONAL CRIMINAL COURT: A COMMENTARY 957, 964-65 (Antonio Cassese, Paola Gaeta, John R.W.D. Jones eds., 2002); Paola Gaeta, *The Defence of Superior Orders*: *The Statute of the International Criminal Court versus Customary International Law*, 10 EJIL 172, 176-77 (1999); Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law of War*, 86 CAL. L. REV. 939, 949 (1998) ("The majority approach in the industrialized democratic West appears to be the manifest illegality rule.").

[5] Compare Gaeta, *supra* note 4, at 172 (arguing that according to customary international law, obedience to orders is never a defense (absolute liability approach) and that the ICC Statute has departed from that rule, adopting the conditional liability approach) to Osiel, *supra* note 4, at 946-49 ("In both international law and the military codes of most states, the nutshell answer to the problem of due obedience is that the soldier is excused from criminal liability for obedience to an illegal order, unless its unlawfulness is thoroughly obvious on its face…. one must conclude that international law on the matter of due obedience is not fully settled.").

[6] *See* Zimmermann, *supra* note 4, at 970. *See also* DINSTEIN, *supra* note 3, at xxii-xxiii (discussing the developments after the conclusion of the Rome Statute that do not comply with its understanding of the defense).

As long as an order is legal, a soldier must obey. But, even if the order is illegal, according to the superior order defense, a soldier can, and perhaps should, obey, as long as the order does not involve carrying out a manifestly unlawful act. Multiple rationales have been offered for awarding a criminal defense to soldiers who obeyed illegal orders. Many have raised the soldier's grave dilemma as the basis for negating his culpability in the wrongful act. On the one hand, the soldier may face possible military proceedings (criminal or disciplinary), or even a summary punishment, for disobedience. On the other hand, without the defense, he may face criminal proceedings, even in the international arena, for obedience to an unlawful order.[7] The defense provides a way out of this dilemma.

Other rationales to relieve soldiers of criminal responsibility for obeying illegal orders include: the hierarchal and stringent nature of military organizations, as well as military training, that is designed to make a soldier obedient so that he will sacrifice his life for his country, overcoming the natural instinct for life;[8] the soldier's inability to analyze the lawfulness of her actions during the "heat of battle"; his reliance on his commander's training and superior factual knowledge of the situation, as well as the need to ensure obedience in a time of war.[9] But even these rationales cannot excuse, and surely not justify, obedience to a manifestly unlawful order.

When does an order become "manifestly unlawful"? There are two main approaches to this question in courts' adjudication and in jurists' writings. According to the first, when illegality of the order is obvious, the soldier must refuse to obey. I call this approach the reason-based approach. According to the second, when the order is morally repulsive, the soldier must refuse to obey. I call this approach the emotion-based approach. Both approaches examine the soldier's decision of whether to [287] obey according to an objective criterion: whether a reasonable soldier under the circumstances should recognize the order as manifestly unlawful. Yet, the distinction between these two approaches is based on how one reaches the conclusion that the act is manifestly illegal.

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[7] *See, e.g.*, DINSTEIN, *supra* note 3, at 6-8, 22 ("the soldier who receives an order to commit an offence is driven, in the international as in the national arena, on to the painful horns of a most acute practical dilemma."), 73.

[8] *See* DINSTEIN, *supra* note 3, at 5-6

[9] *See* Jessica Liang, *Defending the Emergence of the Superior Orders Defense in the Contemporary Context*, 2 GOETTINGEN J. INT'L L. 871, 873-74 (2010) (surveying the various rationales); Osiel, *supra* note 4, at 965-68 (same).

According to the first approach, the conclusion that the order is manifestly unlawful is based on a process of reasoning, leading to the conclusion that the order is outside the realm of legality. According to the second approach, the conclusion is based on "pre-reflective, gut-level, unreasoning."[10] In other words, it is based on emotional repulsion towards the act that one is ordered to perform.

Until recently, the difference between the two approaches had not created serious difficulties, and thus was not adequately explicated in the scholarly literature.[11] Yet as I will show, the difference has now become acute because of recent developments, especially the rise of military lawyers who give legal authorization to military operations.

Lauterpacht articulated the first approach, stating that an order must be considered manifestly unlawful if its illegality was "obvious to a person of ordinary understanding."[12] The manifest illegality test according to this approach is based on reason (or in Dinstein's terms, "intelligence") possessed by the average person, as it examines the reasonable man's understanding of the order's illegality.[13] According to the test, the soldier goes through a process of contemplation, concluding either that the order is within or outside the realm of legality.

The second approach was captured by Israeli courts in the famous 'black flag test.'[14] According to this approach,

> The distinguishing mark of a "manifestly unlawful order" should fly like a black flag above the order given, as a warning saying "Prohibited!". Not formal unlawfulness, hidden or half-hidden, nor unlawfulness discernible only [288] to the eyes of legal experts, is important here, but a flagrant and manifest breach of the law, definite and necessary unlawfulness appearing

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[10] *See* Osiel, *supra* note 4, at 995 ("His practical maxim may remain 'mine is not to reason why.' But the whole point of the rule is that no reasoning why is necessary to discern the wrongfulness of an order immediately displaying its criminality on its face.").

[11] But see Eliahu Harnon, Miriam Gur-Arye et al., *Superior orders Defense—A Symposium Summary*, 20 MISHPATIM 591, 585-87 (1991) [in Hebrew] (Aharon Enker offering a distinction that somewhat alludes to mine).

[12] *See* DINSTEIN, *supra* note 3, at 27 (quoting Lauterpach).

[13] *See* DINSTEIN, *supra* note 3, at 27-30.

[14] Central District Court-Martial/3/57, Military Prosecutor v. Melinki, P.M. 17, 90. In the appeal the Military Court of Appeals noted that this test "appeal to the voice of the soldier's conscience". Appeal/279-283/58, Ofer v. Chief Military Prosecutor, P.E. 44, 362, 411-12.

> on the face of the order itself, the clearly criminal character of the acts ordered to be done, unlawfulness piercing the eye and revolting the heart, be the eye not blind nor the heart not stony and corrupt, that is the measure of "manifest unlawfulness" required to release a soldier from the duty of obedience upon him and make him criminally responsible for his acts.[15]

Almost a century earlier, an American judge wrote in similar terms when he explained that the defense of a superior order will not apply if the defendant's act was 'so palpably atrocious as well as illegal that one can instinctively feel that it ought not to be obeyed, by whomever given…'[16] Again, as in the reason-based version, the test relies on an objective criterion, but this time it creates a presumption of recognizing the order's manifestly unlawful nature when the order 'pierces the eye.'[17]

It may seem that both approaches to the definition of manifestly illegal order converge in every case. After all, if an order is clearly illegal for the ordinary person it would be repulsive, and a soldier must not obey according to both approaches. If an order is within the realm of legality, it may be immoral but clearly not grossly immoral so as to make it repulsive. Thus, a soldier must obey the order according to both approaches. But consider the following example: a Major orders his soldier-driver to exceed the speed limit by 10 mph in order to return to the military base on time to participate in a routine activity. This order is illegal. According to the reason-based approach it is also manifestly illegal since its illegality is clear. The order is clearly beyond the realm of legality. Thus, the soldier should not obey the order. However, according to the emotion-based approach, this order is not manifestly illegal; one's moral sensibility is not necessarily pierced by such an order. Thus, the soldier should obey.

For the reader who considers this distinction to be 'splitting hairs,' I offer the example of 'the Early Warning Procedure' of the Israeli Defense Forces (IDF), which demonstrates why the difference between the two approaches has become critical. A high-ranking IDF officer [289] orders a low-ranking officer to use 'the Early Warning

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[15] Central District Court-Martial/3/57, Military Prosecutor v. Melinki, P.M. 17, 90, 212, 213-14. The translation is taken from Attorney-Gen. of the Gov't of Isr. v. Eichmann, 36 I.L.R. 275, 277 (Supreme Ct. of Isr. 1962) (quoting Appeal/279-283/58, Ofer v. Chief Military Prosecutor, P.E. 44, 362).

[16] McCall v. McDowell, 15 F. Cas. 1235, 1241 (C.C.D. Cal. 1867) (No. 8,673).

[17] *See* DINSTEIN, *supra* note 3, at xxv, 29-30 (discussing the defense's objective criterion).

Procedure' according to which a Palestinian resident of the Occupied Territories is 'asked' to approach his neighbor's house and inform him that he needs to come out of the house. The military suspects that the neighbor is a dangerous terrorist and wants to arrest him without bloodshed. The early warning is given both to allow people who are not suspected in any wrongdoing to leave the building safely and to allow the suspected terrorist to turn himself in before the military uses force that may lead to his injury or even death. Assume the low-ranking officer protests against such use of the neighbor, a fellow human-being, but the high-ranking officer assures him that the command was approved by the military's legal division. For at least three years (2002-2005), until the Israeli Supreme Court ruled that such an order is illegal, this scenario was possible.[18] Indeed, according to the IDF, the 'Early Warning Procedure' was applied on hundreds of occasions during this period.[19]

According to the reason-based approach, after the IDF issued a general directive, approved by military lawyers, allowing such an order,[20] the soldier should have obeyed the order since it was not clearly illegal. In fact, it was clearly legal since the most qualified military legal authority participated in formulating the directive and found it to be compatible with IHL.[21] According to IDF's military inner regulations and Supreme Court adjudication, the legal opinions issued by the military lawyers are the authoritative interpretation of the law for all military personnel.[22] Moreover, the Israeli Attorney General approved the directive.[23] According to Israeli law, as long as no conflicting judicial decision exists, the Attorney General is the authoritative interpreter of the law,

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[18] *See* HCJ 3799/02 Adalah – The Legal Center for Arab Minority Rights in Israel v. GOC Central Command, 60(3) PD 67 [2005] *available at* http://elyon1.court.gov.il/files_eng/02/990/037/A32/02037990.a32.pdf). A request by the Israeli government for a further hearing in the case was denied. *See* HCJFH 10739/05 Minister of Defense v. Adalah (Feb. 27, 2006). I write "at least" since there are contradictory reports whether the procedure the military used prior to the 2002 petition to the HCJ was approved by military lawyers. *See* Gabriella Blum, *The Laws of War and the 'Lesser Evil,'* 35 YALE J. INT'L L. 1, 47 (2010).

[19] HCJ 3799/02, *supra* note 18, at section 19 (the Hebrew judgment speaks of "hundreds of cases" the English translation speaks of "numerous").

[20] *See* HCJ 3799/02, *supra* note 18, at section 5.

[21] *See* HCJ 3799/02, *supra* note 18, at section 17.

[22] Supreme Command Standing Order 2.0613; HCJ 4723/96 Avivit Atiya v. The Attorney General, 51(3) PD 714 [1996] [both in Hebrew].

[23] *See* HCJ 3799/02, *supra* note 18, at section 18.

and the [290] executive branch must follow his interpretations.[24] Yet, a reasonable soldier may feel that the physical danger from gunfire originating from the wanted person's location, or from various booby-traps on the way to the suspect's house, makes this order manifestly illegal.[25] According to this claim, endangering the life of an innocent resident of the occupied territories to ensure the soldier's safety stings the eye, making this order manifestly illegal according to the emotion-based approach.

The two approaches for identifying a manifestly unlawful order present very different visions of how people make decisions when faced with issues such as whether an order is manifestly unlawful. According to the first approach, the mechanism for identifying a manifestly unlawful order relies on reason-based judgment. The picture is of a soldier who identifies a manifestly unlawful order through a process of reasoning. She is not required to have legal knowledge, or to conduct a lengthy process of contemplation, but the process is based on thinking whether the order is clearly illegal. According to the second approach, the process of identifying a manifestly unlawful order is driven by emotions. This approach depicts the soldier's decision making as driven by a thoughtless surge of repulsion, by a feeling of disgust.

Before proceeding further, one note of clarification is required. The question of whether to obey an order is conceptually different from the question of whether a criminal defense of obedience to a superior's order will exist after the fact.[26] Yet, both in military discussion and in academic debates, the question of the duty to obey an order is usually debated through the prism of the question of the existence of the defense. Thus, the difference between these conceptually distinct questions becomes meaningless for the soldier who confronts an order. For this reason, I aim to determine whether a soldier has a duty to obey by examining the criminal defense of obedience to superior orders.

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[24] *See* YOAV DOTAN, LAWYERING FOR THE RULE OF LAW: GOVERNMENT LAWYERS AND THE RISE OF JUDICIAL POWER IN ISRAEL 55 (2014).
[25] *Cf.* HCJ 3799/02, *supra* note 18, at section 24 (President Barak) ("one cannot know in advance whether the relaying of a warning involves danger to the local resident who relays it.").
[26] *See* DINSTEIN, *supra* note 3, at 69; Enker, *supra* note 11, at 585.

[291] II. THE DISAPPEARANCE OF THE EYE'S UNMEDIATED GAZE FROM THE MODERN BATTLE FIELD

1. The Role of the Human Eye in Past Massacres

A recurrent feature of massacres conducted in recent history is that soldiers who refused to participate in the massacres emphasized the role of the unmediated encounter with their victims, and especially eyesight, in their refusal to obey orders. The direct, unmediated gaze at the human victims breaks forms of disassociation with the enemy and the dehumanization that enables massacres to occur. Before analyzing this phenomenon, I present two examples.

On October 1956, on the eve of the Sinai War, a battalion of the Israeli Border Police was ordered to enforce an unusually early curfew on Arab villages within the borders of Israel. The battalion commander, Major Shmuel Melinki ordered the platoon leaders and the company commanders to kill anyone who violated the curfew that was scheduled for an unusually early hour that day.[27] Yet although Major Melinki was known as a strict commander,[28] a massacre took place in only one of the eight villages; in the village of Kafr Qasim.[29] Forty-three Arab Israeli citizens, including women and children, were killed in the massacre. There were several officers who received Melinki's order and changed it before the curfew began, thus preventing a larger massacre. However, for the purposes of this chapter, I will focus on those who disobeyed as a result of the unmediated encounter with the reality of Arab-Israeli citizens returning home.

Sergeant Lampert, the senior commander in the small village of Kafr Bara, gave his soldiers the order and yet when he himself encountered two Arab citizens who broke the curfew, he allowed both of them to return home unharmed.[30] The District Military Court, which adjudicated the Border Police soldiers who obeyed the order, noted that 'Lampert's candid testimony shows that his decision to let the adolescent and the old man

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[27] Central District Court-Martial/3/57, Military Prosecutor v. Melinki, P.M. 17, 101-02, 137-39, 181, 191-92, 198; Appeals/ 279-83/58, *supra* note 15, at 384-86, 398.
[28] 3/57, *supra* note 27, at 169; Appeals/ 279-83/58, *supra* note 15, at 390.
[29] Appeals/ 279-83/58, *supra* note 15, at 394; 3/57, *supra* note 27, at 178.
[30] The two were a fourteen years old adolescent who returned to the village with his sheep and an old man who returned to the village with his wagon.

live was not a result of discretion in executing the order, but a result [292] of inhibitions and human emotions that collided in his heart with the Major's order to kill and overcame that order.'[31] At the village of Jaljulia, Captain Levi, the company commander, informed his soldiers of the order and encouraged them to disobey. When asked in Court why he disobeyed, he explained: 'when we received the order in the briefing room, it seemed OK and logical, but on the ground, it was not that simple, not that easy…when I saw it with my eyes, to see this with one's own eyes – perhaps I am sentimental, I don't know – it was hard for me…I think it is just a matter of human emotion…'[32]

Of course, the human eye saw great massacres without flinching. Still, based on their study of crimes of obedience, Kelman and Hamilton conclude that '[a]s long as victims are out of sight, it is easier to forget that there are real human beings who are being harmed by one's actions. Thus, it is easier to kill people by dropping a bomb on a distant target or pushing a button at a missile-launching station than it is to kill them face to face.'[33] It is no wonder then that Michael Walzer suggests exempting soldiers of responsibility for distance killings as he explains that:

> When war is fought at a distance, he [the combatant] may not be responsible even for the innocent people he himself kills. Artillery men and pilots are often kept in ignorance of the targets at which their fire is directed. If they ask questions, they are routinely assured that the targets are 'legitimate military objectives.' Perhaps they should always be skeptical, but I don't think we can blame them if they accept the assurance of their commanders. We blame instead the far-seeing commanders.[34]

The revulsion caused by seeing does not always correspond to the rules of IHL. On many occasions, illegal killings may cause no revulsion. At other times, legal killings

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[31] 3/57, *supra* note 27, at 171-72.
[32] 3/57, *supra* note 27, at 172-73. One Arab citizen was injured by shooting in Jaljulia. It should be noted that the minority judge at the Military District Court presents an entirely different factual picture, according to which the circumstances that prevented massacre in the other villages were completely contingent on a more obedient population, better roads etc. and not because of the "purer" conscience of the soldiers there. *See* 3/57, *supra* note 27, at 238-247.
[33] HERBERT C. KELMAN & V. LEE HAMILTON, CRIMES OF OBEDIENCE 163 (1989).
[34] MICHAEL WALZER, JUST AND UNJUST WARS 312-13 (1977).

will cause revulsion. Understanding how legal [293] killings are prevented because of this revulsion helps to further explain the role of the human eye in war.

In his book, *Just and Unjust Wars*, Walzer discusses a recurring tale that appears in memoirs of wars.[35] According to the tale, 'a soldier on patrol or on sniper duty catches an enemy soldier unaware, holds him in his gun-sight, easy to kill, and then must decide whether to shoot him or let the opportunity pass.'[36] Since, according to the law of war, soldiers are subject to attack at any time (unless they are wounded or captured), this killing is completely legal and yet on many occasions solders refrain from killing.[37] Walzer detects, in all five cases he examines, that the enemy soldier is suddenly seen as a man. In other words, disassociation is broken. The enemy is seen as a funny man, a naked man taking a shower, a wandering person, a smoking man, a 'fellow-creature' like me and you, not an enemy soldier. In all cases, the human eye is at the center of the experience. Moral and legal reasoning according to the rules of war should lead the combatant to the decision to shoot, since combatants, as a matter of international law, are fair game.[38] Yet, the human eye, the 'feeling' rather than any kind of moral reasoning, prevents one from shooting.[39] Not all soldiers encounter this feeling, and indeed in some of the examples Walzer gives, a different soldier does shoot the 'human' enemy.

2. The Disappearance of the Human Eye in Killing at a Distance

In the modern battlefield, militaries rely more and more on missiles shot by planes, helicopters and Unmanned Aerial Vehicles.[40] This technique is characterized by detachment of the person activating the aerial vehicle from the remote target. The victims of these operations are seen through [294] electronic devices more like figures in video

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[35] WALZER, *supra* note 34, at 138-43.
[36] WALZER, *supra* note 34, at 138-39.
[37] *See* WALZER, *supra* note 34, at 138.
[38] But see Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 JOURNAL OF LEGAL ANALYSIS 69, 70 (2010) (suggesting based on legal and moral reasoning a reform in which the rule that all combatants are fair game will be narrowed).
[39] *See* WALZER, *supra* note 34, at 139-40 ("There is at such moments a great reluctance to shoot – not always for moral reasons, but for reasons that are relevant nonetheless to the moral argument I want to make….I hesitate to say that what is involved here is a moral feeling…").
[40] In 2005, the Israeli Air Force Commander, Elyezer Shkedy, estimated that the Air Force was responsible for hitting 60-80 percent of all terrorists hit by the IDF. *See* Amir Rapaport, *A Decision with Existential Meaning*, MARIV, Saturday Supplement, July 1, 2005, p. 10 [in Hebrew].

games. Indeed, video games are the favorite image used by pilots to describe the situation in the cockpit when they aim their missiles in targeted killings operations towards individuals suspected of terrorist activity.[41] As one pilot explained, 'this is the whole beauty and uniqueness in air combat. You sit there above, quietly, in your distant space, without noises, without booms, without human cries. You are completely fixed on the target; the horrors and filth of the battlefield are absent. You conduct your mission and return home.'[42] A reporter who interviewed several of the pilots summarized their experience writing that 'up until today, after dozens of targeted killings, the pilots barely know who their targets are …several of the pilots told us that they don't really care. It allows them to keep distance, to remain sterile in the air-conditioned cockpit.'One pilot [43] noted that 'there are cheers of jubilation after the hit. That is O.K. since you are in the cockpit and you are detached from what you have done. The cheers are not that you have killed someone but that you succeeded in striking, that you fulfilled your mission.'[44]

A vivid expression of the absence of the eye from the modern battlefield was given in a 2002 interview with the Air Force Commander at that time, Dan Halutz. Following Israel's assassination of the arch-terrorist Salah Shahade, which also resulted in the unintended death of fifteen people, civilian casualties, including nine children, Halutz explained that the 'dilemma of pilots in aircrafts is sometimes more complex, since they don't see the enemy with their eyes. The enemy in anonymous…there is no intimate battlefield engagement of one *eye seeing the other eye*…'[45] When the soldier's eye does not see the victims in an unmediated way, it is difficult for the eye to be pierced or for moral feelings to be awakened. This is the most adequate way with which to understand Halutz's much debated reply in his interview with *Haaretz*. In the context of the targeted killing of Shahade, Halutz was asked how a pilot feels when dropping a bomb during a targeted killing operation in a highly populated city. [295] Halutz replied

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[41] Yigal Mosko, *We Refuse to Become War Ciminals*, YEDIOT AHARONOT - SEVEN DAYS, September 26, 2003, 18, 22 [in Hebrew].
[42] Vered Levi-Barzilai, "*Fed Up with Bleeding-Heart Liberals*" (An Interview with Dan Halutz) HAARETZ – SUPPLEMENT FOR SATURDAY, August 23, 2002.
[43] Zadok Yehezkeli & Anat TaI-Shir, *"I don't mind that they are contemplating, but the contemplation ends when they are up in the air" (the Commander of the Apache Squad)*, YEDIOT AHARONOT - SEVEN DAYS, September 26, 2003, 13, 90 [in Hebrew].
[44] Mosko, *supra* note 41, at 22.
[45] Levi-Barzilai, *supra* note 42 (my emphasis).

that when he drops a bomb all he feels is 'a little bump in the airplane's wing…after a second it passes, that is all. That is what I feel.'[46]

III. Why the Rise in Giving Legal Approval to Military Actions can Hinder Human Rights?

On the face of it, there is no tension between the doctrine of manifestly unlawful orders and the growing involvement of military lawyers in approving military operations. True, the premise of the reason-based approach is that the manifestly unlawful order is so clearly illegal that a reasonable soldier does not need a legal advisor to identify it.[47] Moreover, military lawyers are supposed to prevent not only manifestly unlawful orders but also 'regular' illegality in the military's conduct. In other words, while for the manifestly unlawful orders, no legal knowledge is required, the lawyer's role is (also) to detect the 'regular' unlawful orders, thus ensuring that even this threshold of legality will not be crossed. And yet, as I show, the growing tendency to obtain legal advice creates an inclination to rely on legal clearance and thus dilutes the premise that a soldier can rely on her judgment, rather than on legal advice, in determining whether an order is manifestly unlawful. Moreover, by relying on legal advice as the sole criterion for the legality of orders, the emotion-based approach for manifestly unlawful orders becomes obsolete. As David Kennedy explains, the growing involvement of lawyers not only encourages a particular 'language of evaluation' for military action, it also allows the legal language to 'substitute for other judgments.'[48] But, while the legal language creates the impression that it 'balances' all relevant, competing considerations, I demonstrate that [296] disobedience based on unmediated eyesight cannot be fully captured by the reason-based test.

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[46] In his book Halutz explained that his answer "describes accurately solely the physical feeling a pilot has…the meaning of this answer is that when a pilot drops a bomb he is not engaged in moral questions but only focused in fulfilling his mission with accuracy." *See* Dan Halutz, At Eye Level 249 (2010) [in Hebrew].

[47] *See* Osiel, *supra* note 4, at 1010; see also the United States Military Tribunal at Nuremberg, in the *Case of the German High Command* (1948) ("The expert opinion of legal advisers was unnecessary to determine the illegality of such orders," because those "given to the *Wehrmacht*…were obviously criminal.").

[48] David Kennedy, Of War and Law 143 (2006).

The International Law Department (ILD) of the IDF has been, for more than a decade now, intensely involved in approving military operations.[49] While the IDF initiated its targeted killings policy without the legal approval of the ILD,[50] as criticism of that policy grew, the ILD gave general legal advice on its legality.[51] Afterwards, 'the IDF decided they needed a lawyer to help them apply it.'[52] Petitions to the Supreme Court made against the military, some in the context of targeted killings, provided both more reasons to discuss targeting decisions from a legal perspective and further incentives to the IDF to comply with the advice of lawyers.[53] The ILD's involvement became even greater in the second Lebanon War (2006) and in the three recent military operations in the Gaza Strip (2008, 2012, 2014) when ILD legal advisors became involved in approving the plans and targets in real time as part of the command routine.[54] As Amichai Cohen describes, in recent years, 'IDF commanders demand legal cover for their actions.'[55]

[297] Currently, the ILD has become heavily involved in concrete targeting decisions. As various authors note, the ILD has achieved a power of veto over some targeting decisions.[56] Especially in the case of pre-planned targets, identified in advance of operations and struck by the Air Force, ILD lawyers are thoroughly involved in all

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[49] Amichai Cohen, *Legal Operational Advice in the Israeli Defense Forces: The International Law Department and the Changing Nature of International Humanitarian Law*, 26 CONN. J. INT'L L. 367, 407–11 (2011).

[50] *See* Chen Shalita, *'I Don't Like the Term Assassination. In the Military We have a Different Name for it'* (interview with the Judge Advocate Menachem Finkelstein) KOL HA'IR, April 6, 2001, p. 67 (admitting that the Judge Advocate unit was asked to examine the legality of targeted killings only after they eleven targeted killings were conducted).

[51] *See* ALAN CRAIG, INTERNATIONAL LEGITIMACY AND THE POLITICS OF SECURITY: THE STRATEGIC DEPLOYMENT OF LAWYERS IN THE ISRAELI MILITARY 146-48 (2013);Yuval Yoaz, '*Not Every Bombing Requires an Ongoing Approval*,' HARRETZ, September 9, 2004, b3; Etti Livni, Yitzhak Tonic, *'This Month – with the Establishment of the ICC, A Revolution Occurred*,' 31 THE LAWYER, July 2002, 26, 28.

[52] CRAIG, *supra* note 51, at 147.

[53] *See, e.g.*, HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr., 54(6) PD 285 [2006] *available at* http://elyon1.court.gov.il/ Files_ENG/02/690/007/a34/ 02007690.a34.pdf (substantially approving the targeted killings policy).

[54] CRAIG, *supra* note 51, at 1, 162-63, 171, 182-85;Cohen, *supra* note 49, at 375; Michael N. Schmitt & John J Merriam, The Tyranny of Context: Israeli Targeting Practices in Legal Perspective , 37 UNI. PA. J. INT'L L. 53, 82-83 (2015); Amos Harel, *The Chief Military Advocate General, Brigadier-general Avichai Mandelblit Speaks of Cast Lead, Chiko Tamir, and on 'B'Tselem,'* HARRETZ, September 18, 2009.

[55] Cohen, *supra* note 49, at 381 & fn 73.

[56] CRAIG, *supra* note 51, at 147-49, 157; Schmitt & Merriam, *supra* note 54, at 137 (noting that MAG Corps Possess 'a red card' vis-à-vis individual strikes).

stages of concrete targeting decisions.[57] In targets that are emerging, known as Time Critical Targets, the attack "cells" that are located separately from the headquarters, where the lawyers sit, have more autonomy in the targeting decisions. However, even in these targeting decisions, ILD 'lawyers are heavily involved in developing targeting rules and assisting the Division Commander in overseeing Attack Cell operations.'[58]

As explained above, the absence of the human eye has strong de-humanizing effects as it makes the disassociation of the perpetrator from his victims easier. With this disassociation looming in the background, the existence of legal clearance for military operations has a strong potential to contribute to two other conditions identified in scholarly literature as increasing the chances for "crimes of obedience." The first is the creation of the appearance of authority to act; the second is its routinization.[59] In addition, legal clearance also serves to de-humanize the victims by creating legal language-rules. In the following, I elaborate on these three developments.

First, legal approval strengthens the appearance of authorization that stems from the order itself. The order itself gives authorization to act and creates a strong sense of obligation to obey. Now that the authority qualified to decide on the legality of the action has cleared it, any reasonable soldier may have the impression that he is absolved of the responsibility to make a personal moral choice regarding its legality.[60] Not only was he ordered to act by an organization that trains young [298] people to obey, he knows that the act has been legally approved by the proper legal authority. Moreover, after the Supreme Court, the highest legal authority in the land, substantially adopted the ILD's legal position on the legality of targeted killings, the perception of authorization has become even stronger, at least in the context of targeted killings. In this spirit, the IDF's former Air Force Commander Dan Halutz explained that pilots are focused on performing the targeted killing while 'fully confident that the decision makers have

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[57] Schmitt & Merriam, *supra* note 56, at 73-81 ("Proportionality is monitored, to the extent feasible, until the moment of weapons release. If significant new intelligence surfaces, a reassessment all relevant officers involved in the targeting process, including the legal advisor, is required."); Cohen, *supra* note 49, at 382 ("As ILD lawyers became more involved in actual operations, and have to give answers to specific real time questions….the question becomes closer to 'can we bomb this building now?'").
[58] Schmitt & Merriam, *supra* note 56, at 73-74.
[59] *See* KELMAN & HAMILTON, *supra* note 33, at 16-19.
[60] *See* KELMAN & HAMILTON, *supra* note 33, at 16-17. *See also* Cohen, *supra* note 49, at 384 (noting that "[o]btaining legal approval for a policy….will undoubtedly help calm [soldiers] anxieties" regarding the legality of their orders.).

struck the right balance between the need to protect our citizens from mass-murders and the need to reduce to the lowest possible level the casualties among the civilian population.'[61] Several pilots reflected in the media on the limited amount of information available to them, and on their reliance on the scrutiny conducted by others in the chain of command.[62]

Second, the legal "clearance," that becomes part of the process in which many of the targets for attack are chosen, reduces the felt need for the pilot to decide in each case on the legality of the operation, as his role becomes part of a highly programmed routine in which the issue of legality is entrusted elsewhere.[63] In making these violent acts routine, the actor's moral inhibitions loosen.[64] One Israeli pilot who decided to refuse to participate in the targeted killings explained that 'the Apache air squadron in essence entered into a routine of assassinations.' He further described the effect of the routine:

> once you are in a system in which the mission is to execute this kind of killing, and you come every day to the squadron brief, practice and teach other pilots, and explain how we should have hit from here or from there, you are going through a process of rationalization that orients you to perform the mission, and somewhere within this process perhaps we repressed what every pilot and officer in the IDF must consider.[65]

[299] Legal "clearance" has become part of the routine of aerial attacks, a process in which each unit has its own domain of responsibility. This diffusion of responsibility allows each soldier in the chain to avoid seeing herself as responsible for the entire operation. The final "product" is divorced from the different phases, forgotten by each

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[61] HALUTZ, *supra* note 46, at 278.
[62] Yigal Mosko, *We are Ashamed of Being Pilots*, YEDIOT AHARONOT, September 25, 2003, 2, 4 (interviewing Captain (Res.) Yontan who states that "a pilot obeys an order without knowing the entire data.... He does not know anything. An order, that is what we get."); Yehezkeli & TaI-Shir, *supra* note 43, at 14 (noting that one of the pilots said: "I didn't know who the man in the car was, but I knew he wanted to kill us, and if I have an authorization to shoot, I shoot."); Doron Avigad, *An Active Fighter Pilot: We Try to Prevent Killings of Innocents at Levels Gideon Levi is Unaware Of*, GLOBES, 7.15.2014 (noting that he is calm when "pressing the fire button" knowing of all the work done by others in choosing targets so the innocent civilians will not be harmed).
[63] *See* KELMAN & HAMILTON, *supra* note 33, at 18.
[64] *See* HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 330 (1951).
[65] Mosko, *supra* note 62, at 4.

actor within the process. The intelligence officer merely gives the information needed; the squad commander merely briefs the pilot; and the pilot just shoots the missile. As part of the routine, it is more and more difficult for any part of the "assembly line" to identify illegality by using his reason. When an action repeats itself over and over, conducted by well-trained units, it comes to seem reasonable. The bureaucratization of the entire process also creates a feedback-loop in which the different units mutually reinforce each other in viewing the entire process as normal and legitimate.[66] Thus, each part of the "assembly line" is strengthened in its inclination to obey by the obedience of the other parts of the line.

Moreover, in order to target rocket launchers immediately after rockets are fired and before the launchers are hidden by their operators, the IDF devised a routine to annihilate these launchers by responding with an air-strike within one minute. Such a sweeping semi-automatic response, even against rocket launchers that are located in a civilian environment, surely does not leave any time for the operator of the aerial vehicle to decide whether the order is legal, and instead he relies fully on advance legal authorization.[67]

The legal advisor is one of the few people involved in the targeting routine who sees each operation in its entirety before it is executed. In each aerial attack in which a legal clearance is required, the legal advisor is perceived by most, if not all, other actors as responsible for the legality, and even the morality, of these operations. Thus, other actors may forfeit the responsibility to make moral decisions or may stop thinking of the meaning of the entire routine; they just focus on being as efficient as possible in their role on the assembly line. A decorated former IDF pilot spoke of how the routine made questions of responsibility dissipate: "I am afraid that such questions [the morality and goals of the orders received] do not occupy pilots, rather they compete among themselves over who will be assigned the next mission to liquidate [300] someone in the center of *Nablus*, on the main street, or who will get to drop a bomb on a building in *Ramallah*."[68]

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[66] *Cf.* KELMAN & HAMILTON, *supra* note 33, at 18, 165 (describing the creation of routinized orders in bureaucratic organizations).

[67] *See* CRAIG, *supra* note 51, at 161, 174 (noting that Israel employed in the Second Lebanon war 'quick-response technologies' that destroyed a launcher within one minute of its detection and noting that such quick reaction must rely on advance legal authorization).

[68] Yigal Shochat, *Red Line, Green Line, Black Flag*, HARRETZ, January 17, 2002.

One incident provides further support to the claim that segmentation of functions adversely affects individual responsibility. On January 7, 2003, a day after a terrorist attack in Tel Aviv that took the lives of twenty-three Israelis, a junior intelligence officer was supposed to send, via his computer, information that would send two helicopters, which were on alert, to retaliate. The officer failed to send the information, and the operation was cancelled. The officer argued that he refused since he was ordered to supply information on the time people were entering the building. The order stipulated that this mode of operation was chosen in order to achieve the maximum amount of casualties. The officer notified his commanders that in view of the formulation of the order there was grave concern that innocent people would be hurt by the attack, and thus, this was a manifestly illegal order to which he would not comply. Despite a direct order from the unit commander to transmit the information, the officer failed to do so. As a result of the incident, the officer was removed from his position to an administrative post. This decision was approved by the Judge Advocate. The IDF Chief of Staff reprimanded the head of the entire unit because of the failure to transmit the information. The head of the unit directed his soldiers that "no one among you is allowed to refuse an order because of its illegality since the Directorate of Military Intelligence is not directly involved in hurting Palestinians…if anyone is allowed to decide not to attack, it is the pilots or other combatants and not the intelligence unit soldiers." The Judge Advocate stated that he would investigate this affair, yet the results of this investigation were never disclosed.[69]

This incident demonstrates that even without the eye gazing at the battle field and seeing the victims, soldiers may still refuse orders because of a process of reasoning that results in the conclusion that the orders they received were manifestly illegal. Yet this incident also exemplifies how an 'assembly line' mentality was controlling the IDF's targeted [301] killings operations in that period. Still, in line with the IDF ethos, in the

[69] Amir Rapaport, *Due to the Officer, the IDF did not React to the Terrorist Attack in Tel-Aviv*, MAARIV, p. 13, January 27, 2003; Amir Rapaport, *The Chief of Staff Reprimanded the Commander of Unit 8200*, MAARIV, p. 12-13, January 28, 2003; Amir Rapaport, *The Judge Advocate will Investigate the Matter of the Intelligence Officer*, MAARIV, p. 6, January 31, 2003; Amir Rapaport, *Intelligence Under Fire*, MAARIV – THE WEEKEND EDITION, p. 16-17, 30, January 31, 2003.

directive sent by the unit's commander, as well as in public interviews of IDF officers,[70] it was emphasized that pilots and combatants were allowed to refuse an order if they perceived it as manifestly illegal.[71] Indeed, contrary to the testimonies of pilots cited above, and to assessments by outside commentators, the IDF's official position has remained that nothing has changed with regard to this ethos. Yet even those most sympathetic to this ethos confirm that with the rise of legal advisors' involvement, the expectation that soldiers executing orders would make a moral judgment of its legality has declined.[72]

The centrality of lawyers in the execution of military operations also contributes to the dehumanization of the victims, which is one of the central factors in crimes of obedience.[73] During an armed conflict the enemy is usually dehumanized in numerous ways. The rise of the role of military lawyers contributes to this process with the creation of special legal "language rules" that become controlling not only in legal discourse but also in military jargon. As part of the military routine, lawyers are given the role of experts with regards to the legality (and some would argue also the morality) of military operations. As experts they possess a language of expertise that is distinct from natural language. By using this language, the other actors are able to avoid confronting the true nature of [302] their actions.[74] It makes them view their actions as devoid of their true character, thus distancing even further the need to face reality. For example, the Hebrew term for "targeted killing" ("*sikul memukad*") used by lawyers and subsequently the military (although not always adopted by the media) lacks the word "killing" and should be translated as targeted prevention or focused foiling. The disappearance of the true

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[70] *See, e.g.,* Zadok Yehezkeli & Anat TaI-Shir, *Chief of Air Staff Group: "I am unaware of any problem with our pilots,"* YEDIOT AHARONOT - SEVEN DAYS, September 26, 2003, at 15.

[71] *See* Rapaport, *Intelligence Under Fire*, *supra* note 69, at 16, 30; Yehezkeli & TaI-Shir, *supra* note 69, at 90; Levi-Barzilai, *supra* note 42.

[72] Schmitt & Merriam, *supra* note 56, at 81 (presenting the IDF's official position according to which pilots retain the discretion to abort a mission according to their discretion and yet noting that "IDF personnel cautioned that the operations center often enjoys a better situational awareness of the target area than the pilot…. Thus, unless a pilot personally observes indicators that raise doubt about the target, he or she is entitled to rely on the discretion of the operations center in executing the strike. The ultimate measure of control for air operations therefore lies in the senior decision-makers in the air operations center [who enjoy]…..robust support from intelligence analysts, weaponeering experts and legal advisors").

[73] *See* KELMAN & HAMILTON, *supra* note 33, at 163 ("When victims are dehumanized…the moral restraints against killing or harming them become less effective."); PHILIP ZIMARDO, THE LUCIFER EFFECT xii (2007) ("Dehumanization is one of the central processes in the transformation of ordinary, normal people into indifferent or even wanton perpetrators of evil.").

[74] *Cf.* KELMAN & HAMILTON, *supra* note 33, at 18-19.

nature of the action – killing – allows soldiers to avoid acknowledging the issue even at the basic level of language. Interestingly, the former head of the ILD expressed her dismay at this language rule noting that she 'would call it "targeted killing" exactly as in English…I don't like this "language laundering." I don't like making killings into prevention. We kill a human being, so we kill a human being.'[75] Yet even the Israeli Supreme Court adopted the 'preventive strike' terminology.

CONCLUSION

There is prevailing consensus that jurists are the best mechanism to ensure the protection of human rights and IHL in general.[76] Even those who criticize courts or legal advisors for their failures in protecting human rights do not deny that lawyers are the best guardians of human rights. They merely suggest that jurists should do a better job in protecting human rights. Usually, those who object to this rise of jurists' power in the context of enforcing international law in issues of national security explain their objection in terms of military necessity. According to this approach, military commanders are so fearful of the scrutiny of the all-powerful legal system that they prefer to behave extremely [303] cautiously. Even when military necessity requires a risky tactic, military commanders avoid actions that may defy legal rules. They follow the legal logic and apply it to a field that requires a completely different logic.[77]

My chapter has pointed to the growing influence of legal advisors in the military operational decision-making process and how this development takes the question of

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[75] Yuval Yoaz, "*We Should not be Ashamed: This is 'Targeted Killing' and it is Legal*," HARRETZ, March 8, 2005, B3.

[76] The first additional protocol to the Geneva Convention even acknowledges the obligation of the parties to "ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject." See Article 82, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, 41. *See also* Cohen, *supra* note 49, at 393 (noting that the International Committee of the Red Cross's commentaries of the provision "attempt to beef up the state's obligations according to Article 82…the ICRC declared the existence of the legal advisors service a norm of Customary International Law.").

[77] This approach was adopted in part by the Israeli Winograd Commission to investigate Israel's actions in the Second Lebanon War. The Commission noted that "the extended reliance on legal advice during military operations might cause transference of responsibility from elected officials and commanders to advisors, and might hinder both the quality of the decisions and the operational activity." *See* Cohen, *supra* note 49, at 368 (citing the commission and discussing its findings).

deciding on a manifestly unlawful order out of the hands of combatants. Together with the disappearance of the direct gaze of the battlefield, these developments will continue to set the tone of the modern battlefield, especially as more and more automated weaponry enters the arena. The potential ability of a combatant to refuse an order based on the 'sting' to his eye disappears completely as the human eye exits the actual battlefield and weaponry is activated without further human intervention after deployment, or from a remote location. Military lawyers will undoubtedly play an even more central role in the battlefield, as they will be entrusted with approving the parameters according to which automatic weapon systems are programed. These developments justify more scrutiny of the decisions made by military legal advisors. The Israeli Military Judge Advocate should increase transparency by publishing the legal opinions that approve the major war tactics used by the IDF. More emphasis on the accountability of legal advisors should follow.[78]

Legal advisors and legal thinking have inherent limitations that may hinder the goal of protecting human rights. This is not a limitation due to the cultural divide between military lawyers and lawyers working for human rights organizations.[79] Rather, it is a limitation due to the logic of reason-based thinking that characterizes both cultures. Thus, the rise in power of legal advisors may lead to obedience to orders that in the past were categorized as manifestly unlawful orders since they were assessed according to the emotional reaction they created in a combatant experiencing the battle field. Contrary to conventional thinking, the rise in the [304] power of jurists does not necessarily imply better protection of human rights even if lawyers implement IHL properly.

Moreover, in democracies that go to war, the controlling mindset of supporting the military is usually so dominant that it may guide even the reasoning of expert lawyers, especially when these lawyers are part of the military and apply highly indeterminate concepts such as proportionality.[80] The advantage of the "emotional" path for identifying a manifestly unlawful order is that only such an impulse can break through

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[78] Or Bassok, *Manifestly Lawful in the Eyes of the Advocate General*, HARRETZ, January 10, 2015 [in Hebrew].
[79] Luban, *supra* note 2.
[80] CRAIG, *supra* note 51, at 155 (arguing that in the Shehadeh case, at least part of the explanation is that "the legal institutional culture [in the ILD] was overwhelmed by the offensive spirit of the IDF with the result that the lawyers became the instrument of the military."), 185-86.

the controlling mind-set.[81] According to the reason-based approach, the existence of legal advice from military lawyers stating that a certain act is legal ensures that the order is not manifestly unlawful.[82] The path of emotions is built on the logic that the soldier is overwhelmed by seeing or imagining the atrocity and refuses to obey. It requires unmediated eye contact between the soldier and his victim. When all the connections between the soldier and his victims are mediated through technology, he can more easily disassociate himself from the harm he is causing and thus the emotional approach to preventing manifestly unlawful orders is annihilated. A reliance on legal clearance does not solve this problem. Rather, by relying on legal logic in approving military operations, and by taking away the decision of whether to disobey away from the combatant, the problem is just exacerbated.

[81] *See* Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 279-81 (1996) (discussing the mechanistic conception of emotions), 291-92 (criticizing the mechanistic conception).

[82] *See* DINSTEIN, *supra* note 3, at 33 ("Manifestly illegal orders and an indistinct law, enveloped in mist, are mutually contradictory."); Osiel, *supra* note 4, at 978. *See also* H. Lauterpacht, *The Law of Nations and the Punishment of War Crimes,* in BRIT. Y.B. OF INT'L L. 58, 75 (1944).