2012

# The Targeted Killing Judgment of the Israeli Supreme Court and the Critique of Legal Violence

Markus Gunneflo

# THE TARGETED KILLING JUDGMENT OF THE ISRAELI SUPREME COURT AND THE CRITIQUE OF LEGAL VIOLENCE

MARKUS GUNNEFLO

Abstract. The targeted killing judgment of the Israeli Supreme Court has, since it was handed down in December 2006, received a significant amount of attention: praise as well as criticism. Offering neither praise nor criticism, the present article is instead an attempt at a 'critique' of the judgment drawing on the German-Jewish philosopher Walter Benjamin's famous essay from 1921, 'Critique of Violence'. The article focuses on a key aspect of Benjamin's critique: the distinction between the two modalities of 'legal violence' – lawmaking or foundational violence and law-preserving or administrative violence. Analysing the fact that the Court exercises jurisdiction over these killings in the first place, the decision on the applicable law as well as the interpretation of that law, the article finds that the targeted killing judgment collapses this distinction in a different way from that foreseen by Benjamin. Hence, the article argues, the targeted killing judgment is best understood as a form of administrative foundational violence. In conclusion Judith Butler's reading of Benjamin's notion of 'divine violence' is considered, particularly his use of the commandment, 'thou shalt not kill', as a non-violent violence that must be waged against the kind of legal violence of which the targeted killing judgment is exemplary.

Keywords. Aharon Barak, Walter Benjamin, Judith Butler, critique of violence, divine violence, legal violence, Supreme Court of Israel, targeted killing.

*The headlong stream is termed violent*

*But the riverbed hemming it in is*

*Termed violent by no one.*

(Excerpt from Bertolt Brecht's poem 'On Violence' ['*Über die Gewalt'*] 1930s)

## 1. INTRODUCTION

The targeted killing judgment of the Israeli Supreme Court has, since it was handed down in December 2006, received a significant amount of attention.[1] Not least has it been scrutinised from the point of view of international law and has, from that particular point of view, received both praise and criticism.[2] The present analysis offers neither praise nor criticism but is rather an attempt at a critique of the judgment: 'critique' in the sense of the term the German-Jewish philosopher Walter Benjamin employs in his famous 1921 essay, 'Critique of Violence' (Benjamin 1978). My critique of the targeted killing judgment is based on the theoretical framework provided in that particular text by Benjamin, along with the important readings of it provided by Jacques Derrida in 'Force of Law: The

[1] HCJ 769/02 The Public Committee Against Torture and Palestinian Society for the Protection of Human Rights and the Environment v. the Government of Israel et al. hereinafter (PCATI).

[2] See e.g. Ben-Naftali (2007), Ben-Naftali and Michaeli (2007), Bendor (2007), Cassese (2007), Cohen and Shany (2007), Eichensehr (2006), Even-Khen (2007), Keller and Forowicz (2008), Kremnitzer (2007), Lesh (2007), Melzer (2006), Melzer (2008), Milanovic (2007), Schondorf (2007), Wojcik (2007), 'On the Legal Aspects of "Targeted Killings": Review of the Judgment of the Israeli Supreme Court', Policy Brief, Program on Humanitarian Policy and Conflict Research, Harvard University (2007).

Mystical Foundation of Authority' (Derrida 1992) and Judith Butler in 'Critique, Coercion, and Sacred Life in Benjamin's "Critique of Violence"' (Butler 2006).

The analysis proceeds as follows. After a brief introduction to the judgment (section two) I introduce the framework of analysis of Walter Benjamin's 'Critique of Violence'. I focus on a key aspect of both Benjamin's critique and the targeted killing judgment – the distinction between lawmaking and law-preserving violence (section three). From the point of view of this distinction I analyse the Court's exercise of jurisdiction over these killings in the first place, the Court's decision on the applicable law as well as the particular interpretation of that law. I argue that the targeted killing judgment collapses the distinction in a different way from that foreseen by Benjamin thus constituting a particular configuration of lawmaking and law-preserving violence (section four). In conclusion, I consider Judith Butler's reading of Benjamin's 'divine violence', particularly his use of the commandment 'thou shalt not kill', as a non-violent violence that must (I deliberately use the strong modal verb 'must' here for reasons that will be developed *infra*) be waged against the kind of legal violence of which the targeted killing judgment is exemplary (section five).

## 2. THE TARGETED KILLING JUDGMENT

In 2000, in the context of the second Intifada, there occurred a quantitative and qualitative shift in killings by the Israeli Defence Forces (IDF) and the Israeli Security Agency (ISA).[3] Having previously been a form of covert operations,

[3] Adam Stahl describes the counterterrorism operations of the IDF and the ISA in the occupied territories as 'symbiotically linked': 'The ISA collects the necessary intelligence through a web of techniques, which the IDF then acts upon, if deemed operationally viable' (Stahl 2010, p. 112).

from this point, one may speak of an official Israeli military tactic of killing individuals in the occupied territories that are deemed to pose a threat to Israel, a practice that was termed (in Hebrew read in Latin script) *Sikul memukad,* literally 'focused foiling' or 'thwarting' commonly translated into English as 'targeted killing'.

In 2002, the Israeli Supreme Court, sitting as the High Court of Justice, issued a decision on a petition by a member of the Knesset, Mohammed Barakeh, to stop the killings. In an exceedingly condensed decision, reproduced below in its entirety, the court effectively determined the targeted killing policy 'non-justiciable':

> We read and widely listened to the claims of the Applicant's representative. It seems to us that the announcement given on behalf of the Respondents supplied an exhaustive response to the Applicant's claims. The choice of means of warfare, used by the Respondents to preempt murderous terrorist attacks, is not the kind of issue the Court would see fit to intervene in. This is the case *a fortiori* when the appeal lacks a firm factual foundation and seeks a sweeping redress.[4]

This decision was reversed in late 2006 when the Israeli Supreme Court, sitting as the High Court of Justice, issued a judgment on a second petition to stop the killings, this time by one Israeli and one Palestinian NGO. The judgment was written and decided by the renowned former president of the Israeli Supreme Court, law professor and Israel Prize laureate Aharon Barak, with concurring opinions of colleagues Eliezer Rivlin and Dorit Beinisch (the latter current president of the Israeli Supreme Court).

The 2006 judgment was decided primarily on the basis of international law, more specifically, the international law applicable in armed conflict. With

---

[4] HCJ 5871/01 *Barakeh v. Prime Minister* translated from Hebrew in Ben-Naftali and Michaeli (2003, p. 369).

regard to the status of international law within the Israeli legal system Barak states that international customary law is part of Israeli law 'by force of the State of Israel's existence as a sovereign and independent state' (PCATI, para. 19).

Barak determines that '[t]he general, principled starting point' for the judgment is that since the beginning of the first Intifada a 'continuous situation of armed conflict' has existed between the state of Israel and 'various terrorist organisations active in Judea, Samaria and the Gaza Strip' (PCATI, para. 16). This assertion is corroborated by reference to previous case law of the Israeli Supreme Court and Barak further claims that this is 'in line with the definition of armed conflict in the international literature'(PCATI, para. 16).

Barak describes the 'normative system' that applies to this armed conflict as 'complex' (PCATI, para. 18). With reference to Cassese's textbook of international law Barak determines that an armed struggle between an occupying state and 'terrorists' who come from the territory under belligerent occupation amounts to an international armed conflict (PCATI, para. 18). Barak states that these laws include the laws of belligerent occupation but is not limited to them alone. There are also the laws of the conduct of war (*jus in bello*) applicable to 'any case of an armed conflict of international character – in other words, one that crosses the border of the state – whether or not the place in which the armed conflict occurs is subject to belligerent occupation' (PCATI, para. 18).[5] Referring

[5] Clearly there is disagreement as to which law governs the different activities of the Israeli state on the occupied territories, such as targeted killings and the so-called 'security fence'. Hence, this decisive statement of Barak may be contrasted with the 2004 advisory opinion 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory', of the International Court of Justice (ICJ). According to the ICJ, within the normative framework of international humanitarian law *only* the rules dealing with military authority in occupied territories

to International Court of Justice (ICJ) case law, Barak acknowledges that in addition to international humanitarian law, human rights law also is applicable in international armed conflicts but that the relationship between the two is one in which international humanitarian law applies as *lex specialis* (PCATI, para. 18).

Having already established the normative framework to be the rules governing the conduct of hostilities in the context of an international armed conflict, Barak turns to the question of the categorisation of the individuals being targeted under the targeted killing policy. First, the problematic category of 'unlawful combatants' is considered and rejected. This is so because: "It is difficult for us to see how a third category can be recognised in the framework of the *Hague* and *Geneva Conventions*. It does not appear to us that we were presented with data sufficient to allow us to say, at the present time, that such a third category has been recognised in customary international law" (PCATI, para. 28).

Barak instead 'proceed[s] to the customary international law dealing with the status of *civilians who constitute unlawful combatants*' (PCATI, para. 28, emphasis added), a term, as far as I can tell, invented for the purposes of this particular judgment.

---

is currently applicable on the West Bank (cf. article 6, paragraph 3 of the Fourth Geneva Convention). This means that the legal framework that guides the targeted killing judgment of the Israeli Supreme Court (the rules governing the conduct of hostilities in the context of an international armed conflict) would not even be relevant should the ICJ advisory opinion be followed. (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory 2004 paras. 124-125). I take this to be an indication, as good as any, of the indeterminacy of the law governing the policies and measures taken by the state of Israel on the occupied territories.

Such civilians may, according to customary international law, be attacked 'for such time as they take a direct part in hostilities'.[6] This constitutes an exception to the principle of distinction, recognised in both treaty law and customary international law, that determines combatants to be eligible for attack but not civilians.

With regard to the scope of this exception, Barak determines the 'accepted view' to be that this includes acts that 'by their nature and objective are intended to cause damage to the army' (PCATI, para. 33). However, Barak adds that it 'is not limited merely to the issue of "hostilities" toward the army or the state. It applies also to hostilities against the civilian population of the state' (PCATI, para. 33).

Again, without giving any indication as to what this might mean Barak refers to 'the accepted definition' in saying that someone takes part in hostilities when this person uses a weapon within the framework of the armed conflict but also when collecting intelligence or preparing for hostilities (PCATI, para. 33). This means, that there 'is no condition that the civilian use his weapon, nor is their [*sic*] a condition that he bear arms (openly or concealed). It is possible to take part in hostilities without using weapons at all' (PCATI, para. 33).

Barak further determines the following cases to be instances of direct participation in hostilities: a person who collects intelligence on the army whether on issues regarding the hostilities or beyond those issues; a person who transports unlawful combatants to or from the place where the hostilities are taking place; a

[6] The treaty-based version of this norm is found in article 51.3 of Additional Protocol 1 to the Geneva Conventions of 12 August 1949. The Position of the International Committee of the Red

person who operates weapons which unlawful combatants use, or supervises their operation or provides service to them (PCATI, para. 35); a person serving 'voluntarily' as a 'human shield' (PCATI, para. 36); a person who 'enlist[s]' another person to take a direct part in hostilities, or, 'send[s]' others to do so; a person who 'decide[s]' upon, or, 'plan[s]' 'the act' (PCATI, para. 37).

On the other hand, Barak writes, someone who 'sells food or medicine to an unlawful combatant'; someone who 'aids the unlawful combatants by general strategic analysis, grants them logistical, general support including monetary aid'; someone who 'distributes propaganda supporting those unlawful combatants' takes an '*indirect* part' (PCATI, para. 35). This means that they may not be targeted but '[i]f such persons are injured, the State is likely not to be liable for it, if it falls into the framework of collateral or incidental damage' (PCATI, para. 35). It remains unclear if Barak here means to introduce a presumption to the effect that harm done to persons taking an 'indirect part' constitutes lawful 'collateral damage' or if he, in this instance, merely refers to the 'ordinary' proportionality assessment.[7]

With regard to the temporal element – 'for such time' – Barak concludes that

---

Cross (ICRC) is that there is an equivalent in customary international law to this norm, a position that Barak finds 'acceptable' (PCATI, para. 30).

[7] This proportionality assessment is governed by the norm applicable in international armed conflicts that determines that civilian casualties must not be excessive in relation to the concrete and direct military advantage anticipated from the attack, in this case the killing of the targeted person. The treaty-based version of this norm is found in Article 51.5 of Additional Protocol 1 to the Geneva Conventions of 12 August 1949.

a civilian who has joined a terrorist organization which has become his 'home', and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack 'for such time' as he is committing the chain of acts. (PCATI, para. 39).

Before someone is considered to fall into the category in question Barak determines that there needs to be '[i]nformation which has been most thoroughly verified … regarding the identity and activity of the civilian who is allegedly taking part in the hostilities' (PCATI, para. 40). Also, a civilian taking a direct part in hostilities cannot be attacked, if 'a less harmful means can be employed' (PCATI, para. 40). This last criterion is derived from the principle of proportionality of internal Israeli law (PCATI, para. 40).

From this brief summary I think it is clear that the judgment provides the government with a flexible category of persons; 'civilians who constitute unlawful combatants' who may lawfully be killed through executive decision without prior judicial oversight. The judgment also provides the government with some leeway with regard to the lawful killing of others than those targeted as 'collateral damage'. Hence, effectively, the judgment enables the Israeli government to proceed with its policy of targeted killings within the bounds of law.[8]

## 3. WALTER BENJAMIN'S CRITIQUE OF LEGAL VIOLENCE

[8] The Israeli Ministry of Foreign Affairs issued a press release on 20 December 2006 by reason of the Israeli Supreme Court judgment. Revealingly, in the first paragraph it is stated that 'the Court's decision enables Israeli security forces to continue carrying out targeted killings on condition that the merits of every instance are individually examined'. It is specifically mentioned that the press release was written with the aid of the legal department of the Foreign Ministry in coordination with IDF legal staff (Israel Ministry of Foreign Affairs, press release of 20 December, 2006).

Almost all texts on Walter Benjamin's 1921 essay 'Critique of Violence', in languages other than the original German language, discuss the translation of the title *Zur Kritik der Gewalt* into *e.g.* English as 'Critique of Violence' and French as *Critique de la violence.* This discussion is relevant also here because it is revealing for the target and scope of Benjamin's critique.

In his close reading of Benjamin's text entitled 'Force of Law: The Mystical Foundation of Authority' Derrida determines the translation of *Gewalt* to 'violence' to be a 'very active interpretation' (Derrida 1992, p. 6). An interpretation that does not take account of the fact that *Gewalt* apart from violence *also* signifies legitimate power, authority and public force (Derrida 1992, p. 6). This means that the target for Benjamin's critique is the violence of or in public authority or force. Thus, Judith Butler has described Benjamin's 'Critique of Violence' as a 'critique of *legal* violence', the kind of violence that the state wields through *instating* and *maintaining* the binding status that positive law exercises on its subjects (Butler 2006, p. 201, emphasis added).[9]

In Benjamin's critique there are two distinct yet interdependent modalities to legal violence: lawmaking and law-preserving violence (Benjamin 1978, p. 287). Lawmaking or foundational violence is associated with the moments of the inauguration of law. Derrida notes that these are instances marked by military violence, describing them as 'terrifying moments', exemplified by 'the sufferings, the crimes, the tortures that rarely fail to accompany [the founding of states]' (Derrida 1992, p. 35).

[9] It should be mentioned that the notion of 'legal violence' appears already on several instances in Benjamin's text.

Apart from this military and physical form of violence, the founding of states is also associated with violence of another kind. Hence, what occurs in the very moment of the inauguration of law and polity can be described as a violent performative act that creates a foundation for the law as well as its enforcement, disguised as a mere constative. This instance can be summarised in the claim that 'This will be law' or, more emphatically, 'This is now the law' (Butler 2006, p. 202). The fact that this is done, as it were, by fiat, is underscored by Benjamin by declaring it a work of 'fate' (Benjamin 1978, p. 285). Derrida has taken this to suggest that the founding of law and polity, epitomised in a 'declaration of independence', cannot rest on anything but itself. Hence, he describes this moment as an instance of 'non-law', but adds, 'it is also the whole history of law' (Derrida 1992, p. 36). This event is best described by Derrida not in 'Force of Law' but in his 'The Laws of Reflection. For Mandela, In Admiration':

> In the event of such a founding or institution, the properly performative act must produce (proclaim) what in the form of a constative act it merely claims, declares, assures it is describing. The simulacrum or fiction then consists in bringing to daylight, in giving birth to, that which one claims to reflect so as to take note of it, as though it were a matter of recording what will have been there, the unity of a nation, the founding of a state, while one is in the act of producing that event. (Derrida 1987).

It is important to say that according to this account, the military as well as the performative violence that founds law do not amount merely to a historical embarrassment for the law but are *always already* at stake in all the different instances and practices of application or enforcement.[10]

[10] In view of that, Costas Douzinas writes that the violence at law's inception is 'entombed in every legal act as a residue or excess' (Douzinas 2006).

This leads us to the second modality of legal violence: law-preserving or conserving violence. This is the repeated and institutionalised effort to make sure that the posited law continually is binding on the population it governs (Butler 2006, p. 202).

A number of state institutions may be singled out as significant actors in conserving violence. Benjamin's speaks of 'the police' but Derrida points out that the police in this instance do not only refer to the policeman in uniform and with a baton, but, '[b]y definition, the police are present or represented everywhere that there is force of law', that is to say when law is enforced (Derrida 1992, p. 44). In her reading of Benjamin, Butler mentions that the enforcement of law in courts should also be considered law-preserving violence (Butler 2006, p. 202). Quite strikingly, at the end of his essay, Benjamin refers to law-preserving violence as 'administrative violence' (Benjamin 1978 p. 300).

As demonstrated most forcefully by Derrida, what Benjamin is trying to do with the two modalities of legal violence is important but the distinction as such is problematic. In fact, this is something that already Benjamin takes note of in his reflections on the police and the death penalty respectively.

For Benjamin the police provide an instance where 'the separation of lawmaking and law-preserving violence is suspended' (Benjamin 1978, p. 286). How so and when so suspended? Derrida writes that the police 'invent law, make themselves lawmaking, legislate each time law is indeterminate enough to give them the chance' (Derrida 1992, p. 43) and Benjamin specifically says that this is done 'for security reasons' when the law cannot guarantee the ends that it 'desires at any price to attain' (Benjamin 1978, p. 287) which primarily is its own self-preservation (Benjamin 1978, p. 285).

In relation to the death penalty Benjamin writes that 'where the highest violence, that over life and death, occurs in the legal system, the origins of law jut manifestly and fearsomely into existence.' (Benjamin 1978, p. 286). I take this to suggest that the distinction between the two modalities of legal violence is ruined in fatal cases when the origin of law – described by Benjamin as 'violence crowned by fate' – is exposed (Benjamin 1978, p. 286). Hence, Benjamin writes, in such instances law 'reaffirms itself' and in this very violence 'something rotten in law is revealed' (Benjamin 1978, p. 286).

Benjamin's reflections on 'the police' and capital punishment respectively are both relevant to the targeted killing judgment.

Being a 'fatal case' in the double sense of the term of being conditioned by fate and in the sense of dealing death – similar to a capital punishment judgment – the targeted killing judgment may be understood as another example of 'positive law's seizure of mere life' (Butler 2006, p. 211) and thus a reaffirmation of the violence of law. Also, Benjamin's reflections on the police highlights how the indeterminacy of the law allows for state institutions on the law-preserving side (*inter alia* courts) to engage in lawmaking and predicts how this will occur for reasons of 'security' in order to preserve the law that has been instated.

I claim that the distinction between lawmaking and law-preserving violence as well as its necessary breakdown or indistinction is crucial for understanding the Israeli Supreme Court targeted killing judgment. However, for reasons of the history of the state of Israel, the two forms of legal violence appear to be working under somewhat different circumstances in this case compared with the circumstances Benjamin had in mind in his 'Critique of Violence'. In what follows I therefore turn to how these circumstances allow for a particular

configuration of the two modalities of legal violence in the targeted killing judgment.

## 4. THE TARGETED KILLING JUDGMENT AS ADMINISTRATIVE FOUNDATIONAL VIOLENCE

Benjamin writes of the importance of the peace ceremony, a ceremony that signifies that the victory establishes a new law and thus marking the threshold between foundational violence and conserving violence as well as the moment where the individual subject is refused the right to resort to violence, in other words, the instance of the establishment of a monopoly of violence (Benjamin 1978, p. 283).

In Israel/Palestine there has been no such final peace ceremony. A brief historical overview starting at the time of the founding of the state of Israel suggests that the declaration of independence (performative violence) was preceded and followed by a war, from the perspective of Benjamin very revealingly referred to by Israelis as the 'war of independence' and *al-Nakba* or 'the catastrophe' by Arabs (military violence). The first phase of this war lasted from 29 November 1947, when the UN General Assembly passed partition resolution 181, until 14 May 1948, when the British Mandate expired and the state of Israel was proclaimed. The day after, on 15 May 1948, a number of Arab states intervened, not accepting the terms on which the Israeli state was founded. This phase lasted until 7 January 1949. In this war approximately 730,000 Palestinians fled or were expelled and have not been allowed to return since (Shlaim 2009, p. 28). In 1967 there was the Six Day War, heralded as pre-emptive self-defence against Arab aggression by Israel, resulting in a swift victory over Egyptian, Syrian and Jordanian armed forces and the indefinite occupation of the Palestinian

territories of Gaza and the West Bank; an occupation that has seen two violent uprisings in the first and the second Intifada.

For the purposes of understanding the Israeli Supreme Court targeted killing judgment it is important to remember that the military violence that founded the state of Israel has remained or continued long after the instating of law and the establishment of a monopoly of violence, a monopoly of violence that furthermore was extended in 1967 to the occupied Palestinian territories.

This means that, with the state of Israel, we have an utterly problematic transgression of the threshold between lawmaking and law-preserving violence. I claim that this makes for a particular configuration of lawmaking and law-preserving violence, something that manifests itself in the targeted killing judgment through the Court's exercise of jurisdiction over these killings in the first place, the Court's decision on the applicable law as well as the particular interpretation of that law.

In relation to the issue of the Court exercising jurisdiction over these killings the following fact needs to be addressed: the targeted killing judgment is a judgment from a national Court invoking the Israeli basic law as the source of its jurisdiction, something that clearly positions the judgment in law-preserving violence. At the same time this national Court exercises jurisdiction, indeed, has the final power to decide, on the actions of military commanders in what was referred to in the 2002 decision of the Israeli Supreme Court as the 'choice of means of warfare', in other words lawmaking or foundational violence (for Benjamin writes that there is inherent in all 'military violence' a 'lawmaking character' (Benjamin 1978, p. 283)).

Put differently for emphasis: while the Court in 2002 decided not to get actively involved in Israeli targeted killings (although the Court in the brief

formulation that accompanied the decision unambiguously aligned itself with the Israeli Government), in 2006 the Israeli Supreme Court made itself actively complicit in foundational violence. 'Complicit' might even be considered an understatement since the Israeli Supreme Court indeed has the ultimate power to decide whether such killings may be executed or not. As Barak points out '[t]he starting point which has guided the Court has been that the military commanders and officers who answer to the commander of army forces in the *area* [the West Bank and Gaza] are public officials fulfilling roles pursuant to law' (PCATI, para. 55). And, quoting another decision of the Court, '[t]he final and decisive decision as to the interpretation of a statute, as per its wording at any given time, is granted to the court' (PCATI, para 56).

In such a case the distinction between lawmaking and law-preserving violence breaks down in what might be termed administrative foundational violence. The present judgment of Barak provides interesting leads with regard to how such a peculiar configuration of the two modalities of legal violence might play out. In fact, I think Barak gives us a good hint of precisely that when he writes (and notice how he is mimicking Benjamin in letting the law itself act, through anthropomorphism): 'The State's fight against terrorism is the fight of the state against its enemies. It is also law's fight against those who rise up against it' (PCATI, para. 62.). Apparently, one feature of this particular configuration of the two modalities of legal violence is the judiciary and the law appearing in full bellicose partisanship with the state.

But how exactly does law 'fight against those who rise up against it' under the conditions of a problematic transgression of the threshold between lawmaking and law-preserving violence, that is to say, a situation of continued foundational violence *as well as* an established monopoly of violence extended to occupied

territories? In the following I will focus on the Court's decision on the applicable law as well as the particular interpretation of that law.

In relation to the question of the applicable law there was of course the possibility of determining the case on the basis of what is referred to in the discourse on the legality of targeted killings as the paradigm of law-enforcement, that is to say, judging Israeli targeted killings from the standpoint of the norms governing the violence that may lawfully be used in response to criminal acts *i.e.* law-preserving violence.[11] The pivotal norm here would, from an international law perspective, be the right to life recognised in human rights treaties of which Israel is bound as well as in customary international law. That goes for both those targeted and for any bystanders. To be sure, positive law provides circumstances under which also the right to life may be deviated from. Far from an uncompromising proscription the right to life would, however, have provided a more restrictive normative framework for the Israeli policy of targeted killings.

It has already been noted that Barak decided the appropriate legal framework to be the law applicable within the context of an international armed conflict. However, as acknowledged by Barak, the protection provided by human rights treaties does not cease in armed conflict. Thus, potentially the right to life could still be the appropriate norm in considering the legality of Israeli targeted killings. However, Barak does not even consider the complexity of determining what is more general and what is more particular in circumstances when there is a conflict between norms belonging in different regimes but simply states:

[11] In his 'Targeted Killing in International Law' Nils Melzer labours with a distinction between the paradigm of law-enforcement and the paradigm of hostilities. In this context it should be

'humanitarian law is the *lex specialis* which applies in the case of an armed conflict. When there is a gap (*lacuna*) in that law, it can be supplemented by human rights law' (PCATI, para. 18). With that laconic statement Barak leaves the consideration of the implications of human rights norms for the legality of targeted killings and thus we have effectively moved out of the paradigm of law-enforcement and instead entered the paradigm of the conduct of hostilities, a normative framework more accommodating to targeted killings. Derrida actually remarks in his reading of Benjamin that this is the proper legal framework for lawmaking or foundational violence (Derrida 1992, p. 39); that is to say, the legal framework that governs what he speaks of as 'the sufferings, the crimes, the tortures that rarely fail to accompany [the founding of states]' (Derrida 1992, p. 35).

With regard to the killing or injuring of bystanders in a targeted killing attack, this is also less of a problem in this legal framework due to the already mentioned principle of proportionality. According to this principle it is not unlawful to kill or injure bystanders as long as the civilian casualties are not excessive in relation to the concrete and direct military advantage anticipated from the attack, in this case, the killing of the one targeted. From the point of view of this norm, bystanders killed in a targeted killing attack constitute 'collateral damage' given that the proportionality test has been satisfied.

Having considered the decision on the applicable law I will now turn to the Court's interpretation of that law.

---

mentioned also that Melzer criticises the judgment of the Israeli Supreme Court for completely disregarding the paradigm of law-enforcement (Melzer 2008, p. 34).

From the perspective of Benjamin there is one crucial problem with the norms applicable in an international armed conflict; a problem Barak would have to deal with in interpreting that law. The problem is that, while remaining silent on legal justifications for recourse to military violence (*casus belli*), the international humanitarian law applicable in international armed conflicts normally grants all parties to the conflict equal right to conduct hostilities.

Naturally, this would open for lawmaking violence exerted against the state of Israel something that is directly contrary to, to quote Benjamin, 'law's interest in a monopoly of violence' (Benjamin 1978, p. 281). In fact, Benjamin addresses the fact that the state according to 'military law' is obliged to acknowledge the lawmaking violence of others when 'external powers force it to concede them the right to conduct warfare', something he, along with the right to strike, describes as an 'objective contradiction in the legal situation' (Benjamin 1978, pp. 283-284).

In order to avoid the prospect of being obliged to acknowledge the lawmaking violence of others (that is to say, the right for Palestinian militants to conduct warfare against Israel and still maintain the right for the state of Israel to do so against Palestinians in the occupied territories by means of targeted killings); there are essentially two different paths of interpretation available, *i.e.* two ways for Barak to interpret away the contradiction noted by Benjamin. Both work by way of exception to the principle of distinction determining combatants, but not civilians to be eligible for attack. For reasons already mentioned Barak did not opt for the category of 'unlawful combatants' but instead for his own category of 'civilians who constitute unlawful combatants'. However, because of the way in which this category is construed, *i.e.* Barak's exceedingly expansive interpretation of 'for such time as they take a direct part in hostilities', one might

agree with Judge Rivlin who, in his concurring opinion to the judgment, approvingly writes that 'there is no difference between the two paths in terms of the result, since the interpretation of the provisions of international law proposed by my colleague President Barak adapts the rules to the new reality' (PCATI, concurring opinion by Judge Rivilin para. 2). In fact, Barak explicitly writes that his understanding of the category of 'civilians who constitute unlawful combatants' proceeds 'in the spirit' of 'dynamic interpretation' (PCATI, para. 28) – elsewhere referred to by Barak as 'judicial law-making' (Barak 1998).

The very convenient category of 'civilians who constitute unlawful combatants' answers perfectly to the interest of preserving the monopoly of violence while maintaining the right continually to exercise this particular form of foundational violence. For, 'civilians who constitute unlawful combatants' do not have the right to resort to violence. On the contrary, they may be tried, judged and punished for their participation in hostilities (PCATI, para. 25). Furthermore, 'civilians who constitute unlawful combatants' are legitimate targets for attack 'for such time as they take a direct part in hostilities'; a norm which, as we have seen, may be stretched to include a rather wide group of individuals. Lastly, they do not enjoy the rights granted to combatants. Thus, for example, the laws of prisoners of war do not apply to them (PCATI, para. 25).

The conclusion from the preceding analysis is that Barak, by exercising jurisdiction over Israeli targeted killings, through his decision on the applicable law as well as his particular interpretation of that law, effectively has enabled the Israeli government to proceed with the violence that continues to found the state of Israel while maintaining its monopoly of violence.

## 5. THE DESTRUCTION OF LEGAL VIOLENCE

Toward the end of Benjamin's essay there is a distinct shift where Benjamin suddenly drops his careful elaboration of the two modalities of legal violence and instead declares that the 'destruction' of legal violence 'becomes obligatory' (Benjamin 1978, pp. 296-297). I will conclude by considering what this blunt statement by Benjamin and his subsequent confrontation of legal violence with 'divine violence' might mean in the context of the Israeli Supreme Court targeted killing judgment. I will do so in relation to the performative declaration issued right at the end of the judgment: 'Let it be so' (PCATI, para. 64).

To be sure, the 'Let it be so' might be understood to refer exclusively to what immediately precedes it; a quote from another judgment of Barak about democracy fighting with one hand behind 'her' back against terrorism because of law. However, the text of the judgment leaves open the possibility that the 'Let it be so' instead refers to the judgment in its entirety. In this interpretation the 'Let it be so' serves the function of mobilising the law of the judgment, putting it into operation, effectively constituting its subjects.

As pointed out by Judith Butler there are many reasons to be suspicious about Benjamin's statement about the destruction of legal violence. In particular, since he does not say whether it is obligatory to oppose all legal violence or whether, for example, some forms of obligation that restrain those in power from doing violence should be supported or if subjects should be obligated to the state in any way (Butler 2006, p. 218). Even though Benjamin never argues that all legal systems should be opposed, one may assume from the level of generality in which he writes that law generally poses a problem for him (Butler 2006, p. 203 and 209). Neither the categoricalness of his statement nor the partly unrevealed reasons for it should, however, preclude us from making distinctions between the different forms that legal violence takes. As has already been mentioned it is

clear, for example, that the death penalty stood out as particularly emblematic of legal violence for Benjamin, and, I would argue, this is true *a fortiori* for targeted killings.

The obligatory destruction of legal violence poses, according to Benjamin, the question of a 'pure immediate violence' that might be able to 'call a halt' to legal violence (Benjamin 1978, p. 297). This form of violence Benjamin names 'divine violence'. Benjamin presents to us several ways of apprehending the confrontation between legal and divine violence: legal violence's power over 'mere life for its own sake' is confronted with divine violence understood as 'pure power over all life for the sake of the living' (Benjamin 1978, pp. 295 and 297); the bloodiness of legal violence is confronted with divine violence that is exercised 'without bloodshed' (Benjamin 1978, p. 297); the making and preserving of law of legal violence is confronted with the 'law-destroying' effects of divine violence (Benjamin 1978, p. 297); the setting of boundaries of legal violence is confronted with divine violence which 'boundlessly destroys them' (Benjamin 1978, p. 297); the power and power-making of legal violence is confronted with justice, the principle of divine violence (Benjamin 1978, p. 295).

In her 'Critique, Coercion, and Sacred Life in Benjamin's "Critique of Violence"' Judith Butler offers a compelling reading of Benjamin's divine violence; in particular his use of the commandment 'thou shalt not kill' as a non-violent violence that *must* (obligatorily) be waged against the coercive force of positive law.

As has already been mentioned, in contrast with legal violence, referred to by Benjamin in the original German language as *Blutgewalt*,[12] translated as 'bloody power', Benjamin refers to this non-coercive violence as 'lethal without spilling blood' (Benjamin 1978, p. 297). This leads Butler to conclude that it is not waged 'against human bodies and human lives' (Butler 2006, p. 201). In Butler's account it is instead waged against the legal subject, that is to say, the subject formed by law.

In order to achieve this there is need for a point of view on law that is external to, not on the same order of, the laws that are to be destroyed (Butler 2006, p. 211). In a peculiar mix of Marxism and Jewish messianism, Benjamin constructs this exterior dimension utilising, on the one hand, the theory of the general strike and, on the other hand, the divine commandment 'thou shalt not kill'. I will start with the commandment and come later to the general strike.

Even though we are accustomed to thinking of the commandment as 'operating in an imperative way, mandating action on our part and ready with a set of punitive actions if we fail to obey', Butler argues that Benjamin makes use of a different Jewish tradition of understanding the commandment; a tradition where the commandment is precisely not the 'vocalization of a furious and vengeful god' but instead strictly separates the imperative from the matter of its enforceability (Butler 2006, p. 204). In this tradition the commandment delivers an imperative *without* the capacity to enforce in any way the imperative it communicates (Butler 2006, p. 204). For, in contrast to law, the commandment

[12] Gil Anidjar has recently drawn attention to secondary literature's lack of attention to how blood figures in Benjamin's 'Critique of Violence'. In particular, the much telling notion of *Blutgewalt* for legal violence has been neglected (Anidjar 2009).

has no police force and no army. It is immoveable, 'it is uttered, and it becomes the occasion for a struggle with the commandment itself' (Butler 2006, p. 212).[13] It is precisely this peculiar form of transmission in the form of a struggle with the commandment that appears to be important for Benjamin rather than the source of the commandment as such.[14]

In this account of how the commandment is transmitted, the commandment is open for interpretation and even contravention (Butler 2006, p. 212). It exists as a 'guideline for the actions of persons or communities who have to wrestle with it in solitude and, in exceptional cases, to take on themselves the responsibility of ignoring it' (Benjamin 1978, p. 298). Thus, in the final analysis 'what is mandated by the commandment is a struggle with the commandment, whose final form cannot be determined in advance … one wrestles with the commandment in solitude' (Butler 2006, p. 212). For Butler, the wrestling with the commandment is an anarchistic moment; one that happens without recourse to principle and takes place, as it were, between the commandment and the one who must act in relation to it (Butler 2006, p. 214). Furthermore, Butler refers to the struggle with the commandment as something that must be 'suffered' irrespective of whether the struggle results in compliance or contravention (Butler 2006, p. 216).

---

[13] The radical difference between this peculiar transmission of the commandment from the transmission or enforcement of law (as well as the potential for justice of the former but not the latter) finds the following formulation in Benjamin's essay on Kafka: 'the law which is studied and not practiced any longer is the gate to justice' (Benjamin 1968, p. 139).

[14] Revealingly, in her preface to Benjamin's 'Illuminations', Hannah Arendt writes that Benjamin was greatly attracted not by religion, but by theology and theological interpretation (Arendt 1968, p. 4).

In this way the commandment not to kill functions as a commandment not to murder the soul (the focus of the divine injunction) of the living, and therefore as a commandment to do violence against the positive law that is responsible for such murder. Such a non-violent violence strikes not at the body or 'organic life' of any individual but precisely at the subject who is formed by law (Butler 2006, p. 211). Thus, the wrestling with the ethical address 'thou shalt not kill' is a 'lethal' struggle that 'does not stop short of annihilation', yet without spilling any blood in the process (Benjamin 1978, p. 297).

Assuming that the struggle with the ethical address 'thou shalt not kill' can be understood in the manner outlined by Butler, *i.e.* as a non-violent violence striking at the subject formed by law; how can this counterforce to the operation of law be understood to function? Put more directly in the context of the targeted killing judgment: how does the struggle with the commandment not to kill oppose a judgment that forms subjects who may lawfully be killed? How can it 'call a halt' to the law mobilised in Barak's 'Let it be so'?

In order to elucidate how this works one will need to consider how the struggle with the commandment is linked to the general strike in Benjamin's critique.

Benjamin understands the general strike to be a form of violence that is fundamentally non-violent in the way that it breaks with the coercive enforcement of law, in refusing to take up anything but a 'wholly transformed work', no longer enforced by the state (Benjamin 1978, pp. 291-292). Even though one is used to call a strike an action against the state, Butler, following Werner Hamacher, suggests that it is better understood as an omission, that is to say, 'a failure to show, to comply, to endorse, and so to perpetuate the law of the state' (Butler 2006, p. 219). Hence, Butler likens the individual who struggles with the

commandment with the population that take up a general strike 'since both refuse a certain coercion and, in the refusal, exercise a deliberative freedom that alone serves as the basis of human action' (Butler 2006, p. 219). This freedom provides, in turn, the condition for a sense of responsibility that has as its core and only principle an ongoing struggle with non-violence (Butler 2006, p. 205).

The bloodless effect of this struggle, this suffering, this strike, this taking responsibility for one's actions, is in Butler's words, a 'separation of legal status from the living being (which would be an expiation or release of that living being from the shackles of positive law)' (Butler 2006, p. 211).

I find this to be a critical call for an ethical relationship to legal violence that is relevant not only for the 'public officials fulfilling roles pursuant to law' on the West Bank and Gaza, a law on which the Israeli Supreme Court has the 'final and decisive' say, but for anyone who reads and ponders the targeted killing judgment and thus finds herself or himself addressed by Barak's 'Let it be so'.

**Acknowledgements.** This article was originally presented at the Power of Law workshop held at University of Helsinki, Faculty of Law on 28-30 January 2010. I remain indebted to the Institute for International Law and the Humanities (IILAH) at Melbourne Law School, University of Melbourne, and its director Anne Orford for hosting me during the completion phase of the article and also for giving me the opportunity to give a seminar on it. I would like to thank Gregor Noll who has offered his always critical, yet always constructive comments on several occasions during the time of writing. Thanks are also due to two anonymous referees for their thoughtful comments. The text has benefitted from having been exposed to David McBride's erudite language skills. All remaining mistakes are of course mine.

REFERENCES

Anidjar, Gil. 2009. Blutgewalt, *Oxford Literary Review* 31(2): 153-174.

Arendt, Hannah. 1968. Introduction. In *Illuminations: Essays and reflections* ed. Hannah Arendt, 1-58. New York: Schocken Books.

Barak, Aharon. 1998. The role of the Supreme Court in a democracy, *Israel Studies* 3(2): 6-29.

Ben-Naftali, Orna. 2007. A judgment in the shadow of international criminal law, *Journal of International Criminal Justice* 5(2): 322.

Ben-Naftali, Orna and Karen R. Michaeli. 2003. Justice-Ability: A critique of the alleged non-justiciability of Israel's policy of targeted Kkillings, *Journal of International Criminal Justice* 1(2): 368-405.

Ben-Naftali, Orna and Karen R. Michaeli. 2007. Public Committee against torture in Israel v. Government of Israel, *American Journal of International Law* 101(2): 459-465.

Bendor, Ariel L. 2007. Justiciability of the Israeli fight against terrorism, *George Washington International Law Review* 39: 149-163.

Benjamin, Walter. 1968. Franz Kafka on the tenth anniversary of his death. In *Illuminations: Essays and reflections* ed. Hannah Arendt, 111-140. New York: Schocken Books.

Benjamin, Walter. 1978. Critique of Violence. In *Reflections: Essays, aphorisms, autobiographical writings*, ed. Peter Demetz, 277-300. New York: Schocken Books.

Butler, Judith. 2006. Critique, coercion, and sacred life in Benjamin's 'Critique of Violence'. In *Political theologies: Public religions in a post-secular world*,

ed. Hent de Vries, Lawrence E. Sullivan, 201-219. New York: Fordham University Press.

Cassese, Antonio. 2007. On some merits of the Israeli judgment on targeted killings. *Journal of International Criminal Justice* 5(2): 339-345. doi:10.1093/jicj/mqm012.

Cohen, Amichai and Yuval Shany. 2007. A development of modest proportions: The application of the principle of proportionality in the targeted killings case, *Journal of International Criminal Justice*: 310-321. doi:10.1093/jicj/mqm016.

Derrida, Jacques. 1987. The laws of reflection: Nelson Mandela, in admiration. In *For Nelson Mandela*, ed. Jacques Derrida, Mustapha Tlili, 13-42. New York: Seaver Books.

Derrida, Jacques. 1992. Force of law: The mystical foundation of authority. In *Deconstruction and the possibility of justice* ed. Drucilla Cornell, Michel Rosenfeld, David Carlson and David Gray, 3-67. New York: Routledge.

Douzinas, Costas. 2006. Speaking law: On bare theological and cosmopolitan sovereignty. In *International law and its others*, ed. Anne Orford, 35-56. Cambridge: Cambridge University Press.

Eichensehr, Kristen. 2006. On target – The Israeli Supreme Court and the expansion of targeted killings, *Yale Law Journal* 116: 1873-1881.

Even-Khen, Hilly Moodrick. 2007. Can we now tell what 'direct participation in hostilities' is? *Israel Law Review* 40: 213-244.

Israel Ministry of Foreign Affairs, press release of 20 December, 2006. Israel Supreme Court Decision on targeting terrorist operatives. Available through the web page of the Ministry of Foreign Affairs; http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings

/Israel+Supreme+Court+decision+on+targeting+terrorist+operatives+20-Dec-2006.htm. Accessed 16 June 2011.

Keller, Helen and Magdalena Forowicz. 2008. A tightrope walk between legality and legitimacy: An analysis of the Israeli Supreme Court's judgment on targeted killing, *Leiden Journal of International Law* 21(1): 185-221.

Kremnitzer, Mordechai. 2007. Targeted killing policy: Insufficiently limited justice, *The International Association of Jewish Lawyers and Jurists* 44: 38-43.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. International Court of Justice, Advisory Opinion of 9 July 2004, available through the web page of the Court: http://www.icj-cij.org/

Lesh, Michelle. 2007. The Public Committee against torture in Israel v the Government of Israel, *Melbourne Journal of International Law* 8(2):373.

Melzer, Nils. 2006. Targeted killing or less harmful means? Israel's High Court judgment on targeted killing and the restrictive function of military necessity, *Yearbook of International Humanitarian Law* 9: 87-113. doi:10.1017/S1389135906000870.

Melzer, Nils. 2008. *Targeted killing in international law*. Oxford: Oxford University Press.

Milanovic, Marko. 2007. Lessons for human rights and humanitarian law in the war on terror: Comparing Hamdan and the Israeli targeted killings case, *International Review of the Red Cross* 89(866): 373-393.

On the Legal Aspects of 'Targeted Killings': Review of the Judgment of the Israeli Supreme Court. 2007. Policy Briefs: Program on Humanitarian Policy and Conflict Research, Harvard University. Available at:

http://opt.ihlresearch.org/index.cfm?fuseaction=Page.viewPage&pageId=707. Accessed 16 June 2011.

HCJ 769/02 The Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v. The Government of Israel *et al.* (PCATI). Judgment of 13 December, 2006. Available through the web page of the court: elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf. Accessed 16 June 2011.

Schondorf, Roy S. 2007. The targeted killings judgment, *Journal of International Criminal Justice* 5(2): 301-309. doi:10.1093/jicj/mqm009.

Shlaim, Avi. 2009. *Israel and Palestine*. London: Verso.

Stahl, Adam. 2010. The evolution of Israeli targeted operations: Consequences of the Thabet Thabet operation, *Studies in Conflict & Terrorism* 33(2): 111-133.

Wojcik, Mark E. 2007. Introductory note to Public Committee against torture in Israel v. Government of Israel, *International Legal Materials* 46: 373.