Legal Transparency as a National Security Strategy

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The act of taking initiative is considered the preferred modus operandi within the various spheres that shape and define the concept of Israel's national security: on the battlefield and in diplomacy, as well as on the media front. Conventional wisdom within all these spheres is that one should not be dragged along by the force of events, nor should one ever allow an adversary to define the terms of the battle. The legal realm, however, would appear to be an exception to this rule. Although recognition of its importance has greatly increased in recent years, thinking on the subject remains limited to the defensive and reactive; in other words, thinking is limited to the question of how to furnish the political and operational echelon with professional advice and the proper means of defense against court petitions, lawsuits, commissions of inquiry, and other legal proceedings in Israel and abroad. These are important tasks, but is it the sum total of the law's ability to contribute to security? What about a more comprehensive legal strategy that is more proactive and takes the initiative? What benefit, if any, would it have, and at what price? This article addresses these questions by reviewing the public legal campaign, unprecedented in form and scope, waged by the Obama administration throughout its first term.

This campaign did not include newspaper ads or viral videos on social networks. The message was conveyed in a series of speeches by the most senior legal officials in the administration. One after another – and occasionally more than once – they presented to the public, in a clear and detailed manner, the "legal vision" that guides the administration's

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national security policies, and in particular the war it is waging against al-Qaeda and its subsidiaries around the world.

This article will not offer a legal analysis of the content of the speeches or presume to take sides in the ongoing debate between the administration and its critics on legal positions regarding military and security issues. The basic assumption of this series of speeches asserted that such a discussion is unavoidable and even essential in any democratic country. The problem is that when it heats up, particularly in wartime, the debate is liable to frame the tension between security and values as an inevitable choice between them. Obama identified this "false choice" as an obstacle and vowed to work toward eliminating it. He did not foment a revolution in the administration's legal positions for this purpose; instead, he redefined the ideological framework in which the public debate on these positions is conducted. The article will analyze this framework and explain why it has proven itself to be an effective means of bolstering security as well as the law and the values that the law represents. In conclusion, it proposes lessons to be learned and outlines directions for thought and action that are relevant for Israel.

Eliminating the False Choice

In January 2008, presidential candidate Barack Obama stated that "ever since 9/11, this administration [the Bush administration] has put forward a false choice between the liberties we cherish and the security we demand." He warned that the winds blowing from the White House for eight years had led the United States into a crisis of legitimacy, both domestically and internationally, which had severely damaged the country's standing and capacity to fight terrorism effectively. Several months after his election to the presidency, Obama presented his alternative in a speech he delivered at the National Archives on May 21, 2009.[1]

At the basis of the credo he presented at length at the National Archives was the assertion that his highest responsibility as president to safeguard the security of the American people does not contradict his obligation to safeguard the democratic values and the universal moral values defined in the US Constitution and American and international law. What is needed, according to Obama, is not a balance between security and values, but determination not to compromise on either of them, with the understanding that in the long run, they reinforce each other and are

essential to one another. He stressed that maintaining these principles is not a luxury, and complying with the law is not a burden, but that "our values have been our best national security asset," especially during wars against an elusive enemy that is not bound by the same laws and values.

Obama provided a number of examples of the manner in which steadfast loyalty to values translates into tangible security benefits. The more the United States maintains its positive moral image, he explained, the closer the cooperation it enjoys with its allies and the easier it is for it to recruit new ones. In such a situation, it is easier to promote American interests in international institutions, it is more difficult to incite public opinion against the United States through anti-American propaganda, and America's enemies have a harder time recruiting fighters and garnering the popular support that is essential to their struggle. American military actions pass muster with the courts and with Congress more easily and trigger less opposition and protest at home and abroad. The President also explained how his unequivocal ban on torture would not only remove a moral stain, but would also encourage enemy fighters to turn themselves in, allow friendly states to turn prisoners over to US authorities for interrogation, and ultimately improve the quality of the intelligence gathered.

The second half of the speech was devoted to another area in which Obama wished to distinguish himself from his predecessor: transparency. The conflict with an enemy like al-Qaeda understandably raises complex ethical questions. The manner in which Obama proposed to deal with these questions was to explain everything that could be explained and to invest time and resources in persuading Americans to have faith in the decision making processes and in the mechanisms designed for oversight of actions taken on behalf of their security. For this reason, the President included in his speech a promise never to hide the truth just because it is inconvenient, and always to inform the public of the reasons underlying his decision to reveal information or to conceal it from the public. Maintaining secrecy more transparently leads to fewer suspicions and conspiracy theories of the type that were rife during the Bush administration, when "Americans often felt like part of the story had been unnecessarily withheld from them." These words echo President John F. Kennedy's speech on freedom of the press in 1961, in which he spoke about the fact that "the dangers of excessive and unwarranted concealment of pertinent facts far outweighed the dangers which are cited to justify it."[2]

In Obama's view, the two major topics in the speech, legality and transparency, play a dual role: they serve as essential checks on those with power and authority, but they are also a source of legitimacy that is no less essential for them. In his view, as long as the public perceives legality and transparency to be antithetical to security, the country will remain in a state in which its democracy is fragile and its freedom of action limited. This is how he described this situation:

> We see that, above all, in the recent debate—how the recent debate has obscured the truth and sends people into opposite and absolutist ends. On the one side of the spectrum, there are those who make little allowance for the unique challenges posed by terrorism, and would almost never put national security over transparency. And on the other end of the spectrum, there are those who embrace a view that can be summarized in two words: "Anything goes." Their arguments suggest that the ends of fighting terrorism can be used to justify any means, and that the President should have blanket authority to do whatever he wants—provided it is a President with whom they agree . . . Both sides may be sincere in their views, but neither side is right. The American people . . . know that we need not sacrifice our security for our values, nor sacrifice our values for our security, so long as we approach difficult questions with honesty and care and a dose of common sense.

However, if the new President had expectations that he would succeed in reframing the debate in one speech, he was most likely disappointed. By the right wing opposition, his statements were seen as confirmation of the claim that his approach to counterterrorism was soft and ineffectual; the response from human rights organizations was no less chilly. In his book *Kill or Capture*, journalist Daniel Klaidman described a meeting Obama held with central figures in the American human rights community one day before the speech, where he set out the main points of his theory. According to the report, the event ended on a discordant note. The attendees, who were also invited to watch the President's speech the following day, elected not to come.[3]

The "Canonical" Speeches

In his Nobel Prize acceptance speech in December 2009, Obama reiterated the benefit of compliance with the law during wartime.[4] However, the conceptual change he was attempting to promote began to be felt only when speeches gradually began to be delivered by other prominent figures from the administration's legal team. They all used the President's speeches as a starting point, quoting them extensively, but each speaker expanded the discussion of the legal and ethical issues pertaining to his area of responsibility, or which were in the headlines at that time.

The first of them was Harold Koh, State Department legal advisor and former dean of Yale Law School, and a well established and respected figure in the human rights community. The detailed speech[5] he delivered in March 2010 at the annual meeting of the American Society of International Law, one of the world's most important forums among experts in international law, was intended to give additional legal content to the framework defined by the President. Koh's main argument was that the administration is unreservedly committed to international law in all its counterterrorism activities. At that time, it had become clear that Obama was dramatically stepping up the use of targeted killings by means of unmanned aerial vehicles (UAVs), even outside the Afghan battlefield, and this was provoking mounting criticism. Koh brought his professional and moral authority to bear, claiming that these actions were not in contravention of international law, and from certain legal perspectives, they were even preferable to other methods.

From Koh's speech onward, a set pattern can be identified. Every time there was a legal or public dispute about actions taken by the administration or by military forces, a senior official publicly presented the administration's legal case. This series of speeches created a platform for the administration's lawyers that allowed them to respond directly to criticism in simple language and within the context of a broad legal framework and an ongoing public process. In this spirit, several months after Koh's speech, Assistant Attorney General David Kris, who worked under Attorney General Eric Holder, explained in a speech[6] to the Brookings Institution the administration's position on another controversial topic: prosecuting foreigners accused of terrorism in federal courts. After Osama Bin Laden was killed, Koh published a post in a leading legal blog in which he explained why the action was lawful.

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It was not just legal advisors who took part in the campaign. In order to neutralize the claim of a tradeoff between security and values, it was not enough for respected lawyers to talk about security; it was also necessary for respected security figures to persuade people that the law is not a burden, but rather a security asset. John Brennan, assistant to the President for homeland security and counterterrorism, was the perfect man for this mission. With a long career in the CIA behind him and the look to match, Brennan became one of the main bearers of the message. In September 2011, he delivered a speech[7] at Harvard Law School whose title sums up its contents: "Strengthening our Security by Adhering to our Values and Laws." Shortly thereafter, the microphone returned to the lawyers, when Jeh C. Johnson, general counsel of the Department of Defense, delivered two speeches only four months apart – in October 2011[8] and February 2012.[9]

Johnson reviewed the administration's efforts and its successes in improving the legal framework so that it would furnish the tools with which to confront threats of the kind posed by terrorist groups, and at the same time maintain the necessary separation between the military and the civilian justice system. He addressed such sensitive subjects as prolonged military detentions and the legality of extra-judicial targeted killings of American citizens who have joined al-Qaeda. In the second speech, Johnson addressed the rumors that there were serious differences of opinion between him and Harold Koh, and confirmed the existence of disagreements among the various advisors. He suggested that they be viewed as proof of the complexity of the legal challenge and the seriousness of the attempts to confront it. Whether intentionally or not, these speeches all gave the impression that legal positions on some of the most complex issues, even when they were crystallized and agreed upon, had not been formulated without anguish and misgivings.

The next speaker was Attorney General Eric Holder, who of all the speakers is possibly the closest to Obama personally. In March 2012, he delivered a speech[10] at Northwestern University Law School in which he addressed, inter alia, the criticism of the government's wiretapping program and clarified several of the legal positions mentioned by his predecessors. The surprise in this series of speeches came a month later, when the Central Intelligence Agency also joined the "legal transparency offensive."[11] Stephen W. Preston, general counsel of the CIA, claimed in a detailed public speech[12] – uncharacteristic of the covert agency – that

the CIA's actions are also subject to the same ethical principles and to American and international law.

In late April of that year, following public criticism of the program of targeted killings, President Obama sent Brennan out to speak again.[13] This time, he focused on attempting to convince his listeners that the program operates according to a set of strict standards and procedures and is under the direct oversight of the President in order to ensure the legality of every action and reduce mishaps and errors to a minimum. According to Brennan, "the United States government has never been so open regarding its counterterrorism policies and their legal justification."

At this stage, commentators could no longer ignore the series of "canonical speeches"[14] that began with the address by the President and continued with the speeches by senior legal advisors in the State Department, the Department of Defense, the Department of Justice, the CIA, and of course, the speeches by "Mr. Security," John Brennan. Few people doubted that it was being closely coordinated by the White House. According to one description, it was Avril Haines, legal advisor to the National Security Council, who participated in drafting and coordinating the speeches.[15]

The next speech,[16] delivered in September 2012 by Harold Koh, provided answers to questions on a topic not covered by the previous speeches: cyber warfare. In this speech, Koh explained how the administration views international humanitarian law as valid in the virtual battlefield as well. A cyber attack, according to Koh, can be considered a military attack that triggers the right to self-defense. Likewise, any military action in this area is subject to the principles of the laws of war in international law.

Koh also addressed the question of why the United States should initiate and impose on itself legal restrictions in a new realm that is not covered by the "old laws." "International law," said Koh, "is not purely constraint, it frees us and empowers us to do things we could never do without law's legitimacy. If we succeed in promoting a culture of compliance, we will reap the benefits. And if we earn a reputation for compliance, the actions we *do* take will earn enhanced legitimacy worldwide for their adherence to the rule of law."

The last in the series thus far was another speech[17] by Jeh Johnson, which was covered in the media relatively widely, both in the United States and abroad. It may be that one of the reasons for this is that the Pentagon's

senior lawyer chose to deliver his address at Oxford University, but it is more likely that the content of the address was the principal reason for the interest it aroused. Johnson chose to devote his last speech as Defense Department general counsel to one of the legal framework's main weak points, which he and the other speakers took the trouble to formulate and present to the public.

According to that framework, much of the authority the United States derives for its war against al-Qaeda stems from the fact that the country has been in a state of war with the organization and its associates worldwide since 2001, in the wake of the September 11 attacks. This argument has led to criticism that in fact, the legal framework was of a war that was not limited in time or space, and it was thus liable to turn the exceptional situation of war, with powers that are reserved for this situation – such as extra-judicial killings, trials in military courts, and unlimited detention – into the new norm. In order to assuage this fear, Johnson attempted to persuade his listeners that in the view of the administration, the war with al-Qaeda has an end. The question is merely how we will know when it has arrived.

The United States, he explained, is involved in an unconventional war against an unconventional enemy, and therefore it should not be expected that the war will end conventionally by means of a truce or surrender. However, it should not be perceived as a permanent war. According to Johnson, if al-Qaeda continues to get weaker and its ranks continue to dwindle, as has happened in recent years, a tipping point will necessarily come when the state of war ends, and along with it, the relevant powers it grants the government.

On International Law

One of the main obstacles to the success of the overall message was the negative attitude toward international law and its institutions during the Bush administration. The new administration promoted a different approach: that the law was basically good and necessary, but that it needed an updated interpretation.

Many of those who gave the speeches stressed that any action taken by security forces in a conflict with al-Qaeda was weighed against four basic principles of the laws of war: (1) Necessity: the action was essential from a security perspective; (2) Distinction: a sufficient effort was made

to differentiate between combatants and civilians not involved in the fighting; (3) Proportionality: any damage that was nevertheless caused to civilians was proportional to the military benefit of the operation; and (4) Humanity: actions were designed so that unnecessary suffering is avoided and human dignity is preserved. When they are presented thus, simply, the laws of war (which are also called international humanitarian law) appear to offer a normative framework with which it is easy to concur. It is also easy to concur that abiding by these laws during asymmetric conflicts is a complex challenge. This is a better starting point for the debate on correctly interpreting the law so that it will fulfill its original purpose in 21st century conflicts as well.

A similar message was also conveyed regarding international legal institutions: they are important, but they need improvement. In his speech, Harold Koh spoke at length about the International Criminal Court and the UN Human Rights Council. The United States has significant differences with both institutions – namely, with respect to the definition of the crime of aggression and the biased approach toward Israel respectively – but, according to Koh, the current administration, in contrast to its predecessor, has decided to work to correct the flaws by means of constructive cooperation.

The essence of the message to the public was that international law and its institutions are not inherently antithetical to the interests of the United States. On the contrary: they have a positive potential that can be realized through initiative and leadership.

Taking Stock

Did the series of speeches succeed in reframing the debate? And if so, did this have positive consequences for security, for values, and for the law? It is still too early to make a definitive assessment, but there are sufficient signs that the answer to these two questions could be affirmative.

At the very least, it can be said that the debate on the administration's counterterrorism policies has become significantly more moderate than during the Bush administration. During the run up to his second electoral victory, President Obama received high marks from the public,[18] and even from his political rivals, on national security. In parallel, criticism of the administration's legal and ethical record by the Congress, the media, and human rights organizations remained limited for most of Obama's first

term. A former senior lawyer in the Bush administration admitted that Obama had succeeded, more than his predecessor, in gaining approval for his policy from the courts and in earning the cooperation of allies.[19] John Bellinger, who served as legal advisor to the State Department under Condoleeza Rice, expressed great appreciation for the Obama legal team's efforts to explain the legality of various actions taken in the name of national security. [20] Other commentators have described the situation toward the end of Obama's first term as a stabilization of the administration's "legal architecture" on issues of national security. [21] Some even spoke in terms of a broad, bipartisan consensus on the legal framework for counterterrorism,[22] a situation hard to imagine until recently.

These analyses are especially interesting given the fact that most of the commentators claim that in terms of pure legal positions, there was more continuity than change between Bush's second term and Obama's first term.[23] In their view, the Obama administration succeeded in gaining greater legitimacy at home and abroad for legal positions and military methods that are not very different from those of the Bush administration. The fact that Obama is a Democrat undoubtedly helped, but in all likelihood, his legal strategy and the public campaign to market it made a significant contribution. The administration translated this legitimacy into an expansion of military operations directed against al-Qaeda and into strengthening its alliances in various regions in the world. It has been reported that in documents seized at the home of Bin Laden after his death, the organization's leader complained that the al-Qaeda brand had become a liability, inter alia, because of changes in the rhetoric emerging from Washington after Obama's election. [24]

Opinion is more divided on the question of Obama's success in promoting the values of which he spoke. Some argue that the speech campaign helped tone down the criticism from the public, the courts, Congress, and the international community. They view with concern the legitimacy given today to actions that in the past provoked strong criticism, such as the broad wiretapping programs approved by the administration, or the continued detention of prisoners at Guantanamo—in certain cases, without trial and indefinitely. In addition, the administration's decision not to disclose documents describing serious instances of torture from the time of the Bush administration and not to prosecute any of those involved

sparked concern that Obama was perpetuating a tradition of immunity from the law.

These concerns were reinforced when a short time after Obama's reelection, in the last days of 2012, he signed two controversial laws: the Foreign Intelligence Surveillance Act (FISA) Amendments Act, which extends the powers given to the National Security Agency to eavesdrop on American citizens, and the National Defense Authorization Act of 2013 (NDAA), which almost completely blocks the chances of moving toward the closure of Guantanamo prison this year.

There is no doubt that the most trenchant criticisms of the Obama administration's legal positions focused on the aerial targeted killings in countries with which, from a legal point of view, the United States is not engaged in a state of war, such as Pakistan, Yemen, and Somalia. Mary O'Connell, a professor of law at the University of Notre Dame who has led the opposition to such operations since the Bush administration initiated them in 2002, is no longer a lone voice. In academic circles, among human rights organizations, and in the media, there are increasing allegations about the vast discrepancy between the genteel words of the speeches and their application in practice.[25] Outside the United States, where the legal campaign had limited resonance, public dissatisfaction with targeted killings is growing, and the question has already been raised as to whether this issue will become "Obama's Guantanamo."[26] Even the commitment to a future tipping point that will end the war with al-Qaeda did not allay these criticisms.[27]

However, the expectations of more radical change might have been excessive. As several of the speakers explained, every administration must maintain a good deal of continuity with the legal positions of its predecessor. Although Obama was limited by a Republican majority in Congress, he succeeded in implementing an impressive series of reforms, in eradicating unacceptable norms such as torture, and in defining new standards of transparency in matters of national security.

This series of speeches did not excite the general public, but it did create a positive impression with influential audiences in the legal, academic, and media world, as well as in international organizations, which in turn had a significant impact on the public debate. The presentation by prominent speakers of complex legal issues in a simple and accessible manner

provided public legitimacy not only for the administration's actions, but also for the justice system and for American and international law.

In 2013, this strategy is expected to face a significant test internationally. In January, Ben Emmerson, the UN special rapporteur on human rights and counterterrorism, declared that a comprehensive investigation would be launched into the legality of aerial targeted killings. It will be interesting to see whether the fact that Obama's first term advisors took the initiative and presented an orderly and well-reasoned set of arguments will help those of his second term to better cope with a legal, media, and diplomatic challenge of this kind.

Yet even an increase in the intensity of the debate over any one type of military action will not necessarily reduce the deep, long term ramifications of Obama's policy. Under his leadership, a political philosophy has been formulated and implemented, significantly increasing the extent to which the president's powers on national security are subordinate to US and international law.[28] With the help of his staff, he demonstrated a model in which the administration became increasingly bound to the law, and, at the same time, freer to act within the boundaries of the law; more exposed to substantive and legitimate criticism, but better protected from hostile criticism.

As noted, the dispute over US counterterrorism policies is alive, but it has changed. It can be said that Obama replaced the "false choice" between security and values with another choice, a real one, between two possible scenarios. In the first one (which he attributed to the previous administration), national security policy is made without adhering closely to the law and without transparency, but it is limited by reduced legitimacy at home and abroad. In the second, proposed by Obama, policy is limited by the strict confines of the law and by high standards of transparency, but enjoys broad legitimacy. In both scenarios, there is a risk of excessive and immoral use of force, and both have the potential for excessively limiting it. Therefore, public, judicial, and parliamentary oversight will always play an important role. Nevertheless, Obama and the other speakers attempted and largely succeeded in persuading their listeners that the second option, *their* option, is the only way in which security and values can be protected without compromising on either of them.

Lessons for Israel

Decision makers in Israel have several good reasons to think carefully before adopting a public legal strategy identical to the one described here. Israel is a small country; the threats to its security are varied and near, its room for error is limited, and its sensitivity to the loss of soldiers and prisoners of war is great. It has neither the ability to lead the free world or head great coalitions nor does it have any pretension to do so. It is much more exposed to diplomatic and legal proceedings in international institutions than the United States, and it has no reason today to expect fair treatment from some of them. Many people in Israel view international law as a weapon used cynically and unfairly by elements hostile to Israel in order to discredit and undermine it. In addition to all this, the complex legal situation beyond the Green Line and the fundamental constitutional questions that are awaiting political decisions could thwart even the most sincere desire to present a full, coherent, and convincing legal vision.

Nonetheless, it is worth noting several similarities. Like the Bush administration, the Israeli government suffers from a serious crisis of legitimacy that constrains its field of action politically and militarily. In Israel, too, the winds blowing from the senior political and military echelons carry with them the implicit notion that the type of conflict in which Israel is involved sometimes requires making a choice between ensuring security and upholding the law (or necessitates changing the law). Israel, like the United States, celebrates an ethical heritage that constitutes a moral compass. Its roots lie deep in Judaism, in the universal values of the Enlightenment, and in the historical role reserved for the Jewish story in the development of international law and recognition of human rights after World War II.

Israel's legal positions on most security-related issues can be found scattered like the pieces of a puzzle in replies to court petitions, Supreme Court rulings, testimonies of witnesses before commissions, newspaper articles, and transcripts of academic panels. When the government appoints a commission to write a more comprehensive legal opinion, such as the commissions headed by Attorney Talia Sasson, retired Judge Yaakov Turkel, and retired Judge Edmond Levy, it grants the commission a narrow mandate, and it does not always adopt its conclusions. Legal ambiguity appears to be the preferred choice not only for diplomatic and security reasons, but also as a political necessity.

The attitude toward international law in statements by government and security officials often ranges from disdain to seeing it as a problem that has to be considered, albeit reluctantly.[29] Professor Eyal Benvenisti recently wrote[30] about the danger in such statements:

> Statements by various IDF spokespeople or consultants showing contempt for international law could affect the decisions of international courts in the future...Such statements are liable to endanger the IDF's freedom of action and reduce it in future combat. Such statements are liable to create the impression that Israel has little regard for international law because the law is neither relevant nor moral.

In the same publication, Col. (ret.) Pnina Sharvit Baruch described[31] how the public attitude toward international law hampers existing efforts to attain legitimacy in the legal arena.

> It is unfortunate when statements are made by [defense establishment] officials, including senior figures, suggesting that "the rules [of international law – Y. E.] are inappropriate and new ones must be formulated." First of all, such statements are incorrect. In addition, such statements are liable to create the impression that Israel has ignored the laws of warfare since it deemed them to be "inappropriate rules." Thus we find ourselves in a situation in which on the one hand we act on the basis of the rules even when this means imposing restrictions on ourselves, and on the other hand we are accused of ignoring them, in part on the basis of such statements.

These are important recommendations, and if we are to judge by the conduct of officials during Operation Pillar of Defense, it appears that they have been internalized, at least partially. The Cabinet decision from the first day of the operation states explicitly that "Israel will act to the best of its ability to avoid harm to civilians while respecting the humanitarian needs of the population, all in accordance with the rules of international law." In addition, a number of reports have appeared in the media about the central role played by the attorney general in authorizing military operations. Minister of Justice Yaakov Ne'eman stated in an interview with Army Radio: "The State of Israel is careful to act in accordance with the law . . . the IDF does everything necessary in order to observe all the

rules of international law. Even though the other side violates all the rules, harming civilians, we observe all the rules of international law."[32]

The above citations reflect a welcome process of learning lessons from the military conflicts of recent years. Nevertheless, in most of these examples, the approach still remains limited to general statements and damage control. It would probably be more beneficial to formulate legal positions into a vision that can be presented to the public, and to explain how within its framework, Israel's security challenges can be met alongside an uncompromising commitment to Israeli and international law.

Imagine that a legal argument that justifies an action or a policy connected to security is explained fully to the public before it is presented to the court; before the petition is submitted and not in response to it; by a senior legal figure and not by an anonymous lawyer; directly to the citizens of Israel and not before commissions of one kind or another; in language that is simple, not tortuous; and as part of a broad, well structured legal framework and not in response to an isolated challenge. Imagine the military advocate general describing, in a public speech, the decision making process that takes place before an air strike is approved or a checkpoint is set up, or the Shin Bet's legal advisor explaining to law students what the criteria are for approving administrative detention, and what the mechanism of oversight is for such decisions. Imagine a YouTube video of a speech by the Foreign Ministry's legal advisor about the legal framework within which Israel conducts its policies regarding the West Bank and the Gaza Strip. Imagine a press conference in which the defense minister announces his decision to strike a new balance between the need to conceal operational information from the enemy and the need to reveal to the public, in so far as is possible, the standards on the basis of which actions are taken in its name and for its security. Finally, imagine that this entire initiative were led and coordinated by the Prime Minister's Office. Would such an initiative harm or strengthen Israel's security?

There is no doubt that such a change would require leadership and a joint effort by various government offices. Perhaps it is no coincidence that the campaign described here was led by a US administration in which the President is a professor of constitutional law[33] and is surrounded by lawyers. In his first term, the President's national security advisor, the Vice President, the Vice President's national security advisor, the Secretary of

State, the Secretary of Defense, and the Secretary of Homeland Security were all trained as lawyers.

However, with or without help from above, the power to promote a reframing of the public debate is in the hands of anyone who takes part in it. Military officials and security experts have the power to convey the fact that obeying the law and maintaining values are first-rate strategic assets. They can also contribute to shaping improved norms of transparency in the security establishment. Legal counsels have the power to push for the publication of the state's legal arguments in an orderly and accessible fashion – even, or especially, on controversial issues. Human rights organizations have the power to prove that an uncompromising commitment to the law and to values can go hand in hand with a serious approach to security concerns and to the operational and ethical complexities of asymmetric conflicts. Research institutes and academic institutions have the power to reinforce the connection between research on national security and research on issues of law and human rights. For the vast majority of them, this means expressing a truth in which they already believe: in the long run, it is not possible to maintain security without values, or values without security.

Notes

1 Remarks by the President on National Security, National Archives, Washington, D.C., May 21, 2009, http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09.

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3 Daniel Klaidman, *Kill or Capture: The War on Terror and the Soul of the Obama Administration* (Houghton Mifflin Harcourt: Boston and New York, 2012).

4 See http://www.nobelprize.org/nobel_prizes/peace/laureates/2009/obama-lecture_en.html.

5 Harold Hongju Koh, "The Obama Administration and International Law," Washington, D.C., March 25, 2010, http://www.state.gov/s/l/releases/remarks/139119.htm.

6 Remarks as Prepared for Delivery by Assistant Attorney General David Kris at the Brookings Institution, Washington, D.C., June 11, 2010, http://www.brookings.edu/~/media/events/2010/6/11%20law%20enforcement/0611_law_enforcement_kris_remarks.pdf.

7 Remarks of John O. Brennan, "Strengthening our Security by Adhering to our Values and Laws," Cambridge, Massachusetts, September 16, 2011.

8 Jeh C. Johnson's Speech to the Heritage Foundation, October 18, 2011, http://www.lawfareblog.com/wp-content/uploads/2011/10/20111018_Jeh-Johnson-Heritage-Speech.pdf.

9 Jeh C.Johnson's Speech on "National Security Law, Lawyers and Lawyering in the Obama Administration," Yale Law School, New Haven, Connecticut, February 22, 2012, http://www.cfr.org/national-security-and-defense/jeh-johnsons-speech-national-security-law-lawyers-lawyering-obama-administration/p27448.

10 Attorney General Eric Holder Speaks at Northwestern University School of Law, Chicago, March 5, 2012, http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html.

11 This expression was coined by John B. Bellinger in "More on the Obama Administration's National Security Speeches," *Lawfare Blog*, April 20, 2012, http://www.lawfareblog.com/2012/04/more-on-the-obama-administrations-national-security-speeches/.

12 CIA General Counsel Stephen Preston's Remarks on the Rule of Law, Harvard Law School, Cambridge, Massachusetts, April 10, 2012, http://www.cfr.org/rule-of-law/cia-general-counsel-stephen-prestons-remarks-rule-law-april-2012/p27912.

13 Remarks of John O. Brennan, "The Ethics and Efficacy of the President's Counterterrorism Strategy," Woodrow Wilson International Center for Scholars, Washington, D.C., April 30, 2012, http://www.lawfareblog.com/2012/04/brennanspeech/.

14 This is the name given to these speeches on the *Lawfare Blog*. See, for example, the post by Professor Kenneth Anderson from April 19, 2012: "What Should the Administration Say? The Canonical National Security Law Speeches of the Obama Administration Senior Officials and General Counsels."

15 See note 11.

16 Harold Koh, "International Law in Cyberspace," U.S. Cyber Command Inter-Agency Legal Conference, Fort Meade, Maryland, September 18, 2012, http://opiniojuris.org/2012/09/19/harold-koh-on-international-law-in-cyberspace/.

17 Jeh C.Johnson, "The Conflict against Al Qaeda and Its Affiliates: How Will It End?" OxfordUniversity, November 30, 2012, http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/.

18 See "Obama Security Record Gives GOP Few Openings," *Fox News*, June 19, 2012, http://www.foxnews.com/us/2012/06/19/obama-security-record-gives-gop-few-openings/.

19 Jack Goldsmith, "Obama's Weak Spots on Counterterrorism are Open to Romney," *Washington Post*, April 27, 2012, http://www.washingtonpost.com/opinions/obamas-weak-spots-on-counterterrorism-are-open-to-romney/2012/04/26/gIQAJ42zjT_story_1.html.

20 See note 11.

21 Robert Chesney, "Beyond the Battlefield, beyond Al Qaeda: The Destabilizing Legal Architecture of Counterterrorism," *Michigan Law Review* (forthcoming), downloaded from SSRN, September 2012, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2138623.

22 Ritika Singh and Benjamin Wittes, "Two Parties, One Policy: Washington's New Consensus on Terrorism," *Commonweal Magazine*, September 14, 2012, http://commonwealmagazine.org/two-parties-one-policy.

23 John B. Bellinger, "More Continuity than Change," *New York Times*, February 14, 2010, http://www.nytimes.com/2010/02/15/opinion/15iht-edbellinger.html?_r=3&&gwh=4E4F52DA963A0D510C0E5C4DAD1DBD84.

24 David Ignatius, "The Bin Laden Plot to Kill President Obama," *Washington Post*, March 16, 2012, http://www.washingtonpost.com/opinions/the-bin-laden-plot-to-kill-president-obama/2012/03/16/gIQAwN5RGS_story_1.html.

25 On aerial targeted killings see, for example, Micah Zenco, "The Seven Deadly Sins of John Brennan: What Obama's High Priest of Targeted Killings Doesn't Want You to Know," *Foreign Policy*, September 18, 2012; Anthony Romero, Executive Director of the American Civil Liberties Union, "When the President Orders a Killing," Letters to the Editor, *New York Times*, May 31, 2012.

26 John B. Bellinger, "Will Drone Strikes Become Obama's Guantanamo?" *Washington Post*, October 3, 2011.

27 Glenn Greenwald, "The 'War on Terror'—by Design—Can Never End," *Guardian*, January 4, 2013, http://www.guardian.co.uk/commentisfree/2013/jan/04/war-on-terror-endless-johnson.

28 Trevor Morrison, "Obama v. Bush on Counterterrorism Policy," *Lawfare Blog*, November 11, 2012.

29 As a positive example of an approach to law in the professional echelons, it is worth noting statements made by Maj. Gen. (ret.) Avihai Mandelblit when he was military advocate general of the IDF, in an interview published in *Haaretz* on September 18, 2009. Mandelblit stated, inter alia, "But the rule was clear to all ranks and on all levels: we act according to the principles of international law all along the way"; "Asymmetric war is not asymmetric only in the sense that one side has fewer weapons and the other more, but that one (Hamas) sees itself as exempt from the rules of international law and the other (Israel) is bound by them"; "Our goal is to win the war, but in accordance with the limitations of the law. This is a professional issue, part of the military profession"; "The directive to the army is to act according to the laws of armed conflict, the test is connected to proportionality and also to a distinction between combatants and civilians. The military advantage that you gain from any attack must exceed the collateral damage that could be caused. That is how the directives have come down to the field."

30 Eyal Benvenisti, "How Challenges of Warfare Influence the Laws of Warfare," *Military and Strategic Affairs* 4, no. 1 (2012): 33-38.

31 Pnina Sharvit Baruch, "Legal Dilemmas in Fighting Asymmetrical Conflicts," *Military and Strategic Affairs* 4, no. 1 (2012): 39-50.

32 "IDF again Calls on Gaza Residents to Leave Areas where Hamas is Active," Tal Lev-Ram, Army Radio, November 20, 2012.

33 On the connection between Obama's academic background and his security policy, see David Luban, "What Would Augustine Do? The President, Drones, and Just War Theory," *Boston Review*, June 6, 2012.