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Travelling Law

Targeted Killing, Lawfare and the Deconstruction of the Battlefield

Striking Origins
Above the Palestinian village of Beit Sahour on the morning of November 9th 2000 an Israeli Air Force (IAF) helicopter could be heard. Then, an explosion. The Jeep of Hussein Abiyat went up in flames, and with it the senior member of Fatah. The anti-tank missile killed Abiyat and two innocent elderly women. Collateral damage. Later that day, two months after the outbreak of the second Intifada, the Israeli military publically assumed responsibility for the strike:

“During an operation initiated by the IDF, in the area of the village of Beit Sahour, missiles were launched from Air Force helicopters towards the vehicle of a senior activist of the Fatah Tanzim. The pilots reported the target was accurately hit. The activist was killed and his deputy, who was with him, was injured.”

The announcement marked the beginning of Israel’s official assassination policy. The justification and legal contention was that Israel had entered what IDF lawyers called “an armed conflict short of war” and Israel was thus entitled to target and kill enemy individuals as permitted by the rules of war.

Though it might now seem difficult to believe, the European Union and the U.S. condemned the attacks and rejected the Israeli legal justification. British Foreign Secretary Jack Straw claimed that the assassinations were "unlawful, unjustified and self-defeating". The E.U. said the policy amounted to "extrajudicial killings", while U.S. State Department spokesman Richard Boucher said such action was "heavy-handed". The U.S. government made it repeatedly clear that it opposed targeted killings. An international fact finding mission, established by President Clinton and led by former U.S. Senator George Mitchell refused to accept the Israeli view that the threshold of ‘armed conflict’ (the legal terminology for war) had been crossed. The Mitchell Report dismissed the idea as being “overly broad” and noted that the “IDF should adopt crowd-control tactics that minimize the potential for deaths and casualties”, urging further that “an effort should be made to differentiate between terrorism and protests.” The message was clear: terrorism could not legitimately be dealt with via recourse to war, and Israel should revert back to the more traditional law enforcement approach.

The U.S. criticism of Israeli targeted killing policy was short-lived, however. The CIA was already flying Predator drones over Afghanistan in search for Osama bin Laden, but at the time Israel went public with its targeted killing campaign, the Predators were still unarmed. In late 2000 the head of the CIA’s Counter Terrorism Center, Cofer Black, decided to arm the Predator but the head of the CIA, George Tenet still had “serious questions about the new killing

1 I would like to thank Derek Gregory for his ever incisive reading and comments on an earlier draft of this paper.
technology and the ethics and legality behind its use." Shortly after 9/11 Bush approved a presidential finding that sanctioned CIA strikes on Al Qaeda as a defensive measure in the then nascent “global war on terrorism” (henceforth GWoT). The first lethal drone missions were conducted in Afghanistan in late 2001, but what happened in Yemen a year later was different. On November 3rd 2002 CIA operatives fired a Hellfire missile from a Predator, killing Qaed Salim Sinan al Harethi, the man allegedly responsible for organising the suicide bombing attack on USS Cole in 2000. Two days later, Paul Wolfowitz, the deputy defense secretary, openly confirmed it was a U.S. strike, calling it a “very successful tactical operation”. The strike, the first by an armed drone outside of Afghanistan (and thus outside the recognised battlefield) resembled and yet also exceeded Israeli targeted killing tactics. Both the U.S. and Israel had defied the international consensus on assassination, and in this sense we may read these strikes as the origins of a concerted attempt to legalize and legitimize the euphemism of “targeted killing”. 

But the CIA strike in Yemen went even further: it radicalized an already radical conceptualisation of the very definition of war, and did so by abandoning the notion that the battlefield should be geographically limited. The world became a battlefield, as Jeremy Scahill has argued, echoing Derek Gregory’s understanding that the U.S. and Israel had laid the foundations for an “everywhere war”. In this chapter I argue that U.S. drone warfare is indebted in several important ways to Israel’s targeted killing policy, and in particular to Israel’s expansionist definition of armed conflict/war. In recent years, U.S. drone warfare has been subject to growing scholarly and popular critique. But far less attention has been paid to Israeli targeted killing. There may be several explanations for this but surely among them are the twin facts that targeted killing in Israel has decreased every year since 2006 and that, even at their peak in 2001-2004, Israeli targeted killings were and are dwarfed – in scope and scale – by what Kevin John Heller has called “one hell of a killing machine”. But lest the dust completely settle on Israeli targeted killing policy, as Amos Harel argued it already has, my argument is that we might productively approach U.S. drone warfare by examining a key part of its legal origins in and through the Israeli experience.

Crucial to my account is the notion that law is a ‘travelling phenomenon’. Israel used the paradigm of war to legally justify its targeted killing policy and the U.S. subsequently borrowed and expanded this framework. But like anything else, law does not travel alone and no legal ‘transplant’ is an exact replica of the ‘body’ from which it came; it requires a carrier as well as a receptive (legal and political) community. I contend that we might conceive of the ‘law’ of targeted killing and its circulations between Israel and the U.S. as lawfare. By this I mean two things: first, that the attempts by Israel and the U.S. to legalise and normalise targeted killing constitute a weaponization of the law, and second, that the lawfare discourse is a medium through which this weaponized form of law has travelled. To ground this argument I begin with an analysis of the lawfare literature. I reject conservative definitions of lawfare as that which is conducted only by the ‘weak’ enemy Other, and I also problematize the idea that Israel and the U.S. practice a form of ‘benign’ and ‘affirmative’ lawfare. In the sections that follow, I outline how Israel sought to legalize targeted killing and how, subsequently, the U.S. used the war paradigm to radically expand and “deconstruct” the battlefield. These movements between the Israeli ‘legalization’ of targeted killing and U.S. deconstruction of the battlefield are particularly potent forms of lawfare not only because they seek to legitimize violence that would otherwise be considered illegitimate but also because they expand the scope of said violence such that there
may be no escape from the battlefield. By way of conclusion, I argue that targeted killing, lawfare and the deconstruction of the battlefield help to clarify a shift in the geographical and ontological borders of war at the putative ‘end of the American Century’.21

Diabolical Lawfare

Former U.S. Air Force Deputy Judge Advocate General Charles Dunlap popularized the term ‘lawfare’22. In his original essay he defined it simply as “the use of law as a weapon of war”23, but he gave it a pejorative meaning, indicating that lawfare was a new form of warfare that posed a series of potential threats to the U.S. (and NATO). By 2005, the threat was registered in the National Defense Strategy which stated “our strength as a nation will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism.”24

The context for the emergence of the lawfare discourse in the U.S. was the international outcry over torture, rendition and indefinite detention in Guantanamo Bay and Abu Ghraib. There are those who view the very existence of these ‘black sites’ as a deliberate attempt to create a space of exception through the law (that is, lawfare par excellence25). But others view this as a radical misreading lawfare. Lebowitz26, for example, argues that the real abuse of law in Guantanamo came not from the torturers or the lawyers who wrote the ‘torture memos’ but from those actually detained in Guantanamo.27 According to her, “[b]y following what was tantamount to scripted legal advice, detainees and their advocates in the aftermath of the 9/11 attacks launched a massive campaign through various court systems worldwide.”28 In this view, lawfare is synonymous with the tactics of terrorism and as Eyal Benvenisti explains, humanitarians have albeit unwillingly become “strategic all[i]es of the terrorists because the terrorists benefit indirectly from whatever constraints” humanitarians seek to impose on the state.29

Radical views on lawfare are by no means unique to the U.S. Israel has also led the charge against the ‘illegitimate’ use of lawfare. Most commentators begin their analysis of lawfare against Israel with the publication of a United Nations investigation into war crimes committed by Hamas and Israel during ‘Operation Cast Lead’ in 2008-9.30 Dubbed the ‘Goldstone Report’, after its widely revered author Richard Goldstone (a Jewish South African judge who issued several important rulings opposing apartheid, and who served as the first chief prosecutor of the UN International Criminal Tribunal for the former Yugoslavia and Rwanda), the report was a damning condemnation of both Israeli and Hamas actions during the three-week war. But most commentators gloss over this fact and fasten on Goldstone as a powerful symbol of the ultimate abuse of law.31 The lawfare debate in Israel reached a climax in 2010 when Prime Minister Binyamin Netanyahu told the press that Goldstone is a “code word for an attempt to delegitimize Israel’s right to self-defense”. He listed Goldstone as “one of Israel's most serious security challenges” alongside Iran’s nuclear program, and Hamas rocket fire.32

There have been several civil lawsuits filed in U.S. and Israeli courts.33 These lawsuits raise a number of claims, some of them pertaining to the prohibition against torture and indefinite detention34, but more frequently and more recently they concern the fraught issue of targeted killing.35 These lawsuits have had very mixed success in terms of judicial outcome, but such cases are not always about ‘winning’ per se, but are also frequently used to raise awareness and to make political claims. There is particular disagreement, however, as to whether such blatantly
‘political’ use of the courts should be permitted\textsuperscript{36} – as if the use of courts has ever been above politics! By the same token, it is claimed that states also should not strategically use international law when it garners legitimacy only to abandon it when it proves inconvenient or cumbersome.\textsuperscript{37}

But to claim that what Herzberg\textsuperscript{38} disparagingly calls “NGO lawfare” is damaging to legal systems suggests that the courts are too weak or incapable of to weeding out frivolous legal arguments. Moreover, it also artfully glosses over the major successes, in terms of substantive court rulings, that some litigation has forced. The best example to date, even though it remains highly controversial, is the 2006 Israeli High Court of Justice (HCJ) ruling on the legality of targeted killing, which I discuss below. There is no equivalent U.S. ruling and many litigators and scholars believe that the intervention of the courts could be the difference that would significantly curb U.S. targeted killing policy.\textsuperscript{39} But the U.S. courts have repeatedly refused to hear cases concerning targeted killing, citing \textit{inter alia} the fact that it is a non-justiciable question. The executive thus determines targeted killing policy and the President personally authorizes individual strikes – all without judicial review\textsuperscript{40}. Recently, however, and especially since the targeted killing of U.S. citizen Anwar al Awlaki in Yemen in 2010, some NGOs and news-media, and members of Congress have expressed concern that U.S. drone policy has gotten out of hand and requires urgent judicial review. The New York Times has been championing the establishment of a special court that would have access to information and evidence concerning who is placed on a kill list\textsuperscript{41}. Since at least 2012, following the campaigning of senator Dianne Feinstein, a special group of staff members from the House and Senate intelligence committees have had some access to intelligence and operational information used by the CIA in their drone strikes.\textsuperscript{42} But without disclosure of the full legal standards guiding the policy, critics have complained that such oversight is ultimately ineffective and that the commission of another secret court is anathema to legal and public transparency.\textsuperscript{43}

These measures to bring targeted killing under judicial review constitute a ‘legal jihad’ according to Goldstein and Meyer.\textsuperscript{44} Such renderings write the first half of a typology that has always been fundamental to the lawfare debate: lawfare and other illegitimate weapons – from improvised explosive devices to suicide bombings – belong to the enemy Other. To witness the other part we need look no further than to Brook Goldstein’s neoconservative \textit{Lawfare Project}. The \textit{Project} defines lawfare as “ […] the abuse of Western laws and judicial systems to achieve strategic military or political ends.” The qualification of lawfare as something that is done to Western legal systems is highly significant and as the Project’s website goes on to note, lawfare:

"[...] must be defined as a negative phenomenon to have any real meaning. Otherwise, we risk diluting the threat and feeding the inability to distinguish between that which is the correct application of the law, on the one hand, and that which is lawfare, on the other. […]"\textsuperscript{45}

The typology comes full circle only when we view Western legal and military practice against the abusive and diabolical tactics of the Other. In extremis this means that ‘we’ do not do lawfare (we merely ‘apply’ laws). Thus what is common to both Israeli and U.S. lawfare discourse is a strain of abusive and diabolical lawfare which commentators suggest belong to and are typical of the enemy Other; ultimately, these traits are unrecognisable in the Western self. The parallels here to Said’s critique of Orientalism are glaring and yet this lawfare discourse grants a
surprising amount of potential agency to the Other. It is an agency that ruins law and as such cannot be tolerated by liberal lawfare imaginations; it is a diabolical agency that, if activated and realised, threatens not only the Self, but also the western edifice and metaphysics of law. Lawfare has become a site through which classic orientalist tropes have found considerable purchase, but it has also become a battleground: lawfare must be saved from itself and from the Other. What lawfare boils down to, according to Laurie Blank, is the “exploitation of the law of war” by “insurgent groups”. The diabolical lawfare of the Other thus involves deliberately placing their own civilians in the line of fire. According to this logic, those civilians become legitimate ‘collateral damage’, and it is the enemy – not the attacking military – who is responsible for their deaths. Thus Dunlap does not merely call the enemy savages, but refers rather to the “savagery of the[ir] illegalities”, suggesting an inseparability between the illegal and the savage. This is a convenient and self-serving argument that displaces the responsibility of modern military forces to protect civilians while also providing a blanket justification for their ‘accidental’ and ‘incidental’ destruction.

**Benign lawfare?**

But what if this were not the only story of lawfare? What if the above account were a convenient narrative that in effect, if not design, condemns the enemy to a diabolical space precisely to obfuscate and erase the lawfare conducted by the Israeli and U.S. military and their apologists? I would not be the first to write a counter-narrative of neoconservative lawfare. In fact, and as I shall show, military thinking on lawfare has moved on from the traditional conception originally proposed by Dunlap. Nevertheless, and against the background of this putatively ‘diabolical’ lawfare, the remainder of this chapter traces a particularly potent and mobile form of lawfare that has been developed and deployed by Israel and the U.S. over the last decade and a half. I want to suggest that the borders between ‘their’ and ‘our’ lawfare may not be as pronounced as is commonly assumed. Before I get to the substance of the matter, however, it is first necessary to dispel some prevailing myths that would have us believe that U.S. and Israeli lawfare is benign and preferable to warfare.

Although Charles Dunlap originally cautioned against the use of lawfare, he reconsidered his position in light of the wars in Iraq and Afghanistan. “The new counterinsurgency doctrine […] emphasizes that lawfare is more than just something adversaries seek to use against law-abiding societies” he writes, “it is a resource that democratic militaries can—and should—employ affirmatively.” In contrast to the lawfare deployed by the enemy, U.S. lawfare is about abiding by, installing and promoting the rule of law. The example he gives is the establishment in Baghdad of a Rule of Law complex, a “self contained haven” which “permits Iraqis to solve Iraqi problems in relative safety for themselves and their families”. The fortified Green Zone provides a secure environment for a ‘legal infrastructure’ we are told, and along with other ‘law-oriented, effects-based operations’, these have become a ‘critical piece of counterinsurgency strategy’.

And just like counterinsurgency operations were supposedly about winning ‘hearts and minds’ by minimizing violence and fighting with empathy (the much commented on ‘armed social work’), Dunlap’s new lawfare is invested in limiting violence and exercising law instead. He thus re-define lawfare as the “strategy of using – or misusing – law as a substitute for traditional military means to achieve an operational objective.”

There is something disingenuous about the way that the Israeli and U.S. military and their apologists have represented as negative the use of law as a weapon of war, not least because it
chimes of the pot calling the kettle black.\textsuperscript{55} Dunlap’s ‘realization’ that ‘democratic militaries’ can also use the law as a weapon of war is equally incredulous. It belies the truth that the U.S. and other imperial powers both today and historically have all too frequently conducted violence in the name of law.\textsuperscript{56} There is not the space here to write a critical and far-reaching history of lawfare but it is worth making the point that colonial powers have for a long time practiced something very similar to what we call lawfare today.\textsuperscript{57} Indeed, as John and Jean Comaroff have cogently argued, part of the (post-colonial) backlash against colonial power has been directed precisely at the legal institutions of imperialism:

“What imperialism is being indicted for, above all, is its commission of lawfare: its use of its own rules—of its duly enacted penal codes, its administrative law, its states of emergency, its charters and mandates and warrants, its norms of engagement—to impose a sense of order upon its subordinates by means of violence rendered legible, legal, and legitimate by its own sovereign word. And also to commit its own ever-so-civilized, patronizing, high-minded forms of kleptocracy.”\textsuperscript{58}

Again, and as tempting as that last sentence might be, I cannot go there, but I do nonetheless want to keep this colonial history of lawfare in view, not least because it has all kinds of inflections in the way that the U.S. and Israel conduct warfare and lawfare today. Indeed, since the inception of the GWoT John Morrissey has argued, “the US military has waged incessant lawfare to legally securitize, regulate and empower its ‘operational capacities’ in its multiples ‘spaces of security’ across the globe”.\textsuperscript{59} Morrissey shows how what he calls ‘forward juridical lawfare’ secures the circulation of U.S. bodies—military troops, contractors etc. – through Status of Forces Agreements. He notes that contemporary US military lawfare is “orientated to plan for the ‘even-tal’, to anticipate a series of future events in its various ‘security zones’ – what the Pentagon terms ‘Areas of Responsibility’ or ‘AORs’”.\textsuperscript{60} This careful legal preparation is a form of lawfare because it is invested in shaping and \textit{a priori} legitimizing the battlefield; its preemptive nature makes it a particularly effective and insidious (because difficult to locate) form of lawfare. In a more recent paper, Morrissey has shown that U.S. lawfare has a specifically economic inflection, invoking the idea that war making and law making also go hand-in-hand with securing favourable and economic environments\textsuperscript{61}.

While Morrissey’s forward juridical lawfare need not necessarily entail explicit violence it does legally secure the architecture for unleashing it. Lawfare is a prerequisite for violence, then. Perhaps most misleading and frustrating about ‘affirmative’ accounts of lawfare is that they fail to consider the violence \textit{inherent} in the exercise and foundation of law. We must ask the following: on what authority will Dunlap’s ‘democratic lawfare’ be founded, if not on a foundational violence and one constantly re-inscribed through the very exercise of warfare? I’m thinking here, of course, of Benjamin’s lesson that all violence is either law making or law preserving\textsuperscript{62}. As Derrida has shown, law is nothing without \textit{enforcement}, thus begging the question of who will \textit{enforce} this ‘democratic’ lawfare, and how?\textsuperscript{63} These questions, I think, expose the possibility that lawfare is not and has perhaps never been about finding legal \textit{alternatives} to ‘traditional military means’; rather it is a method that also facilitates and in a very real sense produces violent military means, and not just of the ‘traditional’ variety. In the end though, even Dunlap appears unsure as to whether lawfare really is a \textit{substitute} for warfare. He writes of the legal and the lethal as expressing a more of a \textit{complementary} relationship: the “parallel application of legal weaponry coincident with more traditional arms” he argues, “can
have an exceptionally *productive synergistic* effect.”\(^{64}\) Dunlap is closer to the mark with this epiphany, and in what follows I want to show how the lawfare of targeted killing, far from substituting violence with law, seeks to justify the extension of killing *through* the law.

**War through law**

The “legalization” of targeted killing in Israel was contingent on a foundational act of lawfare. Israel constructed a war, in part, *through* law. A similar war, or rather, a similar *conceptualization* of war was subsequently emulated by the U.S. and radically expanded to apply – potentially – everywhere.\(^{65}\) I do not want to repeat here the broad discursive formations of the GWoT that have already been so well documented\(^{66}\) but rather want to focus on the way in which these discursive formations have been injected with a mixture of legal argument and lawfare. Moreover, and although we are by no means beyond the GWoT, the language as a legal construct is now dated. Two examples begin to illustrate the point. Although Israel utilized the post 9/11 language of terrorism and the ‘axis of evil’ to its full advantage\(^{67}\), it never legally justified targeted killing in terms of a *global* WoT as such (thus begging the question of how Israel’s WoT became the U.S. \_GWoT). Moreover, when Obama assumed office in 2009, the then State Department Legal Adviser, Harold Koh advised him to reject the GWoT label, preferring instead to base U.S. military actions on the view that the U.S. is in an “armed conflict with al-Qaeda, the Taliban and associated forces.” And yet, under Obama we have witnessed not the cessation of Bush’s GWoT but its rebranding (as “Overseas Contingency Operations”), recalibration, and expansion\(^{68}\). But it would also be intellectually lazy to say that nothing has changed except the name, and if nothing else Obama and Koh’s legalistic language marks the increasing ‘legalisation’ or ‘juridification’ of the battlefield. This matters to the present analysis because this juridification of the battlefield is underwriting simultaneous changes in the spatiality of the battlefield.

In 2000 the International Law Department (ILD) of the IDF published a legal opinion that sought to re-define the second Intifada as a war. This was a radically *new* situation, Israeli military lawyers argued, and there was no basis for comparison between the first Intifada (of 1987-1992) and the second Intifada.\(^{69}\) There were two essential ingredients to the legal thesis. First, Israel was allegedly no longer in control of the West Bank and Gaza as it had been in 1987 and so could no longer maintain security. (Of course, this was a fiction – and it remains a fiction. The Oslo Accords did not end the occupation, and although Israel withdrew from some Palestinian population centers in the West Bank (‘Area A’) throughout the 1990s, it remained in partial control of Area B and in full control of area C. Gaza too was still occupied at the start of the second *Intifada* and it remains *de facto* occupied today, in spite of Israel’s putative ‘withdrawal’ in 2005.) Second, and related, Palestinians were now armed with serious weapons, forcing Israel’s hand. In an Israeli Ministry of Foreign Affairs press briefing, Col. Daniel Reisner summarized the change in legal perspective thus:

> The rules of engagement for the IDF in the West Bank and Gaza Strip have been modified in accordance with the change in the situation. Prior to the violent events, "police rules of engagement" were applied. […] the situation has now changed. The Palestinians are using violence and terrorism on a regular basis. They are using live ammunition at every opportunity. As a result, Israeli soldiers no longer are required to wait until they are actually shot at before they respond.\(^{70}\)
Once this legal architecture was put in place, the IDF were in a position to use the full force of war: the ILD had created a framework whereby the IDF could legally target and kill Palestinians, or so it claimed. Without first defining Israel’s relationship with Palestine as one of war (in legal terms, an ‘armed conflict’), targeted killing would simply be illegal in all but the most exceptional of circumstances. International Human Rights Law and the Law Enforcement paradigm – the other legal regimes potentially applicable to targeted killing – place far greater restrictions on the use of force, and so Israel had opted for a war-type model (an “armed conflict short of war”) that is guided by the more permissive and ‘grey’ regime of International Humanitarian Law (IHL).

In December 2000, the killing of Dr. Thabet, a political official and member of the Palestinian Authority, prompted the filing of the first petition challenging the legality of Israel's targeted killing policy in the High Court of Justice. A second petition was filed following one of the most controversial air strikes in Israel's repertoire of targeted killings. The IAF dropped a one-tonne bomb on the house in which the leader of Hamas' military wing Salah Shehadeh was sleeping. In addition to Shehadeh and his guard, fourteen Palestinian civilians, including eight children, were killed, and more than 150 injured. Both petitions, however, were dismissed on January 29, 2002, the court refusing to intervene. A third petition was eventually accepted on January 24th 2002 but by the time the court had reached its judgement on December 15th 2006, 240 Palestinians had already been killed in targeted killing strikes. The verdict has received a significant amount of praise and criticism but the most relevant to the present analysis is the fact that the court accepted the majority of the IDF’s legal opinions, including the designation of the second Intifada an armed conflict. The ILD’s radical legal opinion gained the force and legitimacy of law. Steadily, a “war process” had “replaced the peace process” and politics had become “an extension of war by other means”. The significance of the ruling extended beyond Israel though, and as Antony Dworkin pointed out at the time, it would likely become “an important precedent for other countries engaging in military action against terrorist groups”. Dworkin clearly had the U.S. in his sights, and so did the judge who gave the opinion, Dworkin argues: “In some ways Justice Barak’s opinion appears to be written with the U.S. in mind”.

**Travelling Law/fare**

At first the U.S. did not accept Israel’s interpretation of the second Intifada as an armed conflict, and it spoke out against targeted killing. Senior IDF lawyer Daniel Reisner had opined to the Mitchell Committee and had been “aggressively attacked” by the U.S and U.K. for his legal opinions but he looks back on the criticism with a measure of irony: “it took four months and four aircraft to change the mind of the U.S. government”. The U.S. quickly saw a need to target suspected terrorists wherever they might be found, even if they were found outside of a conventionally understood battlefield. Early in 2001, the U.S. had sent delegations to Israel to try to persuade the IDF to stop the targeted killings. After 9/11, however, they returned with a different mission: they wanted to learn from Israel and to study how Israel had developed and justified its’ targeted killing policy. The exact nature of those meetings is classified but news sources at the time reported:

“The Bush administration has been seeking Israel’s counsel on creating a legal justification for the assassination of terrorism suspects […] Legal experts from the United States and Israel have met in recent months to discuss the issue, and are considering widening the consultation circle to include representatives of America’s closest allies in the war against terrorism […] American representatives were anxious to learn details of
the legal work that Israeli government jurists have done during the last two years to tackle possible challenges — both domestic and international — to its policy of “targeted killings” of terrorist suspects."  

It is impossible to say how formative of U.S. policy these high level, closed-door political meetings were and there is no formal and official document that outlines which parts of Israeli policy the U.S. might have emulated, or at least if there is one it remains classified. In any case, whatever might have been directly borrowed then might not be applicable today. But as I must now show law does not travel in official documents and through secret meetings alone.

In her study of what she calls the ‘circulations of law’ in the colonial context, Iza Hussin writes that law is a "travelling phenomenon, its logic centred upon the balance between the local and the general." This frames quite neatly the issue of targeted killing and the way that it has travelled from Israel to the U.S. The ‘law’ of targeted killing was invented and developed by Israel and when it became useful elsewhere – i.e. in the U.S. – the law travelled. But this is a little too neat. What was it that travelled, and how? Was it formal law or lawfare; was it the overall framework or was it specific tactics? The crucial point is not that law(fare) travels but how it travels and why. Hussin is once again useful because she reminds us that law leads a worldly and social life. Of the British colonial period she notes that:

"Law did not travel alone: it had carriers and agents, who themselves had travelling companions – government officials and diplomats, traders and businessmen, missionaries, pilgrims, scholars, privateers. Its departure was often a matter of heated debate; its arrival at each port of call required translation, negotiation and domestication, as well as all-out war."

My aim here then is not to reconstruct a cause/effect ‘moment’ in which Israeli targeted killing is merely ‘transplanted’ to the U.S. To understand how targeted killing law has travelled, it helps to conceive of law as something richer than legal formalism and to consider the way in which – as David Delaney would have it – law is “worlded”. Indeed, to push the point even further, and as theorist of comparative law Edward Wise has written: “legal history, to be genuine history, requires, first of all attention to evidence both about law and about the contexts in which it is embedded.” Much work and production has gone into making and shaping targeted killing and we should remember that an orgy of senior civil and military lawyers, military commanders, world leaders, legal scholars and a host of other experts were – and are – involved in packaging, transporting and unpacking the law(fare) of targeted killing. For sake of space I focus here only on the jurisprudence that has played an especially important role in defining, transporting and transforming the law(fare) of targeted killing.

Several advocates of a more permissive approach to U.S. targeted killing policy have been inspired by or have drawn heavily upon the Israeli experience and the Palestine-Israel conflict more broadly. Former U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston has usefully catalogued some of the most vociferous of these opinions and is worth quoting at length:

Guiora […] argues that, “international laws explicitly providing for active self-defense should be formed out of what has been learned from Israel’s struggle with terrorism.”
The tendency to extrapolate from Israel’s experience in order to arrive at policy prescriptions for the United States is well illustrated by the title and subtitle of a later article by the same author: “License to Kill: When I advised the Israel Defense Forces, here's how we decided if targeted kills were legal—or not.” [...] Similarly, Gross criticizes the inflexibility of international humanitarian lawyers who are not prepared to “reconsider the merits” of targeted killings, chemical warfare, and attacks on currently protected groups of civilians. [...] almost all of the factual information and case studies are drawn from Israel’s policies. [...] other commentators [...] suggest that there is already an identity of interest and indeed even a degree of symmetry in terms of both law and policy between Israeli and American approaches. Thus they [Blum & Heyman] note that both countries have made targeted killings “an essential part of their counterterrorism strategy” and that both have found them to be “an inevitable means of frustrating the activities of terrorists who are directly involved in plotting and instigating attacks from outside their territory.”

Alston’s review of this literature is tremendously useful in demonstrating the ways in which the debate that legal scholars have become embroiled in is not abstract and academic but is concerned with the big political and legal questions, indeed the very stuff of targeted killing. As such, he demonstrates that legal scholars are not neutral arbiters on targeted killing but are rather proactive carriers and shapers of its discourse. Moreover, his summary, from which I have borrowed liberally, usefully shows some of the direct and indirect links that have been made between Israeli and U.S. targeted killings. The message from this scholarship is that the Israeli targeted killing experience is one that can and should be emulated. Radsan and Murphy distil the problem (or perhaps, more accurately, the solution) even further: if a “small country quite vulnerable to terrorism [...] can create and manage a system of accountability for targeted killing, then, on a similar balance, the United States should be able to do so as well.” Alston goes on to show why such arguments are problematic: invariably, they focus on Israel’s stated policy and on the HCJ’s somewhat restrictive approach to targeted killings rather than on the actual practice and conduct of targeted killing. His own analysis of Israeli practice reveals severe shortcomings (and some standards of good practice) and ultimately he registers a profound scepticism that Israel serves as a model to be emulated.

A list of differences exists between the U.S. approach and the Israeli approach, and some of the more significant differences have come to the surface very recently. Israel does not, at least as a matter of policy, target and kill its own citizens, whereas the U.S. has and does. The same Department of Justice “white paper” that justified the execution of U.S. citizen Anwar al Awlaki also contained a radically expansive definition of “imminent threat”, expanding the scope of who can be targeted and when. Israeli scholars and former IDF military lawyers have spoken out against these and other elements of U.S. targeted killing policy. But the most startling difference are surely over the nature and geography of these wars: the size and geography of the Palestine-Israel conflict is very different to those in Iraq and Afghanistan, to say nothing of the putative ‘wars’ the U.S. is waging in Pakistan, Yemen and Somalia. The origins of the conflicts are different and they have been fought differently. Legal scholar Kenneth Anderson is our guide here:

The fact of living cheek by jowl, a conflict going on for generations, a relatively enormous amount of intelligence available for purposes of making meaningful
determinations in a limited geographic space on a limited population – it is all fantastically sui generis, and I believe quite inapplicable and irreplicable elsewhere.\(^95\)

In a way, of course, both Anderson and Alston are correct: we cannot simply cut and paste from one conflict to another, even less because these conflicts are plural and multi-faceted. For example, it is not clear whether Israel is at war only with Palestine (or only Gaza and Hamas?) or whether the armed conflict is also against Lebanon,\(^96\) Syria\(^97\) and Iran.\(^98\) It is also not clear whether and where cyberwarfare constitutes and triggers armed conflict.\(^99\) Furthermore, the U.S. is fighting *multiple* wars, all of which have been of a very different nature and have taken divergent courses: ‘counter-insurgency’ in Iraq and Afghanistan; ‘counter-terror’ there and elsewhere; al Qaeda and the Taliban in Pakistan, al Shebab in Somalia, etc. All these wars/‘wars’ are overdetermined and the idea that one tactic and technology – targeted killing – applies to and should be utilized in and across these wars *in the same way* is intellectually (and strategically) lazy. But herein lies the rub with Alston’s analysis on the inapplicability of the Israeli targeted killing model to the U.S. He focuses our attention on the *practice* of targeted killing and while this is a welcome departure from accounts that merely parrot doctrine and policy, his analysis fails to take into account the broader legal and discursive schema within which targeted killing has been produced and transported. That is, by focusing on the ways in which Israeli and U.S. targeted killings are *incongruent*, he misses the crucial point that they have been *made* congruent through legal recourse to the ‘paradigm of war’. Israel’s “armed conflict short of war” has been remade and it is not so much that targeted killing is taking place ‘beyond borders’ as Alston would have it: targeted killing is taking place through the annihilation and radical redrawing of borders. We must turn to contemporary deconstructions of the battlefield if we are to fully appreciate the lawfare that not only seeks to justify targeted killing but also renders meaningless the borders that might have contained it.

**Deconstructing the battlefield**

In this final section I argue that the most potent form of Israeli targeted killing lawfare, the construction of an expansionist and aggressive paradigm of armed conflict is what most successfully made its way across the Atlantic. But this construction has become so expansive that it in fact does more to *deconstruct* the normative and legal borders of war: once the world is *constructed* a battlefield, the borders demarcating the inside/outside of war no longer exist, for – simply – *there is no outside*. The recent legal battle to redefine and expand the battlefield has not been conceived of as part of the lawfare debate, and yet I believe it is at the cutting edge of politico-scholastic lawfare. Frédéric Mégret has written of a ‘vanishing battlefield’ and while he careful to point out that the “deconstruction of the battlefield” has been underway since the 19th century (with the invention of firepower), he also insists that there *is* something new about the deconstructions of the post 9/11 era:

> “there is no doubt that a deliberate attempt to manipulate what constitutes the battlefield and to transcend it in ways that liberate rather than constrain violence has been at the heart of the response to the terror attacks of 9/11. […] The War on Terror essentially combines all the deconstructing effects that have taken their toll on the idea of the battlefield in the 20th Century, to the point of making it barely recognizable.”\(^100\)

What vanishes for Mégret – the normative legal zones of conflict – appear in Derek Gregory’s analysis as an ‘everywhere war’, where he alerts us to new (but always historically contingent)

\(^{95}\) Anderson 95

\(^{96}\) Anderson 96

\(^{97}\) Alston 97

\(^{98}\) Alston 98

\(^{99}\) Alston 99

\(^{100}\) Mégret 100
spaces of war; cyberwarfare; drone warfare outside of traditional warzones and counter-narcotics.\textsuperscript{101}

These critical – and critically important – analyses respond to recent debates in Law about the so-called ‘legal geography of war’.\textsuperscript{102} Such debates, of course, go back at least to the Authorization to Use Military Force (AUMF) passed by Congress on September 14 2001. The authorization granted the President the authority to use all "necessary and appropriate force" against those whom he determined "planned, authorized, committed or aided" the September 11th attacks, or who harbored those persons or groups.\textsuperscript{103} The authority to use military force also came from secret orders, such as the Al Qaeda Network Execute Order, or AQN ExOrd, signed by Rumsfeld in 2004. Exord, “allowed for JSOC operations “anywhere in the world” where al Qaeda operatives were known or suspected to be operating or receiving sanctuary.”\textsuperscript{104} These laws were hardly direct descendants from those passed in Israel but they bear a striking resemblance in terms of the way that they approached terrorism and, more explicitly, how they conceptualized the fight against terrorism in terms of an expansive armed conflict.

Early in the WoT Condoleezza Rice spoke of a 'new kind of war' that renders the Geneva Conventions irrelevant and "quaint".\textsuperscript{105} Of course, in a way she was right: the original Geneva Conventions are in some ways quaint and their language can seem antiquated today. But IHL is not a static legal regime, neither in custom nor treaty and the U.S. (and Israel) refused to sign the most significant update to IHL – the 1977 Additional Protocols – since the 1949 Conventions were founded. So while the Conventions may well be out of date, the U.S. then and now are plainly not prepared to have IHL updated in ways consonant with (most of) the rest of the international community. The updates and ‘new laws’ sought are ones that defy international consensus because they favour a particularly narrow and \textit{sui generis} way of fighting war: a pre-emptive ‘counter-terror’ war. It is no surprise then that the U.S. has attempted to change law not through treaty but through recourse to consensus defying practice.

Today these generalisations that ‘new wars need new laws’\textsuperscript{106} have taken on very specific and almost deregulatory form. The new laws are ones that expand the scope and ontology of war. Laurie Blank for example, has expressed the need to move away from traditional conceptions of 'battlefield' to something called she calls the 'zone of combat'. But what does it mean, and where does it go? Blank defines the zone expansively: "anywhere terrorist attacks are taking place, or perhaps even being planned and financed".\textsuperscript{107} Indeed, she goes on to claim, citing Natasha Balendra, that a "war against groups of transnational terrorists, by its very nature, lacks a well-delineated timeline or a traditional battlefield context [...]"\textsuperscript{108}. The war cannot, in her view, be limited to this static thing called the battlefield, but must follow the terrorist wherever s/he may go. In this perspective, the transition from the Israeli battlefield to the vision of the ‘world as battlefield’ is upon us, and is allegedly supported by the relevant international law, or at least by lawfare.

But it is Kenneth Anderson who most directly addresses the question of a legal geography of war and its (ir)relevance in the 21\textsuperscript{st} century. Anderson summarises the debate and simultaneously does away with the idea that geographical constraints can and should be put on war: “we have swung full circle in the past decade, arriving back at the traditional view \textit{there is no legal geography of war}”.\textsuperscript{109} This position, broadly supported by a number of other legal scholars, bears more than a passing resemblance to the current official position of the U.S. Government:
"The United States is in an armed conflict with al Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks” said Harold Koh in his much-quoted speech, and in this context the United States “may use force consistent with its inherent right to self-defence under international law.” But Koh makes no mention of where the war is; tacitly implying that geography doesn’t matter, he leaves open the possibility of an everywhere war.

When we think about the law as a travelling phenomenon, it pays to think also of its modes of transportation, its carriers and its protectors. It is not that (targeted killing) law travels easily or seamlessly, but rather that the journeying of law from one place to another is carefully arranged and protected by those who see in it a strategic military value (i.e. lawfare). Inventing and transporting the law of targeted killing was not an easy process, and alongside the lawyers who handled the case, it has been facilitated by the growing use of customary international law in IHL, and also by the involvement of military lawyers in targeting decision; the ‘lawyering up of the kill chain’ that I have written about elsewhere. The two, of course, are connected.

Department of Defence policy requires that “all plans, policies, directives, and rules of engagement issued by the command and its subordinate commands and components are reviewed by legal advisers to ensure their consistency with […] the law of war.” The embedding of lawyers at the operational level, and their direct involvement in lethal targeting operations is said to have rendered targeted killing more transparent while also ensuring an unprecedented level of compliance. Yet as I have argued elsewhere, military lawyers have not become an integral part of the kill-chain only by saying ‘no’ to their commanders and between the strictly prohibited and the clearly permissible there is a grey zone ripe for lawyerly interpretation and inevitably advice must sometimes favour ‘military necessity’ over humanitarian consideration. Customary law – a legal grey zone – is informed by and develops according to state practice and opinion. This means that the behaviour of states and the opinion of legal scholars and military lawyers can, through iteration and (re)citation become law. Israeli and U.S. lawyers and politicians are well aware that customary international law progresses through violations and it would appear that their preferred approach is to 'update' international law through violence and exceptional action rather than through dialogue and consensus. War and law are no longer separate spheres (if they ever were). Lawfare is not only that which the enemy does. Lawfare does not happen over ‘there’ while Rule of Law and ethical war happen over ‘here’. The U.S. and Israel are at the helm of exercising what Eyal Weizman, following Walter Benjamin, has called ‘legislative violence’. The development of the ‘law’ of targeted killing has also been facilitated

What might be novel about the Israel-U.S. approach today is the fact that it has become unthinkable to launch warfare without lawfare. The two have become indistinguishable from one another. But as I hope to have shown, Israel-U.S. lawfare is not only about an attempt to legalize and legitimize targeted killing; more significantly, it is also about creating a broad legal architecture within which not only drones and targeted killing, but other lethal and non-lethal tactics and weapons may be deployed. The legal architecture that supports targeted killing is also an architecture that enables the deconstruction of the battlefield. If and when the battlefield is gone – imaginatively and/or legally – there might be precious space left to escape, evade or stop the legal violence.
If all of this clarifies anything about the putative ‘end of the American Century’ and the making of a new geopolitical order it is perhaps that Israel and the U.S. continue to be at the cutting edge of new forms of imperial lawfare and warfare, but also that these strategies and tactics come with intrinsic consequences that signal not strength and vitality but rather the precarity of Israeli and U.S. imperialism. Israel and the U.S. are responding to and are precipitating changes in the way that war is and will be fought in the 21st century. In this regard they have pioneered the way, as well as the technology, the know-how and experience, and (of course) the legal architecture for carrying out a way of war that – at the moment at least – favours themselves and their allies. But while these techno-legal architectures favour those who ‘have’ (inter alia) drones and the capacity for ‘global strike’ from those who do not, Israel and the U.S. possess neither a technological monopoly nor unique access to the legal regimes that secure the ‘world as battlefield’. Indeed, as many as 87 nations possess some form of drone, and as the Washington Post recently reported:

“China uses them to spy on Japan near disputed islands in Asia. Turkey uses them to eyeball Kurdish activity in northern Iraq. Bolivia uses them to spot coca fields in the Andes. Iran reportedly has given them to Syria to monitor opposition rebels.”

The first drones over Gaza and Afghanistan were also unarmed and while Israel, the U.S. and U.K. may be the only known states to have fired missiles from remotely controlled drones, this will likely not be the case for much longer. And yet, it is not only the spectre of an increasingly difficult-to-regulate global (drone) arms race and drone industry that threatens this putatively ‘western way of war’. Its legal architecture does too, and by way of closing I’d like to consider a different geography of travelling law(fare).

On December 1st 1963 Malcolm X was asked to comment on the assassination of John Fitzgerald Kennedy. Choosing his words carefully, he characterized it as an instance of the “chickens coming home to roost”. It was certainly a controversial comment but it was not a flippan one. Kennedy, of course, had been in power during the early years of the CIA assassination campaign of the 1960s and 1970s. Malcolm X referred explicitly to Kennedy and the CIA’s complicity in the murder of Congolese leader Patrice Lumumba and said that Kennedy had “twiddling his thumbs” at the assassination of Vietnemese Presdident Ngo Dinh Nhu. In 1975 the monumental Church Committee Report confirmed that the CIA had both direct and indirect involvement in plots to assassinate several foreign leaders. The following year, President Ford issued a presidential decree banning assassination and several executive orders since (the most recent of them in 2008) have iterated that “No person employed by or acting on behalf of the United States Government shall engage in or conspire to engage in assassination.” But all of this has now been undone and as metaphor Malcom X’s comment speaks directly to the notion of travelling law and the future that might come to haunt those who have turned the world into a battlefield.

In a letter to President Obama, Kenneth Roth of Human Rights Watch urged Obama in 2010 to avoid setting “dangerous precedents”. It might now be too late for that. The very same legal arguments that Israel and the U.S. have aggressively been pursuing over the last decade and a half apply to and can also be used against them. For example, by conducting drone strikes, CIA employees as civilians who are participating in hostilities have become what the U.S. once classified as “unlawful combatants”. As we know, many labeled thus ended up in places like
Guantanamo Bay, indeed many are still in Guantanamo Bay. But even more pointedly, according to the logic of the expansive armed conflict, there is nothing to stop other states and non-states from conducting their own targeted assassinations on Israeli and U.S. military personnel and infrastructure around the world. These could legitimately include Obama himself (as Chief of Staff of the U.S. military) or the thousands of U.S. and Israeli soldiers and ‘unlawful combatants’ in and off military bases around the world. Possible ‘legal’ strikes could also include the IDF defense compound, the Kirya, located in central Tel Aviv. As I type these closing words, I can see the Kirya through the window of the public library. I wonder whether the civilians around me, and those outside in the bustling cafes might not, according to U.S. and Israeli lawfare, be considered legitimate accidental or incidental ‘collateral damage’ if Hamas or Hezbollah attempted to strike the military compound over the road, but missed by a few meters. Those chickens have not yet come home to roost and at least as far as the conduct of warfare and lawfare are concerned it sure continues to be a long twentieth century.124

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1 PCATI and LAW, Assassination Policy, 2.
2 IMFA, Sharm El-Sheikh.
3 House of Commons, Oral Answers, column 1403.
4 American Embassy in Tel Aviv, Israel Action.
5 Mitchell et al., Committee Final Report, no page.
6 Ibid. See also, Reisner, Operations in Practice.
7 Quoted in Williams, Covert Drone War, 873.
8 Quoted in Scahill, Dirty Wars, epub version: no page.
9 Small, Lawyerng Targeted Killing.
10 Anderson, Legal Geography of War.
11 Scahill, Dirty Wars.
12 Gregory, Everywhere War.
13 E.g. Bureau of Investigative Journalism, Covert Drone Wars; Mégret, Humanitarian Problem with Drones; Gregory, Moving Targets.
14 C.f. Alston, Targeted Killing Beyond Borders
15 B’Tselem, Fatalities.
17 Harel, Doubts Over Targeted Assassination.
18 I borrow the term – and my title - from Iza Hussin who writes: “Law is a travelling phenomenon, its logic centred upon the balance between the local and the general […]. Hussin, Circulations of Law, 21. Her work draws from colonial theories of law and the globalization of law and legal thought (e.g. Kennedy, Globalization of Law.). Legal Anthropologists have also tried to come to terms with the movement and circulation of law, both in the colonial and contemporary context. In analogous work Benda-Beckmann and Benda-Beckmann have proposed the concept of ‘legal mobility’, similarly emphasising the fact that “law has always been mobile” (Benda Beckmann and Benda Beckmann, Mobile Law, 7). These theorizations of law challenge conventional comparative law approaches that have tended to think about ‘legal transplants’ and the ‘diffusion of law’ as a simple top-down imperial project (see Westbrook, Theorizing Diffusion of Law.) Circulation, mobility and travel are thus perhaps more apt
metaphors for the phenomenon in question, see for example, Hussin, *Circulations*. Law is no exception with regard to mobility, of course; politics, people, goods, things, ideas and theory travel too. Edward Said famously wrote of travelling theory, and of the potentials and pitfalls in the itineraries of intellectual though (a topic he considered “central to intellectual life in the late twentieth century”) (Said, *Travelling Theory Reconsidered*, 452). Such movements he noted are “never unimpeded” and necessarily face both overt resistance and conditions of acceptance. Legal Anthropology, and the current work is indebted to Said’s instructive essays on travelling theory. See Said, *Travelling Theory*., Said, *Travelling Theory Reconsidered*. 19

Wise, *Transplant of Legal Patterns*. In a parallel argument (to elaborate on the above note) Said writes that “movement into a new environment is never unimpeded. It necessarily involves processes of representation and institutionalization different from those of the point of origin. This complicates any account of the translation, transference, circulation, and commerce of theories and ideas.” Said, *Travelling Theory*, 157.

19 Mégret, *Vanishing Battlefield*.


22 Dunlap acknowledges the term is not his own (though he is commonly and mistakenly credited with its coinage, e.g. Hajjar, *Lawfare and Armed Conflict*, 6). The term “lawfare” first appeared in 1975: see Carlson and Yeoman, *Humanity or Barbarity*, reprinted and available at: [http://archive.is/cbZ5V](http://archive.is/cbZ5V). Their use of the term was very different to the way that Dunlap used it because they hoped lawfare could be used for pacific ends: they argued that: “lawfare replaces warfare and the duel is with words rather than swords”, no page. The term also (nearly) appears in Qiao Liang and Wang Xiangsui, where these two officers in China’s People’s Liberation Army refer to “law warfare” arguing that powerful states should “seiz[e] the earliest opportunity to set up regulations”, Liang and Xiangsui, *Unrestricted Warfare*, 55.


26 Lebowitz, *Value of Claiming Torture*.

27 See also Yin, *Boumediene and Lawfare*.


30 United Nations, *Fact Finding Mission*. C.f. Jones, *Misrule of Gaza*., Hajjar, *Lawfare and Armed Conflict*. Hajjar argues that Israel “pioneered” what she calls “state lawfare”, and dates its use to 1967. Hajjar offers a useful and encyclopaedic account of how the Israeli state has used law as a weapon to justify violence and her account is an important corrective to those contemporary conversations on lawfare which focus on Israel and U.S. being only victims of lawfare, and not practitioners. I am not sure about Hajjar’s claim that Israel pioneered state lawfare, however, because all states practice – indeed are founded upon – something like lawfare and, in any case, the history of colonialism is, at least in part, a history of empires seeking to justify their superiority through and with reference to law (e.g. Angie, *Colonial Origins of International Law*., Angie, *Imperialism, Sovereignty and International Law*., Orford, *International Law from Below*., Kinsella, *Image Before the Weapon.*) Comaroff and Comaroff and Comaroff have written specifically about the colonial origins of lawfare, and their analysis is
indebted to ‘Third World Approaches to International Law’ (TWAIL), the rich intellectual and political movement that emerged in the 1990s with the goal of deconstructing the unequal power relations which are and which have always been constitutive of international law (Comaroff, Colonialism, Law & Culture., Comaroff and Comaroff., Law and Disorder., see also: Mutua, Savage Victims., Rajagopal, International Law from Below., Jones, Historical Geographies of Lawfare.

30 David Scheffer points to a similar blindness on behalf of U.S. lawfare commentators: “The popular view of lawfare, put forward by neo-conservative commentators and some military lawyers, is exceptionally myopic, oblivious to how other nations view inter-national justice, and disingenuous regarding America’s own aggressive use of the law” (Scheffer, Whose Lawfare?, 215, emphasis added)


32 Quoted in Nelson, Israel on Tenderhooks.

33 For an overview see Hajjar, Lawfare and Armed Conflict., Aceves, Critiquing the Lawfare Critique.


35 E.g. PCATI v Israel, HCJ 769/02., Al-Aulaqi v. Obama et al., 10-1469 (JDB), ACLU vs. Dept. of Justice et al., 08-cv-1157 (JR), Al-Aulaqi v. Panetta, 12-cv-01192.

36 E.g. Herzberg, NGO Lawfare.

37 Goldsmith, Terror Presidency.

38 Herzberg, NGO Lawfare.

39 E.g., ACLU v. Dept. of Justice., Guoria, Legitimate Target.

40 Becker and Shane, Secret ‘Kill list’.

41 NYT, A Court for Targeted Killing., NYT, Lethal Force Under Law. See also Perez and Gorman, Court Review.

42 Dilanian, Congress on Drone Killings.

43 Sewer, Obama’s “Licence to Kill”.

44 Goldstein and Meyer, Legal Jihad.

45 The Lawfare Project, What is Lawfare?.

46 Blank, Lawfare and Proportionalities, 16

47 Etzioni, Unmanned Aircraft Systems, 67: he calls these “abusive civilians”.

48 Dunlap and Letendre, Military Lawyering, 422.

49 Owens, Accidents Don’t Just Happen.

50 See for example, Weizman, Legislative Attack., Morrissey, Liberal Lawfare., Hajjar, Lawfare and Armed Conflict.

51 Dunlap, Lawfare: A Decisive Element, 35, emphasis in original.

52 Dunlap, Lawfare Today, 147.

53 See Gregory, Rush to the Intimate.

54 Dunlap, Lawfare Today, 146, emphasis added.

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57 See Jones, *Historical Geographies of Lawfare*.


60 Ibid., 283.

61 Morrissey, *Securitizing Instability*.

62 Benjamin, *Critique of Violence*.

63 Derrida, *Force of Law*.

64 Dunlap 2010, *Lawfare Apologia*, 125, emphasis added.


68 Jones and Smith, *War/Law/Space*.


70 Reisner, *Press Briefing*.


72 Daniel Reisner invented the term (Reisner, *Interview*). It is not, however, a formal legal designation. Rather it is a deliberately ambiguous term that blurs the boundaries of war and peace. Reisner explains the ambiguity thus: “From a legal perspective, international law, classical international law, actually only recognizes two situations: peace or war. But life isn't as simple as that, and there are lots of terms running around the concerning the in-between. "Lower intensity conflict", "limited war", etc. [...] So where are we? While we are not at the end of the spectrum, which is war, because war is a conflict between two armies or two states, we are definitely in the area of armed conflict. Call it what you wish, some call it "un-conflict", some call it "active hostilities" - whatever the term you wish to use that's fine with us, but please understand that for us, we have reached the decision [...] that the current situation has more of a semblance of war than of peace.” Quoted in Reisner, *Press Briefing*.


74 *Thabet v. Sharon et al.*, HCJ 192/01

75 *Barakeh v. Sharon et al.*, HCJ 5872/01

76 PCATI v Israel, HCJ 769/02, sec.3.9 cites the dismissal of the prior two petitions: "the choice of means of war employed by respondents in order to prevent murderous terrorist attacks before they happen, is not among the subjects in which this Court will see fit to intervene."

77 *B’Tselem, Fatalities*.


80 *Dworkin, A Model For the War on Terror*.

81 There is an irony here that I return to below but is also worth signposting here. General Counsel to the Department of Defence Jeh Charles Johnson recently rejected the label of assassination for his administration's drone-led killing spree, calling it "one of the most repugnant in our vocabulary" (Johnson, *National Security Law*). And yet despite this, the CIA has a long history of assassination that seems to have vanished from view in contemporary discussions of U.S. drone warfare. As early as the 1950s the CIA issued a training manual to its
agents and operatives at the time of the agency's covert coup d'état to topple the Guatemala government and depose of democratically elected President, Jacobo Arbenz-Guzman. In 1975 when the U.S. Senate investigated a string of CIA assassination plots ranging from Guatemala to the Congo (Patrice Lumumba) and Cuba (Fidel & Raul Castro), the Church Committee found that although "assassination is not a subject on which one would expect many records or documents to be made or retained, there were, in fact, more relevant contemporaneous documents than expected" (U.S. Senate Select Committee, Alleged Assassination Plots). The 350-page report finds that the U.S. was directly and indirectly involved in several assassinations and assassination attempts. Since the report was published several CIA documents relating to assassination have been declassified, and US assassination has been the subject of serious and critical scholarship: e.g. Agee, Inside the Company; Kwitny, Crimes of Patriots; Blum, Killing Hope; McClintock, The American Connection.

82 Reisner, Operations in Practice, 63.
83 Reisner, Interview. He was tempted to say “I told you so”, but he refrained.
84 Nir, Bush Seeks Israeli Advice.
85 Hussin, Circulations of Law, 21
86 Ibid., 21
87 Delaney, Nomospheric Investigations.
88 Wise, Transplant of Legal Patterns, 21.
89 See Jones, Targeting Advice.
91 Radsan and Murphy, Measure Twice Shoot Once, 1234.
92 Alston, Targeted Killing Beyond Borders, 410-418.
93 DoJ, White Paper. ACLU, The Justice Department’s White Paper
94 Guiora, Legitimate Target., Guiora, Drone Policy, noting: “broad definitions of imminence combined with new technological capabilities drastically affect the implementation of targeted killing predicated on legal and moral principles. The recently released US Department of Justice (DOJ) "white paper" regarding the Obama administration's drone policy defines "imminence" so expansively there need not be clear evidence of a specific attack to justify the killing of an individual, including US citizens.
95 Anderson, From Proportionality to Necessity.
96 IDF Spokesperson, IAF Targets a Terror Site in Lebanon.
97 Times of Israel, IDF Strikes Syrian Target.
98 Gregory, Everywhere War.
100 Mégret, Vanishing Battlefield, 15.
101 Gregory, Everywhere War.
102 Daskal, Geography of the Battlefield., Anderson, Legal Geography of War.
103 Bush, AUMF.
104 Scahill, Dirty Wars, kindle edition.
105 Quoted in Lubell, Extraterritorial Use of Force, 121.
106 Wippman and Evangelista, New Wars, New Laws?.
107 Blank, Geography of the Battlefield. 4.

Anderson, *Legal Geography of War*, 16, emphasis added.

Koh, *Obama and International Law*.

Jones, *Targeting Advice*.


Beard, *Law and War in the Virtual Era*

Jones, *Targeting Advice*

Ibid.

Weizman, *Legislative Violence*.

See Yumin, *Global First Strike Capacity*.

Taylor, *87 Nations Possess Drones*.


Bush, *Executive Order 12333*.

Roth, *Letter to Obama*.

See Solis, *America's Own Unlawful Combatants*.

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