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“Legalizing War/ Militarizing Law”

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review of Craig Jones, *The War Lawyers for Dialogues in Human Geography*

The War Lawyers takes as its motivating puzzle the transformation of law and lawyers in twentieth century warfare, which, as Jones aptly demonstrates, was not just an increase in their numbers, but a substantive shift in their function. The book’s core focus is the “legalization” or “juridification” of military targeting in the US and (to a somewhat lesser extent) Israel, with a particular focus upon what has come to be known as the “kill chain”. *The War Lawyers* traces both how this shift occurred, and identifies some of the main consequences of this transformation.

Jones argues that this juridification of war was the outcome of a threefold transformation in the character of what he calls “later modern war”. These precipitating shifts were, first, an increased attention to and concern about civilian casualties, second, a shift in the practices of targeting, with an increasing focus on targeting “individuals as opposed to collectives” (41), and third, rising concerns about the spread of international law and human rights norms and their potential impact upon war-fighting.

As military actors began to demand guidance in how to navigate these new constraints, the war lawyers--- specialised experts who could interpret and apply the laws of war --- and the new field of “operational law” came into being to fill this gap. Moreover, this was not simply a technical development, but a political one. “Operational law” not only produced a role for lawyers to advise soldiers, but created a new *type* of law, posed as the solution to the rising concerns of military actors that the laws of war could be *used against them*. Operational law did not just aim to interpret the law, it also aimed to address the widespread scepticism towards international law within the military. With the invention of

operational law, the war lawyers developed a way to make the law for *with* and *for* the military.

This origin story is crucial for understanding how war lawyers would come to act as a “force multiplier”- enabling the military to do things-- rather than simply constraining their actions. A key contribution of the book is to trace how this occurs in practice, by observing and describing what the “war lawyers” actually do. Central to Jones’ argument is the observation that “the law is not ‘found’ but *made* and in the space of operational law the military lawyer *produces* juridical outcomes by resolving indeterminacy on a case by case basis” (99).

The War Lawyers intervenes into several critical debates about the relationship between war and law, including the nature of the relationship between international law and states and their armed forces; the effects of law upon the practice of warfare; and debates relating to the role of law in the post 9/11 “war on terror”. Much of the literature tends to approach the relationship between war and law as question of measuring causal effects of one discrete variable upon another. We see debates focus upon questions such as: to what extent can the laws of war constrain state use of violence? Or, alternately, to what extent are states able to manipulate the laws of war to suit their interests? What these approaches share, however, is that they view “war”, “states” and “the law” as entities which are (and, from some points of view, *necessarily ought to be*) independent, of one another. Consequently, these debates also occasion the emergence of concerns which situate such effects as transgressions which pollute the proper functioning of each sphere (Latour, 1993). Such concerns arise both from military actors who fear “political” restraints upon their sphere of action (Dunlap, 2008), and from lawyers who fear that the law is under political attack (Ohlin, 2015).

Against the views that law primarily constrains states in their use of violence, or that law is primarily used as a shield by states to justify their use of violence, Jones develops a more complex framework that argues that law/ lawyers and states/ militaries increasingly construct one another (and more precisely, that war and law co-constitute each other). Jones suggests that the best way to understand this is through the emergence of a “juridical field” in which the law itself (or, more precisely, the law’s meaning, application, and interpretation) is what is at stake in a contestation among a field of actors including states, international bodies such as the ICC, NGOs, along with the lawyers representing each of the above. Building on existing work on the construction of the law and its application to war (e.g. Hurd, 2017; Kinsella, 2011), Jones thus argues that we should understand the laws of war as actively “creating” and “policing” the distinctions, such as that between civilian and combatant, along which they operate (2).

A second debate focuses on the impact that the laws of war have had upon warfare: Does greater regulation lead to less violence, or at least to a more ethical use of violence (e.g. Moyn, 2021)? Although clearly giving a negative response, *The War Lawyers* also takes issue with the very framing of these questions. International law does not lead to fewer wars, or less violence. But this does not mean that law has no effect upon the conduct of war-- violence *is* becoming increasingly constrained by law/ rules, but these rules are not something independent of the states that are engaging in war/violence. Here the work further develops arguments made previously which argue for understanding war as a productive force, reshaping both society (Barkawi, 2016) and culture (Eastwood, 2017).

And so states (at least the ones that have the power/vision/practice to do so) are able to shape the rules in concert with their use of violence, meaning that the rules themselves, and the ways that violence is regulated, enable state violence as much as constrain it. By creating new categories and interpretations, states “legalize” their use of violence. But this is also not

simply a matter of using law to “paper over” what states which to do—insofar as Jones conceptualizes the “juridical field” as a Bourdieusian field of struggle, in which actors engage in conflict over the meaning and application of the laws of war, the field of action is not completely free, but constrained by an existing set of rules and relationships (which participants then fight over the possibility of reshaping).

A third debate focuses upon the relation between law and war in the war on terror. Prevailing approaches conceptualize “law” and “war” as distinct entities, with international law in decline or under attack (as conceptualized by many liberal critics of the war on terror), or is the state and its armed forces being unduly hampered by law (as in the “lawfare” framework). Jones instead argues that neither of these is the appropriate way to conceptualize this relationship and the changes being observed. In his view, law is best viewed as a terrain of struggle: a site where, and through which, agents and interests make their way and inscribe their desires. While at times Jones’ analysis veers close to the ‘realist’ view that states “use” law to serve their ends, where he differs is in close empirical attention to the specific practices through which law and war come to interact (and the underlying assumption/ argument that these practices matter). There is an attention to are elements of constraint, and agency here that interact in an empirically contingent way that are not present in the more hard-nosed realist view.

I will conclude by highlighting several fascinating observations raised by *Laws of War* which should compel further research. The first is the international /transnational context of these shifts- including both the comparative angle, or what is this shift might look like in other countries, the relational angle, or how the practice of war lawyering travels between countries, and finally, the question of whether the US’ unmatched position in the international system enables it to take actions that might not be available to other states. Second, while the book touches on this to a certain extent, I would be very interested to learn

more about the intra-legal struggles between different groups of government lawyers (foreshadowing of the objections of the JAGs to torture in the war on terror). Finally, there is more to be learned about the question of how states' choices to take overt, vs. covert, action interact with the juridification of war (Stampnitzky, 2016).

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