

## Secure the War

### Target Prosecution & Operational Legal Advice

Today, I want to argue that law, and specifically international and operational law play an important role in securing the legitimacy and practice of what Derek Gregory has called ‘late-modern war’. My protagonist is the military lawyer, and the theater (by which I mean the theater of *conflict*) is Israel and its policy of targeting and killing Palestinians.

**[slide]** I’d like to start, however, at a more theoretical level, and with a provocation recently made by Stuart Elden in his paper, ‘Secure the volume: Vertical geopolitics and the depth of power’. Elden opens his paper with the following:

“The phrase ‘secure the area’ is a common one in military and police situations. What happens if we take the vertical as a key question, taking the additional dimension into account, if security has to contend with volume? What would it mean to ‘secure the volume?’” – Elden 2013

**[slide]** Elden’s question builds on the work of Eyal Weizman and especially his early essays on what he calls the politics of verticality. There, Weizman accused geopolitics of being a ‘flat discourse’ that “largely ignores the vertical dimension and tends to look across rather than to cut through the landscape.” Using Weizman’s literally ground-breaking work and Steven Graham put forward the idea of ‘vertical geopolitics’, a geopolitics which attends to the ‘geo’ not as a flat surface, but as a multidimensional and layered space that reaches high into the sky and deep into the substrate. More recently, Graham and Hewitt have called for an explicitly vertical sensibility to shape ongoing research, especially in urban geography. Elden makes clear, however, that questions of the vertical and the volumetric are of equal importance to *political* geography, and I would tend to agree, especially considering recent interventions such as Peter Adey’s forthcoming edited collection, ‘from above’.

**[slide]** This work on the vertical and the volumetric connects in important ways to my own work on targeted killing in the warzone. But it is not so much on questions of verticality and volume that I would like to intervene today. What interests me most about Elden’s

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provocation is the idea that volumes must be secured. **[click]** I think that Elden is right to talk about ‘securing the volume’ but the active verb there surely requires a consideration of the mechanisms and means through which volume – that is, space – is secured. In turn, this requires a consideration of (among other things) the specifically *juridical* dimensions of power and geopolitics, and more precisely the *legal-operational* dimensions of how, in my case, wars and targets are secured. However, with some exceptions (such as Jeffrey 2009; Dodds, 2010; Elden 2010), critical geopolitics has given scant attention to law, even though the persistent intersections of international law and politics would seem to underscore the need for what Michael Smith has called a “critical legal geopolitics.” What I want to argue today, therefore, is that we cannot grasp the geopolitics of late-modern war without analyzing its constitutive legal dimensions. In what follows I will be paying special attention to operational law, that body of law defined ambiguously as the ‘domestic and international law associated with the planning and execution of military operations in peacetime or hostilities’ (Ltc David Graham 1987)

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Let me now move from these general outlines to the more specific area of my empirical research.

**[slide]** My PhD research examines the targeting protocols used by three air forces in three theaters of conflict. Palestine: where the IAF/IDF openly carry out targeted killings against alleged terrorists. Iraq: where I focus on strikes carried out by the U.S. Air Force and the Royal Air Force. Afghanistan: where again the U.S. and British air forces have been conducting targeted killings, as part of the ISAF mission. Each air & defense force has its own legal division, often called a legal Corps, and these corps are the centerpiece of my empirical research. In the broader project I arguing the following: that in spite of the significant differences in the approaches taken to targeted killing by the US, Brits and the Israelis, the policies actually emerged from the same discursive moment and thus borrow - ethically, politically, legally and ideologically – from one another. They are, in a sense, transnational variations of the same policy, but these variations – iterations with differences – are important too and provoke many questions concerning how targeting policies, laws and practices travel from one military, territory and state to another. So my project is a story

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about how law and targeting shape one another and how both travel, or fail to travel across space.

**[slide]** I recently returned from Tel Aviv where I was conducting interviews with former and currently serving military lawyers. These lawyers belong to a special corps called the Military Advocate General Corps, or 'MAG' **[click]**. The MAG is split into two main divisions, a prosecution branch and an advisory branch (see figure). My work is on the advisory branch, which in turn is split into three sections - one of which is called the International Law Department.

The purpose of the research was to find out the following:

What is the role of the military lawyer in targeted killing operations? What are the effects of the lawyers work, especially in relation to: i) the practice and conduct of targeted killing, ii) its legality, iii) its legitimacy

**[slide]** So far I have interviewed around 10 lawyers from the MAG and am returning to Israel in the coming months to interview more. When I have done that I will start my interviews with the military lawyers in the USAF and the RAF – but I'm not there yet!

In Israel I really wanted to meet the most important lawyers, which essentially meant that I was approaching the most senior, and also sometimes the most controversial military lawyers in Israel. Why controversial? Firstly, their line of work is by definition contentious; their job is to give legal advice to the IDF on military operations. Inevitably, this involves adjudicating on matters including detention, house demolition, and quite often, who gets to live and who dies. But secondly, and more difficult to talk about is the fact that some of the lawyers I spoke to have been accused of international crimes of war. One of the lawyers I interviewed personally signed off on a series of air strikes that killed hundreds of civilians, many *many* of them children under the age of 16. Another had to flee his native South Africa because of an attempt to arrest and try him under universal jurisdiction for his involvement in perpetuating alleged war crimes in the 2009 Gaza war.

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**[slide]** This controversy aside, let me now introduce you to the intriguing career and work of the military lawyer. Military lawyers in the IDF perform a variety of functions. In its mission statement the MAG Corps asserts responsibility for the following (refer to slide)

My research is concerned with the legal advice aspect of these responsibilities, but what is legal advice, and what does it involve? My study takes the practice and performance of lawyers seriously because they have become important vectors in the legalization of the battlespace; key actors that is, who convert what are *abstract* legal principles into *actionable* military protocols.

**[slide]** All of the following quotes, I should say, are from my own interviews and I will use their real names.

Daniel Reisner is perhaps the ultimate war and peace lawyer. Along with a few select others Reisner personally drafted the Oslo Peace Accords. He travelled to Camp David in 2000 and was also there when Arafat, Rabin & Clinton shook hands on the lawn in 1993. But as this peace was beginning to fail (I'm reminded here of Sara Roy's brilliant book 'failing peace') Reisner had seen the writing on the wall and started making preparations for war. But how on earth does a lawyer prepare for war? - a fair question, and one that Reisner was more than happy to answer **[click]**:

“When I came from Camp David we actually started preparing for the second intifada. We were very well prepared for it; we knew it was happening because we knew Arafat was planning one. So, for example, I prepared new rules of engagement for the army that would only enter into effect if the Chief of Staff declared that an armed conflict existed, that we are moving from law enforcement to armed conflict mode.”

What this amounted to, formally, was a move from peace to war. The benefits of moving into the realm of war are simple enough to ascertain, and it is for precisely the same reasons that the U.S. has defined its relationship with al Qaeda as an armed conflict with terrorist

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groups. In other words, once the war is legally secure, militaries have much greater room to maneuver and what was impossible in peace becomes legal and legitimate in war.

**[slide]** Months later, when the Second Intifada did break out, the IDF Chief of Staff Shaul Mofaz declared a state of war. Israel was now officially engaged in what Daniel Reisner had called ‘an armed conflict short of war’. Reisner recounts that after having come up with a general legal framework – that is the paradigm of armed conflict – he and his boss received a call from Mofaz about something more specific:

“guys, I need to understand something. Am I allowed, if I identify a terrorist leader on the other side, am I allowed to kill him – *publically*, not using clandestine 007 techniques. Can I kill him, and if so under what conditions.”

This was not the first time Reisner had been called to give advice on operational issues, but it *was* the first time that any lawyer had *ever* given advice on the IDF *targeting* process. The involvement of lawyers at this critical juncture was something Reisner had been pushing for. He had noted the use of lawyers by the U.S. military in Panama in 1989 and he understood *how* lawyers could be useful in the distillation of complicated legal scenarios. Reisner therefore saw this as an opportunity to both publicize and potentially legitimize military operations that were already *de facto* taking place.

**[click]** Reisner summarized his response to the IDF thus:

I was asked to come up with an answer to this question, which is exactly the question you don’t want to be asked as a military lawyer. [...] And so we started working on a legal opinion and it took us a few weeks and we came up with a legal opinion which I can summarize to you as saying that on the basis of our understanding of the law and the reality that Israel is engaged in what we call an armed conflict with terrorist organisations, on this basis we think that you *can* target an enemy terrorist, intentionally target an enemy terrorist...*if* you fill five conditions”

Again, it is politics of defining the warzone that is most important here, and Reisner is clear that only after the reality of armed conflict has been established may enemy terrorists be

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publically targeted. Reisner went on in quite some detail about the five criteria that he set, but I won't have time to get to that today. I want to now show how military lawyers supplemented the general legal framework of war with more specific operational-level law, but before I do let me first make three brief points about what I have said so far.

**[slide]** The entry of the military lawyer into the realm of operations, and in particular *targeting* operations, was concomitant with changing legal understandings about Palestinian space and its belligerent relation to the Israeli state. Lawyers were instrumental to the propagation of this imagination, but they would never have been given a seat at the table had the IDF not been used to receiving legal advice since the very start of occupation in 1967. Nonetheless, by defining the second intifada as a war, the IDF and the lawyers made space for a new kind of role. The very lawyers who were responsible for writing the Oslo Peace Accords moved seamlessly into giving legal advice in lethal operations. That's the first point.

**[slide]** By imagining a new legal paradigm for the conduct of hostilities, lawyers like Reisner had also etched into practice the *unprecedented operational* role of the military lawyer. The second point then is that the direct operational role of military lawyers is a very recent development. It is not until we look in to what I call the 'historical career of the military lawyer' that we understand how much the role of the military lawyer has changed over time, bearing in mind of course that in Israel they are as old – or rather as *young* as - the state itself, and the same is true in the U.S. Conventionally the work of military lawyers was mundane and predominantly bureaucratic, involving things like court-martial procedures, administrative tasks and marital law. Today lawyers are invited into the war room to give live advice on often-huge *military* operations – something that was unthinkable just 20 years ago. Daniel Reisner describes this as nothing less than a revolution:

“I mean it was unheard of to have a lawyer in the room in a military operation planning meeting and now they [the IDF] can't move without them [...] but its so clear today that no one even knows there was a revolution, that's how good it was.”

**[slide]** The third point brings the first two points together and it is this: lawyers perform a full spectrum of legal duties. This is true in a historical sense, because the career of the

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military lawyer once meant being a professional legal administrator and now it involves expertise is everything from international law to ballistics and operational procedure. My research interrogates this historical career by asking: why, how and with what effects has the military lawyer come to inhabit this new 'hands-on' role at the seat of targeting and killing operations? But the idea of full spectrum of law is also demonstrated by the contemporary military lawyer who, at least in the Israeli context, works in a space that is perhaps best described as a grey zone between war, occupation & peace. In doing so they demonstrate not only that the law is an important part of war; but that the legal battle itself is fought on multiple fronts *not* by some unwitting military strategist, but by very qualified legal experts like Danny Effroni here.

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Okay, so now on to operations law, the final part of my presentation.

**[slide]** The international laws of war proved very useful to the IDF because they provided a general legal framework for the possibility of targeted killing. In reality, however, lawyers do not sit there reading the Geneva Conventions saying 'yes' this is allowed or 'no', that's not proportional. Legal advice is not abstract, but concrete, and is always grounded in actual operational principles. David Benjamin, for example, claims that **[click]**:

“The biggest challenge for lawyers in the military is to take this huge body of international law which is really complicated and very grey and very obfuscated, and basically reduce it to a one liner or a paragraph which gives the military commander the right kind of tools to make the right kind of decision.”

**[slide]** Distillation of complicated abstract law is difficult enough but anyone acquainted with military operations knows also that that decision-making is often time-sensitive. If the law is to hold any sway, legal advice must be pithy and timely. Amos Guoria highlights this point in terms of the lawyer's obligation to the military commander:

“you have to facilitate decision making quickly. [...] I mean you've been mandated with explaining the legal parameters to commanders who need to decide quickly.”

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The ability to move between legal scales, and to do so quickly is thus a key quality of the military lawyer, and one the IDF have come to depend on. But as Mariana Valverde reminds us, legal pluralities require a consideration of both the temporal and spatial dimensions of jurisdiction. Where does international law end and operational law begin? This is difficult to answer in the abstract, but if we look at the decision-making processes within the targeting apparatus, I think we can begin to see how lofty legal principles are integrated into everyday operations. Let me give 2 examples, one which speaks to pre-planned operations and another which speaks to time-sensitive operations:

**[slide]** 1. Pnina Sharvit-Baruch describes some common legal questions that arise in the pre-planning phase of lethal operations **[click]**:

“The pre-planned targets, you have like a bank of targets: those go through legal advice and we have kind of a page for every target, and there’s a legal part for a legal opinion [...] You have the photo, and you have all the details, all the operational details, the location, technical details and you have the legal opinion, you know, if its problematic or not.”

I asked if this was done on a case by case basis and Pnina told me yes **[click]**:

“for each target and if there are conditions, only when they are met it is legal to attack it, for example. Like, only when there are no civilians, or only at night, or if, for example, its a public building, only in day if it’s a civilian dwelling, all kinds of conditions, only after warnings are given, you have all kinds of conditions that can be there.”

No mention here of international law *per se*, but all of the issues raised - about civilians and the location of the target - are merely more operational ways of talking about the more abstract principles of distinction, proportionality & necessity. Now the lawyers have a far greater role to play in pre-planned operations, and in the following second example we witness some of the dilemmas posed by time-sensitive operations:

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[slide] I asked David Benjamin about the relationship between the lawyer and the military commander when it's 'go time':

“One of the dilemmas of the lawyers [is] where to put yourself? Which junction can you be most effective? Its not only in terms of geography, but in terms of the processes, like who is talking to whom, and whose consulting whom. You have to be in the right place, its not easy to know where to place yourself in that process. [..] Now its true, that the way that the army works is that at the end of the day there is one guy making the decision, saying go ahead or not. So as a general rule you want yourself as close to that guy as possible. The problem is: all the other functionaries want to be as close to that guy as possible [...] they all want to have as much influence on the decision making as possible.

*But*, he adds [click],

“what you have to remember is that: when the chips are down and the bullets are flying the senior commander is a very busy person. Not everybody is built for that, and not everybody is built to be a legal advisor. You really need people who can hold their own in that kind of environment because it's a very difficult job. A very difficult job.”

[slide] One of the distinguishing features of late modern war is that it increasingly requires a legal armature to secure its legitimacy and organize its conduct. To be sure we are witnessing an unprecedented 'legalization of battlespace', but the crucial questions are still about *how* such legalization is taking place and with what effects. Who performs the legalization of the battlespace and what would an embodied account of this look like? War cannot be secured through abstract laws alone, be they domestic or international law; it requires also a literal *modus operandi*, a mode of operation. This mode of operation has become more legalistic over the last two decades, spawning a new field called 'operations law' in the mid 1980s. I have not had time to go into the origins of operations law today, but the point I hope to have made is that operational considerations and lawyers who give operational advice play a crucial - and under-examined - role in securing, directing, and actualizing war.

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I am still convinced that political geography should engage more explicitly with questions of international law and its role in securing war. But what have highlighted is that the performance and practice of international law takes place in very specific operational settings. The translation of law between and across these scales inevitably changes the content and meaning of the law, just as it re-orientates the war. Contrary to what I thought, however, the most important work of the military lawyer takes place not at the strategic – international - level, but at the operational level. This is not to fetishize military operations over the principles of international law, but it is to take seriously the fact that when the war is on, the chips are down and the bullets flying - whether we like it or not - *operational law matters*. So as much as the war has taken to the skies, be it helicopters over Gaza or drones over Afghanistan, the volumetric space of the target matrix is *secured* on the ground through specific, detailed and intricate operational legal consideration – made by the military lawyer and the commander s/he advises.

Thank you.