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The United States, Israel, and the Affective Lives of Moral Injury

A Genealogy of Lawfare's Emotional Presuppositions

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ABSTRACT

While 'lawfare' is subject to numerous understandings, I argue that a neglected line of inquiry surrounding lawfare is the emotional presuppositions invoked by the usage of this term. Viewing said emotions as deeply linked to the formative American and Israeli invocations of this particular word, I advance the argument that the use of the term 'lawfare' expresses a fear of 'moral injury' whereby acting contrary to stated values might impair combat efficiency. Exposing this point, I argue, demands a genealogical investigation of the varied intersections of law, war, and morality within the American and Israeli experiences preceding the articulation of 'lawfare' immediately after 9/11. I focus here on the interlinkage of various events, and the diverging ideologies that framed them, from experiences of Nazism to the Vietnam War to Israel's various multi-scalar wars against both its neighbours and the Palestinians. Through exposing these histories and their affective legacies, we gain deeper insights into the long shadows of moral injury that lawfare discourse seeks to pre-empt. Such an exercise possesses great value when navigating a geopolitical future that, despite its many uncertainties, will likely include increasingly prolific invocations of 'lawfare' that stem from deeply rooted and historically textured emotions.

Keywords: lawfare, moral injury; Israel, United States, history of the laws of war

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1. Introduction – An Anti-emotional Emotionalism

Whatever the future of 'lawfare' may be, defining attributes of this concept's origins cannot but be relevant. Articulated in its modern form by then US Air Force Colonel Charles Dunlap in the immediate wake of 9/11, lawfare presented the prospect of military action being undermined by legal interference.[1] According to Dunlap (2001, 20) '…those interested in promoting law as an ameliorator of the misery of war are obliged to ensure it does not become bogged down with interpretations that are at odds with legitimate military concerns.' Inexorably positioned alongside President George W Bush's revenge-fuelled and truth-transcending vows to militantly eradicate terrorism (Kellner, 2007), imaginations of illegitimate lawfare could not but elicit the most intense of emotions. In the face of the US's defining alliance with Israel, lawfare's emotive qualities took on additional dimensions as they concerned Israeli suppression of Palestinian resistance in the Occupied Territories via the Second Intifada that began in September 2000. With Israeli uses of force already accused of going beyond what the law of occupation allowed (Falk, 2000), once the attacks of 11 September 2001 occurred, there was little doubt in many minds that violence-constraining legalism might be wielded by the enemies of those with the capacity, will, and legitimacy to annihilate the existential, but mystified, threat of terrorism (Ansah, 2010; Gordon, 2014). Giving terminological expression to this instinct, lawfare discourse emerged in its modern iteration with an exceedingly narrow American/Israeli focus.[2] Riding the high waves of emotion that defined and connected these formative contexts, charging 'lawfare' could communicate profound indignation towards anyone who would use popularly accessible legal discourses to take even the slightest

[1] On earlier constructions of 'lawfare', see Werner, 2010.
[2] '[T]he lawfare literature is devoid of any sense that there is a geography and history of lawfare beyond the US and Israel and before 9/11': Jones, 2014, 226.

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issue with the US or Israel acting upon its sacrosanct 'freedom to fear' (Carty, 2002).

However, there is something deeply paradoxical about lawfare if we are to consider its affective salience in relation to the traits often associated with 'law' and 'warfare' that, in their amalgamation, create 'lawfare.' After all, theorists and practitioners of both law and war tend to define their pursuits as transcending, or at least circumscribing, the domain of human emotion. Regarding the former, while there is an increasing body of literature on law's relationship to emotions (Bandes and Blumenthal, 2012), their relationship continues to nevertheless be defined by the view that law is an objective medium that must maintain its objectivity regardless of the emotions it invokes (Grossi, 2019). Regarding the latter, war – and the waging of war – is typically shaped by an ethos of affective distancing in its efforts to control emotions such as fear and compassion when rendering the efficient conduct of organised force/violence possible (Grossman, 2009). In few instances was cold calculation as a common presumption of law and war more apparent than during the US-led 'Global War on Terror', the same context giving rise to modern lawfare discourse.[3] Against this backdrop of disclaimed affective relevance regarding the law-war continuum, lawfare discourse produced something of a designated 'safe space' for expressing emotion on the topic of law and war by those who saw the 'Global War on Terror' as a just endeavour.

To identify this emotive paradox of lawfare is to identify something important concerning its discursive function – if discourse is understood in the Foucauldian sense to consist of assertions of rival truth claims within structures defined by shifting power dynamics (Foucault, 2001). Here, to claim truth is lodge an assertion of power that, through the discursive function, opens the door to rival truths by those seeking their own empowerment. This quest for power through 'truth' is especially relevant to

[3] Here, through models developed by influential conservative figures shifting between academia and government, selective compliance with international law was presented as a matter of 'rational choice' when furthering the US's particular conception of its security interests, Ohlin, 2014.

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lawfare, given how its component parts of law and war, concepts connected to the truth of power, relate to one another as matters of both popular perception and actual operation. As David Kennedy (2006) has shown, while law is often understood to be an alternative to war and/or a means of contesting war's violence, this presumption is prone to concealing how modern war operates through highly legalistic means whereby essential coordination functions could not be untaken without law's organisational capacities. As such, those who criticise war in the name of law are liable to being dismissed as insufficiently knowledgeable, and thus not grasping the 'truth', of what it means to subject war to law.

Given how consciousness of this law-war relationship can differ dramatically depending on where one is placed in relation to the broader apparatus surrounding the law-war continuum, there is much room for discursive contestation that draws upon all manner of emotional force given the existential stakes of war and, for that matter, law. Faced with lawfare discourse as a site of clashing truth claims prone to intense emotionality,[4] following Foucault (1977), I advance the argument that, rather than any embodiment of absolute truth, 'lawfare' can be understood through a genealogical exploration whereby a series of incidents, accidents, and peculiarities over an extended timescale contingently merged to make

[4] With lawfare, one must account for how discourse has expanded over the last quarter-century. By approximately 2007/08, the almost universally pejorative assertions of lawfare began giving way to a purported non-normative usage of the term as a framework for characterising the relationship between law and war, Irani, 2018, 126. While many continued to invoke lawfare as a term of indignation, others, including Dunlap (2010) himself, came to emphasise lawfare's neutrality and implored the prospect of Western states themselves explicitly deploying law to further strategic aims. Owing to the broader application of lawfare as a purportedly neutral tool of explanation, there has been no shortage of efforts to invoke it as a means of describing and/or pursuing Western rivalries with Russia and China, see Voyger, 2018; Goldenziel, 2022; Nash and Guzel, 2024; Malzac, 2024. However, it would be exceedingly difficult to argue that the affectively distanced neutral framing of lawfare might eventually transcend the affectively laden formative pejorative framing of this term for there is simply too much organised effort to promote the characterisation of lawfare as an illegitimate tactic, Gordon, 2024. The widespread post-October 7th framing of legal efforts to intercede on behalf of the Palestinians as 'illegitimate lawfare' is a testament to this persistence, see e.g., Sabel, 2023; Bauhn, 2024. For an attempt to reconcile lawfare usages in both neutral and pejorative senses, see Kittre, 2015.

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something amorphous appear, and be experienced, as something concrete. On this basis, connecting historic bodies of discourse – and the clashes of truth and power embedded within them – provides for an account of lawfare's worldly force and emotive resonance that is conscious of the limits of discourse itself. However, this analysis goes beyond the mere exposure of the indeterminacy of novel language via the excavation its contested lineages. In addition to destabilising the truth claims of those who would present 'lawfare' in determinate terms, through this genealogy I aim cast light on the underlying material structures of international law and politics that manifested to produce lawfare as a distinct discursive form (Vucetic, 2011, 1311). This matter of materiality on this front is all the more important given how so many individual lives are shaped by the material effects of what those empowered to wage war happen to think about war and its relationship to law (Jones, 2025).

In constructing this genealogical account of lawfare discourse according to these presumptions, the seemingly paradoxical emotionality that manifested with coining of the term 'lawfare' in the wake of 9/11 could hardly be more relevant. I thus take the position that no subsequent invocation of 'lawfare' can be fully divorced from the affective weight of the context that made this term so captivating to so many. Understanding this reality means delving into the politics of trauma and the modalities of worldmaking that, paradoxically, made 'lawfare' discourse a profound catalyst for performative emotionality despite the ideals of emotional decoupling that shape understandings of both law and war. Given the worldly impact spawned by emotional reactions of those who assert 'lawfare' for the purpose of condemning it, there is little option but to engage with the emotive presuppositions that animate this term and their histories. To do so is to shift lawfare discourse away from the terms set by those for whom 'lawfare' is an object of profound emotional attachment. As such, we must ask why this attachment took the form that it did?

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In unpacking these assertions, as a compliment to Foucauldian genealogy, my analysis of the origins of the emotive presuppositions behind 'lawfare' discourse will be an exercise in what Clifford Geertz (1973, 3-30) deemed 'thick description.' Here, in contrast to exclusive focus upon the 'thin' abstracted logics of geopolitical competition or international legal doctrine, my objective is to account for the many deeply-embedded socio-cultural forces that, in their intersections, become reified through a subject that finds meaning in the term 'lawfare' as an embodiment of their anger, fear, and contempt. This, in turn, opens the door to broader considerations of how the lawfare-hating (and lawfare-fixated) subject influentially acts upon the world, especially when the models of subjectivity they use to define themselves fall into the very hands of those they wish to exclude. While struggles over the meanings of law, war, and their inter-relationship are global in their distribution, in constructing a genealogy of the affective lives of lawfare, my predominant focus is on the US, Israel, and their (in)famous 'special relationship.' After all, 'lawfare' – as we know it – would not possess its current meaning had it not been for the connected efforts of these two nations to shape the laws of war as they have. The affective politics behind this conjoined American-Israeli effort, and their similarly emotive potential consequences, is a story that remains to be told. Uncovering this story can demystify the rhetorical alchemy of 'lawfare' whereby the question of 'is the US/Israel violating the law in its fight against terrorism?' is redirected into the question of 'why would you try to aid the enemy by morally injuring us?'

I begin my account by theorising how 'moral injury' can be understood as the 'concept behind the concept' when making sense of the rhetorical stakes of lawfare discourse and its asserted boundary lines of who can assert what. I argue that the impasse of lawfare's rhetorical traps could be undertaken through a genealogy that exposes the terms of moral injury as it concerns the US and Israel. From here, I begin a genealogical account focused on the timeframe from between the end of the Second World War and the 1967 'Six-Day War' that forged the modern US-Israel 'special relationship.'

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I then turn to the 1970s as a moment of major global shifts and argue that the varied uncertainties here brought the US and Israel ever closer together, especially as it concerned mutual condemnation of Third World attempts to transform international law into a system that would serve the interests of the world majority. Finally, I consider developments in the 1980s and 90s, especially as they – in a highly contradictory capacity – engendered the hopes that American hegemony, peace in the Middle East, and the grand expansion international law could all occur in a harmonious mutually-reinforcing capacity. As the attacks of 9/11 dashed these hopes, this set the stage for the discourse of 'lawfare' to be deployed by those whose histories gave them ample occasion to fear moral injury.

2. What Weight to Moral Injury?

In their efforts to theorise war beyond narrow disciplinary presumptions, Tarak Barkawi and Shane Brighton (2011) assert that, if war can be said to possess a transcendent essence, it is exposure to radical contingency. In other words, to wage a war, and thus raise the stakes of a dispute to the highest existential level, is to invite the possibility that anything might happen. While this dynamic is certainly visible on the rarefied domain of the battlefield, this is but a fraction of war's contingent possibilities. Whether art/literature, scientific/technological innovation, political ideals/identity, morals/ethics, or legal principles/institutions (both within and between bounded polities), all of these meta-domains have long histories of being transformed in ways they never would have otherwise been transformed had it not been for war. Amid the war-triggered tempest of contingency, even the most concerted attempts to invoke existing presumptions in the name of stability have a tendency of being swept up in the storm and retooled into the very novelties they originally attempted to pre-empt.

When viewing the charge of lawfare as a stabilisation attempt in the face of the profound universe of war-related contingency triggered by 9/11, it is

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not difficult to observe how this discourse worked to secure particular constructions of identity. Dunlap (2001, 4) made this dynamic of identity-based risk and securitisation central in his statement that:

> There are many dimensions to lawfare, but the one ever more frequently embraced by US opponents is a cynical manipulation of the rule of law and the humanitarian values it represents. Rather seeking battlefield victories, *per se*, challengers try to destroy the will to fight by undermining the public support that is indispensable when democracies like the US conduct military interventions. A principle way of bringing about that end is to make it appear that the US is waging war in violation of the letter or spirit of [the Law of Armed Conflict].

When interpreting this assertion, what becomes readily apparent is a view of liberal values existing in a fine balance with the effective military capabilities that secure the very conditions of liberalism in a dangerously illiberal world. Accordingly, the proliferation of legal doctrines regarding humanitarian protection and constraints on military discretion might serve to impair the very operation of American power in ordering the world on more or less liberal terms. Should these legal arguments, fall into the hands of America's enemies, then through their persuasive impacts (upon humanitarian advocates, democratic publics, or even US servicemen), the performance of the US military is unduly constrained. Thus, according to this argument, in using formally liberal precepts to undermine a substantive American mission, 'lawfare' has the power to render liberalism the proverbial snake that devours its own tail.

It did not take long before this designation of 'lawfare' became a terminology for furthering the pre-existing narrative that Israel, especially at the UN, was disproportionately condemned as a violator of international law

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– a condemnation often believed to be a pretext for antisemitism.[5] On this reading, criticism of Israel on the grounds of international law, especially as it might be perceived to implicate the Israeli state's 'right to exist' (a discourse that itself exceeds international law's capacity (Vidmar, 2015)), is akin to the antisemitism experienced by the individual Jew (Klug, 2003). A major illustration of how the term 'lawfare' offered a tool for those who feel threatened along these lines is the 'Lawfare Project' a self-professed Jewish civil rights organisation dedicated to legally entrenching a seamless nexus between Zionism and Judaism (Goldstein, 2010) – especially as it concerns equating criticism of Israel with antisemitism.[6] This is to say nothing of how the lawfare concept has been embraced by leading Israeli international lawyers, namely Yoram Dinstein (2011), who presented this term in a manner evoking distinctions between the 'civilised' and the 'barbarous.'

Such efforts to assert stability in the face of far-reaching contingency at least partially accounts for why lawfare discourse faces grave limits, and reproduces extensively critiqued tropes, when theorising the law/war relationship within the present global system. To quote Craig Jones (2020, 297) on this point, '…prevailing accounts of what has been called 'lawfare' assert rather than explain the juridical turn in late modern war.' Additionally, as Freya Irani (2018, 120) makes clear, when Western lawyers speak of lawfare – especially in response to non-Western charges of Western legal breaches – they deploy a distinct vocabulary regarding the 'abuse', 'misuse', and 'cynical manipulation' of law. However, '[o]ften these terms appear without being related to any particular practices: that these invocations are misuses appears self-evident in this discourse' (*ibid*, 121). Thus, within such lawfare narratives, respect for the law – in spirit if not letter – is presented as a Western cultural trait relative to non-Westerners that exists *a priori* to any

[5] A structure of this argument is that the Israeli-Palestinian Conflict is fundamentally 'political', yet the Palestinians have distorted this by framing it as 'legal', see e.g., Zipperstein, 2022.

[6] In this way, entities like the Lawfare Project, ironically use law to solidify a preferred interpretation of Jewishness as an attempt to silence dissenting conceptions of this identity/tradition, see Mann and Yona, 2024.

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specific application of, or (non-)compliance with, the law (*ibid*, 122-125). Such sentiments are only further exemplified through the ways in which Western lawyers, especially after their embrace of lawfare as a 'non-normative' descriptive category, view their applications of law as non-violent alternatives to violence – even when the actual impacts of these legal interpretations are markedly violent (*ibid*, 126-128). All of this begs the question of why those who claim charges against them as 'lawfare' are seemingly willing to uncritically tolerate such analytical shortfalls when faced with the arguments of those who seek to de-monopolise discourse the laws of war.

Might this have anything to do with how the identity-edifying weight of what they seek to protect provides pressing incentive to frame and reproduce 'lawfare' in a manner calling for extensive restriction of who can legitimately discuss, and access, law in relation to war (Hughes, 2016)? In answering this question in the affirmative, zealously guarding the laws of war via lawfare discourse arguably has a great deal to do with perceived threats of contingency. After all, influential legal interpretations coming from academia, civil society, and international organisations, make it harder for governments and militaries to possess a monopoly on the interpretation of the laws of war, and this loss is a powerful source of uncertainty. This is especially true given how, in the rarified domains of 'national security law', the lawyers most likely to charge 'lawfare' operate without much of the scrutiny otherwise imposed by the legal field (Hathaway, 2021). Yet, on a substantive level, if there is a concept that encapsulates the fears of those who charge 'lawfare' – a fear those seeking to control wartime contingency wish to eradicate – it is 'moral injury.'

While the term 'moral injury' has a highly political history (MacLeish, 2018; Abu El-Haj, 2022, 127-164) – and one of the utmost relevance to the genealogy detailed below – when thinking through the charge of 'lawfare' it makes sense to think of moral injury as those who lodge the 'lawfare' charge think of it. Broadly defined as the '…psychological, biological, spiritual,

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behavioural, and social impact of perpetrating, failing to prevent, or bearing witness to acts that transgress deeply held moral beliefs', this risk of moral injury is exceedingly pronounced in war given its rendering of otherwise taboo acts of killing into survival imperatives and duties to others (Lumpkin, Stewart, and Kornegay, 2024, 96, quoting Litz et al, 2009, 697). Moreover, owing to the collective nature of military engagement, the existence of a morally-injured subject, and its possible reproduction, questions the general will to fight. Contrast against the idealised heroic subject whose gallantry in combat can be linked to the justice of their cause, the possibility of one being morally injured by engaging in the same actions tarnishes any overarching narrative of justice. Owing to this susceptibility, varied 'just war' doctrines exist to free combatants' conscience when executing the labour of war. In the words of Robert Meagher (2014, 129), just war '…promised at least the possibility of war without sin, war without criminality, war without guilt or shame, war in which men would risk their lives but not their souls.'

This issue of moral injury takes on unique dimensions in the asymmetric situations that gave rise to lawfare discourse whereby the liberal universalist self-conception of those waging constrained war in accordance with humanitarian principles is contrast against a 'savage' enemy purported blatantly disregard the same set of constraints. Here, as a general matter, by committing itself to humanitarian values and the peaceful resolution of disputes as guiding ideals, liberalism cannot embrace the violence of war as a good in and of itself (Howard 2008). After all, given how the protection of individual life is central to liberal philosophy, the taking of life in war demands a justification that this violence was necessary to prevent a greater harm to the continuity of life under conditions that dignify individual well-being (Dillon and Reid, 2009). On this basis, eliminating an enemy that views violence as an end in and of itself, while maintaining one's liberal self-perception in doing so, serves this logic of dignification despite the deployment of otherwise anathema acts of killing. Given this dynamic, maintaining a sense of liberal conscience under the harshest of wartime

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conditions and professing constraint when faced with an enemy presumed incapable of reciprocation on this point thus becomes a testament to how individual morality constructs collective liberal legitimacy.

Against this presumption, by possessing a conscience that can be morally injured, the very vulnerability of an individual combatant serving a liberal cause becomes a source of collective resilience. This individualised susceptibility to moral injury links closely to liberalism's individualisation of moral conscience – a line of discourse expanded immensely by the so-called 'individualisation of war' purportedly expanded through twenty-first century conflicts (Welsh, 2019).[7] As a result of this individualistic construct, within a system premised on liberalism, a former combatant's expression of their moral injury as a matter of individual experience cannot as easily be countered by any just war tradition premised on a collectively shared notion of substantive morality. In the face of this absence, the laws of war – just war's 'non-identical twin' (Luban, 2017) – takes on an enhanced degree of weight in relation to liberal justification. Here, true to liberal abstraction, legal obligation provides a 'thin' medium of institutional coordination that provides an alternative to shared substantive morality as a basis for order (Knox, 2022, 35). This abstracting quality is present in how liberal notions of 'humanity' shaped a codified laws of war allegedly able to successfully bind actors otherwise prone to disagreeing about substantive morality (Kalmanovitz, 2020, 127-151).

Against this liberal backdrop, centring moral injury greatly expands insights into how the charge of 'lawfare' operates. In viewing opinion on war as the prioritised purview of the individuals who have waged it, those who dismiss non-military (or non-military adjacent) invocations of the laws of war to scrutinise military action are appealing to liberalism's deferral to the subjectivity of moral experience that exists in tension with liberalism's promotion of universally accessible inquiry. This prioritisation has everything

[7] For a critical approach, see Tognocchi, 2024.

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to do with how the wartime risk of moral injury purportedly exists beyond the experience of the noncombatant. Prioritising this standpoint in legal evaluation becomes crucial given how the interpretation of the laws of war (i.e., "was a target the result of legitimate civilian/combatant 'distinction'?", "was an attack 'proportionate' to achieving a legitimate objective?", etc.) has great bearing on whether a given wartime action should or should not be accepted as morally injurious (Luban, 2013). On this basis, since the gravely impactful possibility of moral injury is at stake when applying and interpreting the laws of war, this process of handling the law must be carefully controlled. Otherwise, those who seek to undermine military efficiency through inflicting moral injury via lawfare might find themselves aided and abetted by a cadre of 'useful idiots' who believe that, by invoking the laws of war, they are promoting humanitarian values when, in fact, they are undermining their possibility. As such, the fear of moral injury as an uncontrolled contingency of war forms the kernel of Dunlap's (2001, 4) influential warning on the dangers of the perception that military forces battling the existential threat of terror are '…waging war in violation of the letter or spirit of…' the law.

When thinking through the ways in which liberal ideals formed and sustained the lawfare concept in the context of the 'Global War on Terror', a binding agent of the utmost power was the imagination of a profoundly illiberal enemy utterly impervious to moral injury. This of course took the form of Islamic 'holy warriors' who, in their fixation upon otherworldly reward and resorts to suicide bombing, represented a grave 'radical evil' that exists beyond temporal reasoning and only yields to pre-emptive force (Bilsky, 2004). However, a quarter-century in retrospect, while such American and Israeli justificatory narratives for violence are alive and thriving, the same cannot be said of liberalism as an active force of legitimation within these societies, let alone their relations with the greater world. While designations of 'liberal' are not – and never were – premised on any strict conduct-based criteria (Lawson and Zarakol, 2023), the US, as it is

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currently led by Donald Trump, and Israel, as it is currently led by Benjamin Netanyahu, are openly eschewing liberal models of reasoning and justification with seemingly no end in sight.[8] Given that lawfare discourse was so strongly linked to a purportedly liberal identity, especially as it constructed and characterised moral injury, what does – or could – lawfare possibly mean against such a backdrop of liberal desolation?

Against the broad theoretical framing presented above, given that liberalism is no longer there to act as a façade, I seek to uncover the affective coordinates of American and Israeli lawfare discourse in substantive terms. Through this movement, it becomes possible to see how collective imaginations of trauma, suffering, and sacrifice manifest as modalities of political power in the US and Israel and shape the close relations between these two nations. Doing so requires a showcasing of how this admittedly vast reality crystallises into emotion-laden, and moral injury-fearing, invocations of 'lawfare.' Such an account only makes sense if we can identify what concepts, structures, and events the lawfare-hating subject draws upon when crafting lawfare narratives for the purpose of hating them. To expose this process of subject-formation, I present a broad genealogy that disaggregates a varied array developments for the purpose of showing how their affective legacies are amalgamated through the term 'lawfare.'

3. Setting Moral Standards: American Supremacy, Zionist Nationhood, and Postwar International Law, 1945-1968

When it comes to exemplifying the attributes of law and war that tensely result in modern lawfare discourse, the Second World War was an important point of unification. Through this conflict, Adolf Hitler's Nazi Germany provided a hitherto unforeseen manifestation of supreme universal evil that,

[8] Such rejections of liberalism are, arguably, responses to the compounded moral injuries of the wars of the past several decades where, through the forging of a new identity beyond liberalism, the violence inflicted abroad came home, see Subotic and Steele, 2018; Hajjar, 2019; Rajah, 2022.

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in the eyes of those who could claim a particular oppositional relationship with said evil, enables particularity here to be legitimised in universal terms. For the project of American global supremacy – in challenging the longstanding American tradition of non-entanglement in great power alliance systems – a particular legitimacy was claimed through the assertion of itself as the supreme *vanquisher* of the ultimate universal evil (Foner, 1999). For the Zionist project of creating Israel as a Jewish state in historic Palestine – in challenging centuries of preceding patterns of Jewish socio-political belonging – a particular legitimacy was claimed through the assertion of itself as the supreme *victim* of the ultimate universal evil (Zertal, 1998). For both the US and the Zionists, this universality-cum-particularity model of legitimacy based on their relationship with Nazism manifested as a distinct duality vis-a-vis the nature and application of international law as it concerns war/violence.

Regarding the US, while wartime commitments to freedom and the rule of law defined American values against its opponents, as Stephen Wertheim (2020, 47-114) has shown, even prior to US entry, war planners had already begun crafting elaborate visions of American global supremacy unmoored from lawful constraint. However, after the US's entry into this war and ultimate success therein, these same planners viewed a postwar system of international organisation – which became the United Nations – as a means of legitimising American global power before a domestic populous that was never fully comfortable seeing its national project in imperial terms (*ibid*, 165-172). Compounding this contradictory interplay between universal ideals and narrow interests was the American role in projects to 'humanise' international law as an expression of American morality. Chief amongst these postwar realisations was the largely American-influenced International Military Tribunal's trial of Nazi leadership (Hathaway and Shapiro, 2017, 276-297). Here the US, in condemning its opponents while also tensely navigating relations with its allies (especially the Soviets), legally condemned evil in universal terms while (by distinguishing itself from the Nazis)

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preserving the option of waging future wars via extensive interpretations of 'military necessity' (Moses, 2021, 231-237). Through varied postwar humanitarian legal innovations, from the Universal Declaration of Human Rights to the Genocide Convention to the revision of the laws of war via the Fourth Geneva Convention, great power efforts to restrict broad undertakings of liability was all-pervasive (Hoover, 2013; van Dijk, 2022; Gurmendi Dunkelberg, 2025). While certainly an agent of this interest-based narrowing (Barsalou 2018), the US stood out as the greatest power in terms of both material strength and commitment to universal liberal ideals (Borgwardt, 2005).

In establishing global pre-eminence, there was minimal occasion to consider Americans' individualised wartime trauma as a major political force. Given the loss of approximately one-third of all Jews in the Nazi Holocaust, a similar avoidance of trauma's deep political implications was hardly an option for Zionism's proponents. Here, as Irit Keynan (2018, 103-105) has shown, when faced with the suffering experienced by Holocaust survivors, the leading Zionists displayed a general dismissiveness towards individual trauma in casting the creation of a Jewish state in Palestine as a means of rectifying collective trauma. This same moment of struggle over whether the Jewish future would be determined along Zionist or non-Zionist lines in the face of conflicting constructions of Holocaust trauma (Grodzinsky, 2004), linked closely with similarly ambivalent Jewish engagements with international law (Giladi, 2021). On the one hand, longstanding experiences of victimhood placed Jewish lawyers on the forefront of efforts to transform international law along humanitarian lines (Bilsky and Weinke, 2021). On the other hand, the Zionist call for a logic of state creation necessarily entailed a legitimation of sovereign violence – something novel to the Jewish experience but a well-established logic of existing international law (Fuchs and Hollander, 2014). The tensions embedded within these diverging methods of legal reasonings soon gained many issues to perpetually attach to. In the series of events from 1947 to 1949, Britain terminated its Palestine

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mandate, the United Nations put forth a plan to partition the land into an Arab and Jewish state, and, in the midst of the mass expulsion of 750,000 Palestinians and defeat of invasion by surrounding Arab states, Israel declared independence and was quickly recognised by much of the international community (Kattan, 2009, 146-247).

Following the creation of the state of Israel, despite their nation's recognition, Americans – including Jewish Americans – viewed this development with much ambivalence (Barnett, 2016, 121-153). However, despite no 'special relationship' yet existing, when it came to contesting the international legal legitimacy efforts of both nations, forces of opposition were already undergoing a consolidation process. Consisting of the Soviet Union and the emerging Third World movement to decolonise Asia and Africa, their use of international law to lodge varied critiques of American and Israeli legitimacy claims – and the emotions they invoked – planted the seeds of what would later be declared 'lawfare.' Regarding Third World assertiveness in declaring independence via self-determination to be a 'right' rather than a mere 'principle', while the US sought to involve itself in this process (Kelly and Kaplan, 2001), anti-Zionist influences pulled from a different direction. After all, it was the influence of Arab states that barred Israel's organised participation in the meta-project of Afro-Asian solidarity – an influence apparent in Israel's non-invitation to the 1955 Bandung Conference of newly independent states (Appadorai, 1955, 221-222). Regarding the Soviets, while initially viewing international law as counter-revolutionary, they embraced it to an enhanced degree following Premier Nikita Khruschev's 1956 announcement of the 'peaceful coexistence' doctrine that disavowed open confrontation with Western imperialism (Khruschev, 1959). While initially supportive of Zionism (Kahng, 1998), when faced with the charge (especially from China) that 'peaceful coexistence' was a betrayal of a world revolution now centred in the Global South, the Soviets sought to champion anticolonialism and, in doing so, had to engage anti-Zionism (Friedman, 2015, 83-86, 158). The result of this was

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a Palestine-inclusive Soviet construction of 'wars of national liberation' that, in a contradictory manner, sought to reconcile commitments to both world revolution and international law (Ginsburgs, 1964).

From an American perspective, and one familiar to followers of lawfare discourse, such Soviet and Third World efforts to conform their efforts to international legal rationales were a cynical manipulate international law for political purposes without due regard for its systemic integrity as a juridical regime (Eagleton, 1953; Ramundo, 1967). However, with this American dismissiveness came an openness to condemnations that the US was hypocritical in relations to the same legal standards it considered central to its identity. In other words, the US has set itself up for grave moral injury. This occurred through enhanced involvement in Vietnam. Originally an attempt at distanced aid to a South Vietnam, an entity of contested international legal personality resulting from Vietnam's independence war against France (Heller and Moyn, 2024), President Lyndon Johnson dramatically escalated the involvement of US troops following the 1964 Gulf of Tonkin Incident involving naval clashes (real and alleged) between American and North Vietnam naval forces (Moïse, 1996). Interestingly, the forcible American response drew heavily on Israeli legal justifications for cross border military incursions in the 1950s that were originally condemned by the US (Cuddy, 2023). With American involvement controversial from the onset, such a juridical move indicated a larger array of shifts that complicated the US's image of itself as the guardian of the postwar international legal order.

When considering American legal-cum-moral struggles over military involvement in Vietnam, the significance of Israel must not be discounted. In this capacity, Israel's narrative of rising from the ashes of the Holocaust – a narrative starkly reiterated through the 1961 Jerusalem trial of Nazi official Adolph Eichmann – supplied anti-Vietnam War protestors with an imaginary of higher (international) law that transcended the narrow confines of patriotic obedience in the face of injustice (Meister, 2011, 265; Molden, 2010). However, if there was one great Israeli-prompted event that inexorably

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shaped the moral characterisation of America's Vietnam, it was the 'Six-Day War' of June 1967 where, pre-emptively, Israel launched attacks against Egypt, Jordan, and Syria capturing East Jerusalem, the West Bank, the Gaza Strip, the Golan Heights, and the Sinai Peninsula. Rapidly realigning political dynamics in the Middle East (including definitive Soviet siding with the Arab states) and widely being hailed as inaugurating the US-Israel 'special relationship', this war's impact must be considered in relation to its contemporaneous occurrence with the war in Vietnam (Kaplan, 2018, 94-96). As a military matter, the Six-Day War, in its blindingly swift decisiveness, was everything that the long, drawn-out, and blunder-ridden 'quagmire' in Vietnam was not (Halberstam, 2007).

In a connected vein, from the perspective of many Americans, the morality of Israel's 1967 war registered differently from Vietnam in that it was not being waged on questionable grounds half a world away but was rather driven by a survival imperative in the face of hostile neighbours (Kaplan, 2018, 94-135; Mitelpunkt, 2018, 144-156). Thus, as Michael Fischbach (2019) has shown, the Arab-Israeli conflict profoundly divided the American antiwar left in that many condemned American actions in Vietnam while avoiding the radical Third Worldist view of Israel as a fundamentally colonial entity. In a connected capacity, the war had a highly transformative effect when it came to instilling Zionist sensibilities within a previously ambivalent American Jewish community. With a US-Israel alliance gaining in strength, American Jews – no-longer fearing accusations of dual-loyalty – could view support for Israel as an extension of American patriotism in a manner conflating criticism of Israel with inherent antisemitism (Barnett, 2016, 155-172).

Moreover, this newfound post-67 American-Israeli embrace had vast international legal consequences. Importantly, in capturing of territories of varied statuses both within and beyond the former British Mandate of Palestine, Israel presented serious questions regarding territorial acquisition by conquest that, by this point, was understood to be banned under the United Nations Charter (Jennings, 2017, 75-82). On this point, while the UN Security

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Council quickly issued Resolution 242 affirming the inadmissibility of acquiring territory by war and calling for Israeli withdrawal, Israel and its proponents insisted that by linking withdrawal obligations to 'territories' as opposed to '*the* territories', this resolution did not require complete Israeli withdraw from all that it occupied in 1967 (McHugo, 2002). Zionist arguments along this line were further buttressed by claims that Israeli-occupied territories part of the British-administered Palestine Mandate (East Jerusalem, the West Bank, and Gaza) occupied by Jordan and Egypt in 1948 had no sovereign to revert back to and Israeli maintenance of them was essential for security (Blum, 1968; Schwebel, 1970). For those unpersuaded by these arguments, explicit or implicit US support for them – not to mention the American violence wrought in Vietnam – was evidence of a rank hypocrisy as it concerned the US's proclaimed ability to legitimately dispense international law and justice. This was especially true as Vietnamese and Palestinian causes became increasingly linked through a common anti-imperialist imagination (Lê Espiritu, 2018). The battlelines of a global meta-conflict of legal interpretation were drawn and there was no shortages of moral challenges waiting to be lodged.

When centring individual subjectivity against these broad backdrops, it becomes highly notable that numerous facets surrounding American power, liberal political justification, the technicalities of law, the Vietnam War, and the question of post-Holocaust Jewish identity all manifested through a single individual in the form of Arthur Goldberg. From humble beginnings as the son of Jewish immigrants from the Russian Empire, Goldberg eventually served as John F Kennedy's Secretary of Labour and was later appointed as an Associate Justice of the US Supreme Court, a position he resigned from in 1965 to serve as US Ambassador to the UN out of a belief that he end the Vietnam War (Stebenne, 1996; Goldberg, 1967). However, following the Six-Day War, Goldberg was active in drafting Resolution 242 and provided an influential voice in favour of the position that the resolution did *not* mandate complete Israeli withdrawal (Goldberg, 1973). In his recounting, political

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negotiation as opposed to strict legal application was key to resolving the Arab-Israeli conflict and the Arab states, rather than pursue good faith negotiation, '…counted on the Resolution's ambiguities to permit them to assert their own interpretation' in the hopes that diplomatic support for Israel would erode with time (*ibid*, 193). Prefiguring later lawfare discourse, Goldberg – in a manner deeply consistent with his Zionist commitments[9] – deemed a particular (Arab) interpretation of law to be at odds with the overall purpose that he claimed law should exist to serve. Saturated with an array of powerful emotions, this dynamic of proto-lawfare argument took on a whole new order of magnitude as the 60s gave rise to the 70s.

4. Contesting Moral Reasoning: Crisis, Resistance, and Counter-Hegemonic Challenge After Decolonisation, 1968-1980

Lawfare's core premise that international law is prone to undue 'abuse' and 'manipulation' is underpinned by the larger question of who has the right to make international law? In few instances was this question as hotly contested as it was during the 1970s. With formal decolonisation achieved throughout most of Asia and Africa, these states (joined by Latin America to create the 'G-77' bloc) now possessed a clear majority within key international institutions – especially the United Nations General Assembly (Gregg, 1977). Advancing the position that this majority enabled Third World states to effectively use international fora as a global legislature, such action faced strident resistance from the Global North. For the latter faction's proponents, a key argument was that radical Third World designs would fundamentally undermine international legal standards – especially as they existed as matters of customary international law (Galindo and Yip, 2017). This stance in turn invited contestation from Third World jurists and statemen who characterised existing legal barriers to transformative agendas as imperial relics unduly

[9] Following his UN tenure, Goldberg served as president of the American Jewish Committee and, in this role, 'he was instrumental in converting that traditionally non-Zionist organization into an active and staunch supporter and advocate of Israel.' Cohn, 1990, 11.

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imposed on the non-European world that, in light of decolonisation, had no place within an international system dedicated to fairly representing all the world's people (Wheatly, 2023, 273-277). While the basic structure of this arrangement generated numerous claims and counter-claims that international law was being unduly abused and manipulated (rhetoric familiar to followers of lawfare discourse), intensity here was exponentially amplified if the substantive dimensions of these 70s debates are considered.

On one level, given how the Third World struggle had shifted from achieving formal independence to realising its promises, legal proposals focused on reforming global mechanisms of distribution that maintained a gap between rich and poor nations – most famously the New International Economic Order (McKenna, 2020). The emotional resonance of such redistribution designs was felt immensely in an anxious Global North beset by the 70s 'crisis of capitalism' where declining prosperity engendered much fear of a Third World whose taking of an enhanced share would only fuel further malaise (Maier, 2010). On another (similarly emotional) level, the 70s Third World legal agenda was heavily focused on war and intervention in lingering colonial situations as well as actual and potential neocolonial impositions. While most armed struggles had ceased by the 70s, there remained the Arab-Israeli conflict and American involvement in Vietnam – as well as Portuguese and white minority regimes in Southern Africa (Travers, 1976). Chief amongst the Third World legal projects addressing these situations were defining aggression as an illegitimate use of force and generating legal recognition for self-determination struggles under the laws of war (Wilson, 1990). Connecting distributional and martial issues was the Third Wordlist view of human rights that, following from revolutionary upheaval, set reversing the indignity of colonialism as its core axiomatic principle (Mohandesi, 2023). Given the proliferation of identity-transforming experiences in both the US and Israel during the 1970s, there was ample occasion to condemn Third World legal innovations as illegitimate attempts to inflict moral injury – and thus manipulatively deform international law.

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In the US, at the official level, the beginning of the long 70s could be read as an effort to stem and supress the politics of emotion. Here, the successful 1968 presidential campaign of Richard Milhouse Nixon was an appeal to a 'silent majority' alienated by antiwar radicalism that tapped into popular dissatisfaction with the Vietnam War on pragmatic grounds and aimed to achieve an honourable peace that maintained American global primacy (Sargent, 2015, 42-43; Campbell, 2014). Nixon's actions towards this end were aided immensely by his National Security Advisor, and later Secretary of State, Harvard political scientist Henry Kissinger, a German Jewish refugee from Nazism whose experiences engendered a view of the world as an anarchic struggle for survival devoid of shared legal/moral presumption between nations (Milne, 2015, 326-386). While viewing the world this way enabled Nixon/Kissinger to 'thaw' the Cold War via détente policies of opening new channels of American-Soviet interaction and open of US-China diplomatic relations (Sargent, 2015, 62-66), it also engendered disconnect with emotional realties – especially as they concerned the prolonging of the war in Vietnam. With the broader American public suffering something of a collective moral injury popularly deemed the 'Vietnam Syndrome', Nixon's reliance on esoteric geopolitical rationales such as 'disengagement with escalation' to continue the war represented a grand misreading of the nation's collective mood (Kimball, 2010).

When identifying this mood, there was no greater personification than the traumatised American Vietnam veteran who, unlike the preceding Second World War generation, received no great heroes' welcome home. As détente questioned the existential risk of communist subversion that justified the US's initial Vietnam involvement (Slater, 1993), there was little to explain the moral purpose of killing in this war, especially as it involved counterinsurgencies where soldiers operated in civilian environments productive of atrocities that were unprecedentedly publicised (Brzezinski, 2024). This is to say nothing of how the Vietnam War fatally tarnished the global reputation of a US that, following the Second World War, had such

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grand ambitions of moral global leadership (Lawerence, 2021a). In this context, radical psychiatrists seeking to articulate 'Post-Traumatic Stress Disorder' (PTSD) as a mental condition drew upon their work with Vietnam veterans to claim that recovering from their trauma demanded open opposition to the war and the politics of imperial militarism that made it possible (Abu El-Haj, 2022, 41-54). By virtue of this framing, it was the witness bearing of the traumatised veteran who, in pursuing their personal path to redemption, acted to further a new discourse on national purpose for a nation morally injured by its imperial hubris (*ibid*, 54-62). Despite its cogent linking of individual trauma to the public sphere via the figure of the morally injured veteran, this model proved starkly limited in its translation into political success. This was demonstrated through the 1972 Presidential election whereby George McGovern, who ran on a decidedly moral antiwar platform, lost to Nixon in a landslide (Haar, 2017). A notable defection via the McGovern phenomenon were traditional democratic voters who, in insisting that the US had an indispensable role to play as a moral intervenor on the world's stage, emerged as the ultimately highly influential Neoconservatives (Friedman, 2005, 137-138).

Within this same timeframe of conflicting American visions during the late Vietnam War, another wartime trauma re-evaluation occurred in Israel. Though the Palestine Liberation Organisation ('PLO') remained the great post-67 focus, unresolved tensions stemming from Israel's 1967 territorial captures remained. On 6 October 1973, in what Israelis deemed the 'Yom Kippur War', a coalition of Arab forces led by Syria and Egypt caught Israel unprepared in their attack on the Israeli-occupied Golan Heights and Sinai Peninsula. Following numerous casualties and military setbacks before gaining the advantage, Israeli Prime Minister Golda Meir ultimately yielded to American diplomatic pressure and agreed to a ceasefire brokered by Kissinger premised on territorial concessions to Egypt (Quandt, 1975, 38-39). While lacking the sense of moral injury resulting from violence against civilians as was the case with Vietnam, the 1973 Arab-Israeli War –

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especially as it stood in contrast to the Six-Day War – nevertheless raised a number of questions surrounding the meaning of wartime sacrifice in the face of national humiliation. To quote Keynan (2018, 106), '[i]n 1973, the rhetoric of [Israeli] war changed, and the national myths of heroism gave way to a new narrative that emphasised the individual toll of war.'

In the face of this national identity crisis came the political ascension of Israel's radical right that ultimately led to the 1977 election of Menachim Begin as Prime Minister (Pedazur, 2012, 35-80). Amid this shift, Israel gained a new wave of American supporters via the Neoconservatives, many of them Jewish, who viewed the 1973 war as grounds for opposing détente and returning to active Cold War confrontation (Rosenberg, 2015). A leading figure here was onetime Dean of Yale Law School Eugene Rostow – a son of socialist Jewish immigrants – who stated that '[w]hen the Soviet Union offers the Arabs the glittering dream of Holy War to destroy Israel even men…who genuinely believe in peace with Israel, cannot refuse to join the Jihad' (Quoted in Rosenberg, 2015, 734). Here, Rostow framed an alien enemy against whom violence should not legitimately result in moral injury – and, therefore, attempted infliction of moral injury by this enemy must be stridently and unapologetically pre-empted.

Rostow's status as an international legal scholar, is a testament to how the US and Israel were linked through their shared fear of, and disdain for, international legal condemnation. The 1970s and its defining international legal struggles, are pivotal to uncovering the parameters of this trauma bond that echoes into post-9/11 lawfare discourse. While Israel–especially considering its 1967 occupations–produced no shortage of international legal controversy, US involvement in Vietnam was similarly condemned (Heller and Moyn, 2024). Though international law was far from the main antiwar focus, broad invocations of Nuremburg in this context were enough to gain the attention of the renowned Nuremberg prosecutor Telford Taylor. For Taylor (2010), while American involvement in Vietnam precluded any clear liability for aggression, the same could not be said for the atrocities

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committed against civilians that was the source of so much moral injury for US troops. Such violence, most infamously the 1968 My Lai massacre of as many as 500 Vietnamese civilians, questioned just how effectively US military discipline incorporated international legal standards (Jones, 2020, 78-87). This is to say nothing of the horrific deaths and injuries caused by non-precision weapons such as incendiary napalm came to symbolise the Vietnam War's indiscriminate violence (Neer, 2013,134-164).

Such focuses on atrocity in the 1970s coincided with efforts to re-brand the laws of war as 'international humanitarian law' (Wilson, 2017, 571). While global in its reasons (Alexander, 2015), this humanitarian reframing could easily lead critics of American actions in Vietnam to admire – or at least minimise – Israeli actions in the Occupied Palestinian Territories (McAlister, 2009). Upon capturing the Territories in 1967, while Israel quickly disclaimed the preservation-focused international law of occupation – it nevertheless proclaimed adherence to this legal regime's humanitarian provisions (Roberts, 1990, 62-66). For some, the defiance of preservationist law allowed for the very possibility of Palestinian self-determination (Gerson, 1973, 46-47). However, in defiance of any such outcome, peaceful 'humanitarian' transformation was only part of a larger strategy to normalise the occupation by rendering it irreversible (Gordon, 2008, 70-92).

In the face of this rise of 'international humanitarian law', a related regime could hardly be more consequential when it came to making sense of this moment – international human rights. While this 'human rights revolution' was a worldwide convergence (Eckel and Moyn, 2014), in the context of American self-understanding, it provided a vocabulary for addressing that which the amoral realpolitik of Nixon/Kissinger could not account for (Arnold, 1980, 57). Possessing cross-spectrum political appeal – depending on one's causes – human rights provided nothing short of a 'reclaiming of American virtue' (Keys, 2014). Of these causes, American support for Israel could certainly be cast in human rights language, especially given the 1973 exposure of Israeli vulnerability (Mitelpunkt, 2018, 191-194). This ethos was

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prominently demonstrated through a high-profile 1975 speech by US Ambassador to the UN Daniel Patrick Moynihan that broke from established diplomatic conventions in condemning UN General Assembly Resolution 3379 and its declaration that Zionism was a form of racism (Troy, 2012). According to Moynihan (1975):

> The terrible lie that has been told here today will have terrible consequences. Not only will people begin to say, indeed they have already begun to say that the United Nations is a place where lies are told, but far more serious, grave and perhaps irreparable harm will be done to the cause of human rights itself. The harm will arise first because it will strip from racism the precise and abhorrent meaning that it still precariously holds today. How will the people of the world feel about racism and the need to struggle against it, when they are told that it is an idea as broad as to include the Jewish national liberation movement?

Delivered fifteen months after Nixon's Watergate scandal-triggered resignation, and six months after the complete US withdrawal from Vietnam via the fall of Saigon,[10] Moynihan's speech departed from amorality in the face of a morally anxious American reality. In doing so, he rebuffed alleged moral injury both through and on behalf of Israel. For in the same speech, Moynihan (1975) rejected Third World retribution efforts as inconsistent with human rights, classically understood, and, in his telling, the attempt to conflate Zionism and racism provided lens for exposing impropriety on this front. Thus, for Moynihan, support for Zionism could be understood as a litmus test for whether Third World assertions furthered international legal order premised on human rights or, to use modern terminology, were manipulative illustrations of 'lawfare.'

[10] These two events were connected as Nixon's subpoenaed tapes revealed his intentional prolonging of the Vietnam War in the interests of gaining re-election, see Hughes, 2015.

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A related source of lawfare-originating controversy concerned Third Worldist efforts to revive the immediate postwar task of defining aggression under international law – a legacy of Nuremberg derailed by Cold War politics – via the General Assembly's 1974 Resolution 3314 (Sellers, 2013, 276-286). Binding the US and Israel closer, for numerous Western commentators, such Third World efforts were an exercise in rank hypocrisy – especially how, from their perspective, the 1973 Egyptian and Syrian-led attack on Israeli held territory was a quintessential act of aggression (Rostow, 1975).[11] Moreover, the 1973 OPEC oil embargo against states supporting Israel – which resulted in an economic 'shock' deeply impacting Western consumers – was itself perceived not only an act of aggression, but a secondary aggression against those who contested the original act of aggression (Paust and Blaustein, 1974; Dempsey, 1977). Such anti-Third World views extended to growing fears of transnational terrorism – a feature present in claims that the definition of aggression was deliberated drafted to exclude state responsibility for the acts of non-state armed groups (Blum, 1976, 232). In this meta-context, few figures proved as prescient in anticipating future lawfare discourse as much as Julius Stone, a British-born Australian jurist of Lithuanian Jewish origin whose formative experiences of antisemitism rendered him a devout Zionist (Mowbray, 2019). According to Stone (1977, 242-245), in contrast to the stated objectives of their proponents, such Third World-led efforts at defining aggression would not lead to greater legal predictability and coherence – but would rather create new channels for waging 'political warfare' through the medium of law.

A similar fear of Third World manipulation of law in relation to war, and one arguably closer to American and Israeli moral injury fears, concerned the revision of hostilities conduct regulation via the two Additional Protocols to the Geneva Conventions. Convened in 1973, the Geneva Conference tasked with this revision was notable for its inclusion of representatives from

[11] Alternatively, see Quigley, 2023.

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national liberation groups (including the PLO) – an initiative furthered in great measure by Vietnam (Alexander, 2023). While codifying core law of armed conflict principles as they concerned distinction, proportionality, and the protection of civilians, the final text of the international-focused Additional Protocol I ('API') classified wars of national liberation against 'colonial domination, alien occupation, and racist regimes' to be international, as opposed to internal armed conflicts (AP I, Art 1(4)). Relatedly, when defining conflict participants entitled to combatant immunity and prisoner of war status, while affirming the general need for soldiers to distinguish themselves via uniforms and insignia, in actualising the wars of national liberation delegation, API stated '…that there are situations…where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly: (a) during each military engagement, and (b) during such time as he is visible to the adversary…' when preparing an attack (*ibid*, Art 44(3)).

In extending international conflict and its legitimate participants, API asserted that the American or Israeli soldier possessed an equivalent legal status to the Viet Cong or PLO fighter they opposed – and thus directly challenged their perception of moral superiority. Such indignation at the threat of moral injury lurked behind largely American and Israeli claims that the Additional Protocols were a dangerously illegitimate attempt to undo progress made in the laws of war through their incorporation of inappropriate political considerations into the legal process (Baxter, 1975; Dinstein, 1979). Discourse towards this end was perforated with a feared return of 'just war' as a catastrophically violent, and irreducibly subjective, mechanism of justification that modern legal rationality progressively excised (Whyte, 2018). However, this universalistic condemnation of the Third World agenda was paradoxically linked to the asserted particularities of historic trauma that justified the Zionist project. Synthesis here was expressed by the Israeli delegate who, after depicting the Jewish experience of war and genocide as

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instilling a deep Israeli respect for international law, condemned API as a 'just war' revival and claimed that '…infiltration of political themes into Geneva-based law could well do pernicious and long-term damage to its universality and impartiality and thus undermine the humanitarian work conducted at the Conference' (Geneva Conference Official Record, 1978, 216). While, on this basis, Israel alone voted against the Protocols' adoption, the US delegation led by George Aldrich (1981) ultimately viewed adherence as more beneficial than detrimental, despite moral injury risks, and acceded to the Protocols.

Amidst these many controversies where Americans and Israelis depicted transformed understandings of international law as new channels for moral insult, Jimmy Carter was elected US President in a narrow victory over Nixon's successor Gerald Ford in 1977. Making human rights central to his foreign policy agenda, within this overarching scheme, a particular concern of Carter – himself a devout Evangelical Christian – was achieving peace in the Middle East (Sargent, 2015, 250-260). In centring moral considerations here as he did, Carter drew the ire of both the Nixon-Kissinger realpolitik proponents and Neoconservatives (Nixon, 2013; Kirkpatrick, 1979). Despite these detractions, Carter, in a highly celebrated capacity, brokered peace between Israel and Egypt via the 1979 Camp David Accords (Mitelpunkt, 2018, 270-276). However, this success could not overcome the effect of worsening economic conditions and a series of foreign policy embarrassments – namely the Iran hostage crisis. A new era dawned as Carter lost his 1980 bid for second term in a landslide to California Governor Ronald Wilson Reagan.

5. Asserting Moral Dominance: From the Second Cold War to the End of History to the Day That Changed Everything, 1980-2001

When identifying Reagan's influence on what would later be deemed 'lawfare', two inter-twined axiomatic factors are his 'Second Cold War' and his efforts to reverse the (post-)Vietnam syndrome. Regarding the former,

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through renewed confrontation with the Soviet Union in avowedly moral terms, international legal innovations stemming from earlier détente policies could be viewed as channels through which the US might be manipulated by its rivals (Szabo, 2022). However, true to later formulations of lawfare, despite the ability of opportunistic legal interpretations to undermine American interests, it was nevertheless essential to avoid perceptions of American legal breaches as a means of affirming moral reputation. After all, in the American self-perception central to Reaganism, respect for the 'rule of law' set the US apart from the 'totalitarianism' of the Soviet's 'Evil Empire' (Rana, 2024, 640-641). Regarding the latter, given Reagan's campaign against the internalised moral injury of the Vietnam War, the very character of the traumatised Vietnam veteran needed reframing. Rather than linking trauma to combat – including violence against civilians – in the Reaganite reframing, veteran trauma resulted from a lack of support from an ungrateful and unpatriotic American public who opposed the war in Vietnam (Abu El-Haj, 2022, 67-68, 91-98). As such, legal interpretations viewed as morally compromising US troops were liable to being condemned as abusive manipulations of the law. Taking these two points together, the fear of cynical forces manipulating international law to undermine perceptions of American virtue could be placed alongside HIV/AIDS, crack cocaine, and satanic ritual abuse cults as one of the many existential fears that defined Reagan-era politics and culture (Jenkins, 2008).

When considering these Reaganite innovations abroad, few were as delighted as Begin. No longer constrained by the amoral realpolitik of Nixon/Kissinger or the peace-mongering of Carter, Reagan's coalition, as it included neoconservatives and Evangelical Christians (very different from Carter), contained many who viewed Israel in messianic terms (Kaplan, 2018, 212-214). Against this backdrop, in 1982, Begin invaded a civil war-torn Lebanon, where the PLO leadership had taken up residence, via 'Operation Peace for Galilee.' Ostensibly, undertaken in response to rocket attacks on the North of Israel, the Israelis also sought to decapitate the PLO and support

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the Christian Phalangists who, from Israel's perspective, would be the most advantageous leaders of Lebanon (Chamberlin, 2018, 483-484; Hamilton, 2011). However, as actions here resulted in protracted fighting and many civilian casualties, Israel faced a legitimacy crisis. After all, by invading a smaller crisis-ridden nation, Israel could not easily resort to its 'David versus Goliath' narrative of being the small state (and essential refuge of a people nearly exterminated) that heroically staved off the attacks of several much larger states bent on its destruction (Kaplan, 2018, 138-153; Kober, 2013). Much like the American experience in Vietnam, Israeli actions in Lebanon presented grave risks of moral injury. This concerned both Israel's diminishing international reputation and the experiences of its own soldiers, who, on a unprecedented scale, came out as conscientious objectors (Linn, 1986).

In the face of such risks came Israeli calls to reformulate international law in capacities that became mainstays of the 'global war on terror' – objections to which were deemed 'lawfare.' When justifying Israel's resort to force, Israel's UN Ambassador Yehuda Blum claimed that attacking the PLO in Lebanon was legitimate, for 'if a State is unwilling or unable to prevent the use of its territory to attack another State, that latter State is entitled to take all necessary measures in its own defence' (Quoted in Levenfeld, 1982, 5). When justifying the conduct of hostilities, Israel claimed that high civilian casualties occurred not from legal breaches, but from their opponents were deploying 'human shields.' While using human bodies as a defensive fortification based on a wager the opponent will refuse to kill is a longstanding practice (Gordon and Perugini, 2020), one of the first accusations of 'human shields' as moral affirmation in contrast to enemy barbarism was articulated by then Israeli Defence Minister Ariel Sharon through an op-ed in the *New York Times*. Published weeks before the Sabra and Shatila Massacre of Palestinian refugees that implicated him, Sharon (1982) stated that:

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> Israel's troops entering Lebanon were greeted as liberators for driving out the terrorists who had raped and pillaged and plundered. Our soldiers were welcomed despite the casualties that were the inevitable result of fighting against PLO terrorists who used civilians as human shields and who deliberately placed their weapons and ammunition in the midst of apartment houses, schools, refugee camps and hospitals. No army in the history of modern warfare ever took such pains to prevent civilian casualties as did the Israel Defense Forces…. This policy stands in vivid contrast to the PLO's practice of attacking only civilian targets.

While Reagan's diplomatic pressure led Israel to withdraw most of troops from Lebanon in 1985, Reaganite developments in the US contributed immensely to building a legal-cum-moral model for deploying violence in the vein of 'Operation Peace for Galilee.' With Reagan upholding the 1973 ban on conscription (an achievement of the anti-Vietnam War movement), the 'all-volunteer' US military increasingly became tangibly decoupled from the rest of American life and became something of an entirely parallel social sphere (Abu El-Haj, 2022, 25-26). In this context came a 'military professionalism' movement whereby officers asserted increased influence over defence affairs in a manner resisting capture by opportunistic civilian politicians – those blamed for the blunders in Vietnam that tarnished the military's reputation (Bacevich, 2013, 37-48). A key component of this siloing of the US military concerned the control over the laws of war and their possible interpretation – a matter that was, yet again, a response to how perceived legal violations in Vietnam undermined faith and confidence in military actions.

One figure leading this reappraisal was Vietnam veteran and military lawyer W Hays Parks (Jones, 2023, 210-211). Taking the position that the laws of war are not a detriment to military efficiency, he argued that contra Vietnam, military law must go beyond retroactively of prosecuting soldiers for its violation and become a proactive shaper of military strategy (Parks,

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2002, 984-985). Such a proactive approach was evident in the formulations of 'operational law' in newly enclosed military spaces that merged international and domestic legal standards to further military efficiency (Jones, 2020, 91-124). In the words of Jones (2023, 213):

> …operational law allowed the US military to domesticate the laws of war in two key senses: it allowed them to "nationalize" the international laws of war (and therefore advance claims of ownership to and dominance over the laws of war), and it permitted the US military to "tame" the laws of war, rendering them ever more pragmatic, practitioner-oriented, and military-friendly.

However, despite 'operational law' developing in its shadows, the major Reagan-era controversy that instilled popular international legal consciousness concerned not the laws of war, but human rights.

While avoiding extensive troop deployment abroad, architects of a so-called 'Reagan Doctrine' took an interventionist approach to aiding local allies committed to a decidedly anti-communist agenda (Scott, 1996). Cast in unabashed moral terms, and disavowing of the precept that peoples' have the right to choose their own system of government, such Reagan Doctrine interventions were premised on highly selective constructions of 'human rights' (Snyder, 2021). Though extensive in their scope, the defining struggle here over international law and human rights occurred in Central America – the US's long proclaimed 'sphere of influence.' Here, the Neoconservatives, with key figures now in government, set about actively aiding anti-communist states in Guatemala and El Salvador, and anti-communist insurgents in Nicaragua (Grandin, 2006).

Done in the name of human rights, these interventions – and their catastrophically violent consequences – were similarly opposed in the name of human rights albeit in a manner premised on the doctrinal specificities of international law that opposed American exceptionalism (Shetack, 1989). Portending later 'lawfare' discourse, Reaganites condemned international law

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as a grave danger to American interests when, in 1986, the International Court of Justice entered a verdict against the US for violating the customary norm against non-intervention through its support of Nicaragua's anti-government Contras (Malawer, 1988, 94-99). As opponents of American interventionism celebrated this decision (see e.g., Falk, 1987), the Reagan Administration performatively condemned international law as an enabler of Third World 'radicalism/terrorism' by refusing to submit the Additional Protocols of the Geneva Convention to the US Senate for ratification in 1987 – an outcome influenced by an alliance of prominent Neoconservatives and Vietnam veterans (Kattan, 2023).

Also, in 1987, such characterisations of international law as an enabler of 'terrorism' carried great weight in Israel given that, on December 7th, the Palestinians began their First Intifada in the Occupied Territories. A response to ever diminishing hopes the occupation would end as well as worsening conditions of Palestinian life (Said, 1989), the Intifada – originally a series of protests that soon became apparent as a concerted uprising – raised several questions regarding Israeli response (Gordon, 2008, 154-156). On the one hand, with the experience in Lebanon still very fresh, there were numerous moral injury risks that, as with Lebanon, related to both international opinion and the ethical objections of IDF soldiers finding themselves fighting in densely populated civilian areas (*ibid*, 157-161; Linn, 1996). This problem for Israel was compounded by arguments that Palestinian resistance was a just response to occupation in denial of their right to self-determination under international law (Falk and Weston, 1991). One the other hand, especially as Israeli casualties (military and civilian) mounted at the hands of Palestinians (who themselves suffered casualties during the Intifada greater than during the preceding two decades of occupation (Gordon, 2008, 157)), the Israeli state felt compelled to go to great lengths to maintain its supremacy – often in capacities that brazenly disregarded international opinion (Silber, 2010).

Interestingly, one figure who offered Israel advice along these lines was Henry Kissinger who condemned American Jewish criticism of Israeli

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actions, suggested Israel undertake an international media blackout and warned Israel against making any concessions (or holding a peace conference) as this would only increase oppositional forces (Berman, 2002). The implication here was clear; when faced with the Intifada, international legal standards were Israel's grave enemies. As such, while the horrors of the Holocaust were universalised through humanity-focused legal innovations, Zionists increasingly viewed this suffering as their exclusive property from which they could justifiably exclude others. While Americans similarly strived to present their own particular interests in universal terms during this timeframe, they soon gained a major advantage in doing so as the structure of the world fundamentally and unexpectedly shifted in a way that left the US as the world's sole remaining superpower.

As the First Intifada continued in the Occupied Territories, a momentous transformation happened on the world's stage in 1989 with the collapse of the Berlin Wall, the end of the Cold War, and the beginning of the so-called 'End of History.' While famously prompting innumerable visions of what international law might become in the absence of Cold War gridlock, one vision deeply attuned to the specificities of American and Israeli emotions, and their fear of moral injury, was articulated by prominent critic of anti-Zionism, now New York Senator, Daniel Patrick Moynihan. Published in 1990, Moynihan's *On the Law of Nations* chastised Reagan-era denouncements of international law as unprecedented in the broad arc of American history and dangerous to American constitutional democracy as well as American commitments to Israel. Further restating all that he found absurd about Third World criticism of Israel, Moynihan claimed that, by articulating the Reagan Doctrine as a grounding for order specific to the Western Hemisphere, this problematically excluded Israel. According to Moynihan, 'should a renewed Arab invasion of Israel take place, the United States under the Reagan Doctrine would have no grounds for rejecting it *at law*, nor would there be any basis *at law* for responding' (Moynihan, 1990, 129). Concluding his case for American re-engagement with international law

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(and the protection of Israel it could offer), in Moynihan's words, '[i]nternational law changes, just as domestic law changes. We are fully within our rights to propose changes; to limit or withdraw commitments. What we must not do is act as if the subject was optional, essentially rhetorical' (*ibid*, 177). Thus, for Moynihan, America abandoning international law was an act of self-inflicted moral injury. Should that abandonment compromise Israel, this could very well be a moral injury the US might never recover from.

While Moynihan's tone remained perforated with dour Cold War sensibilities, the collective mood shifted rapidly. On 17 January 1991, with UN Security Council authorisation, a US-led coalition launched Operation Desert Storm in response to Iraq's invasion of Kuwait. Celebrated by both international lawyers and 'military professionalism' advocates (Bacevich, 2013, 35-36), this First Gulf War represented the possibility of a virtuously law-governed global order premised on American supremacy (Aber, 2023). Not long after came the 1993 end of the First Intifada as Israeli and Palestinian leadership agreed to a US-brokered peace process via the Oslo Accords. Though the peace process's timeframe contained numerous instances of trauma-triggering violence for all involved, Oslo nevertheless embodied the liberal optimism that defined the immediate post-Cold War. As Adam Sutcliffe (2024, 225-227) notes, the Oslo Accords were emblematic of a time when universal empathy was envisaged as the great cure for all worldly ills now that the era of irreconcilably ideological conflict had come to an end. In the domain of international law, this sentiment found its expression through a newly hegemonic 'human rights discourse' offering the promise that, contra the demands of uncompromising revolution, endless cycles of violence could in fact be broken (Meister, 2011, 21-25).

Despite this liberal optimism, it quickly became apparent that the end of the Cold War had not excised extreme violence. Especially in the former Yugoslavia and Rwanda, post-Cold War conflicts did much to conjure imaginations of Nazism/the Holocaust as something capable of repeating

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itself (see e.g., Sohn, 1996). Through this pattern of sense-making came a return of the post-Second World War viewpoint detailed above that Nazism was the supreme inexplicable evil and, when faced with this reality, it must be acknowledged that the Americans were its greatest vanquishers and Jews its greatest victims. Now in the post-Cold War world, as consciousness of Nazi evil entered a new era, Americans power was seemingly beyond contestation, and the Jews possessed a state that seemed as if it would finally achieve peace with its enemies. From here came a tremendous global legal innovation with the resurrection of the seemingly abandoned project of international criminal justice via the Security Council's creation of the ad hoc criminal tribunals for the former Yugoslavia and Rwanda in 1993 and 1994 respectively.

Hailed as a return to the unified justice that existed at Nuremberg, it seemed for many that these new legal developments could end impunity in a world now ready to realise the untold promises that had been frustrated during the Cold War (Teitel, 2003, 89-92). Here, tribunal adjudication confronted the contested category of 'non-international armed conflict' (something states feared subjecting to treaty) as an issue that could become subject to standards formed through customary international law (Hoffman, 2010). As this adjudicatory-cum-customary approach to the laws of war came to reshape a traditionally treaty-formed body of law (Mantilla, 2024), this represented a direct challenge to American – and increasingly Israeli (Cohen, 2011, 373-374) – efforts to seek authority over these laws through their projects of military lawyering. While not readily apparent in the 1990s when post-Cold War American global supremacy and the expansion of international law seemed harmonious, this was not to last. In light of complex histories of the law-war-trauma nexus, the latter could be imagined as a conspiracy to morally injure the former. On 28 September 2000, Ariel Sharon, now campaigning for Israeli Prime Minister, controversially visited the Temple Mount/Dome of the Rock – an Islamic sacred site – that, considering widespread Palestinian frustration with the inequities of the proclaimed 'peace process', is often

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considered the catalyst for a new round of uprisings deemed the Second Intifada (Pressman, 2003). With violence taking on increasing heights in the Holy Land and shattering promises of peace, roughly one year later, the al-Queda suicide attacks in New York and Washington DC took place on 11 September 2001.

6. Conclusions - Passion and Dispassion After 9/11

With 9/11 hailed as the 'day that changed everything' (Morgan, 2009), 'lawfare' provided a visceral assertion that those seeking to subject war to law had to recognise that the legal standards they invoked were the products of a world that no-longer existed after 9/11. Paradoxically, this very designation of 9/11 as 'unprecedented' was a catalyst for mobilising so many understandings of the law-war-morality continuum that, as detailed above, were being shaped over half a century. Through this distinct temporal dynamic came something of a 'passion gap' between those who viewed 'lawfare' as a meaning conceptual frame versus those who did not. The former, in their privileging of American and Israeli military perspectives, could passionately draw upon decades of embedded fears of moral injury when loudly denouncing even the most remote prospect of existing legal standards somehow enabling a mystified, but existentially threating, 'terrorist' enemy. The latter, tasking themselves with the judiciously dispassionate appraisal of increasingly complex legal regimes (and dismissively viewing 'lawfare' as a distortion), in great measure cut themselves off from the emotional force that guided earlier generations in opposing militaristic domination legally and otherwise (Modirzadeh, 2020). What are the parameters of this 'passion gap' regarding emotional characterisations of the relationship between law and war? How might it shape the anticipation and interpretation of future events? Whatever inquiry into these issues might look like, the above-detailed genealogy has much to offer to those who would seek to understand the subjects and subjectivities of

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'lawfare' through the complex histories of emotion that found succinct expression through this term.

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