European Journal of International Security, Vol. 3, part 1, pp. 113–133. doi:10.1017/eis.2017.12

First published online 7 November 2017

EJIS

'Lawfare', US military discourse, and the colonial constitution of law and war

Freya Irani*

Mellon-Sawyer Postdoctoral Associate, University of Minnesota

Abstract

In this article, I aim to reorient debates, in International Relations and Law, about the relationship between law and war. In the last decade, writers have challenged common understandings of law as a limit on, or moderator of, warfare. They have instead claimed that law is often used as a 'weapon of warfare', describing such uses as 'lawfare'. Below, rather than arguing that law is either a constraint on or an enabler of warfare, I examine how law comes to be represented as such. Specifically, I examine representations, primarily by US military and other governmental lawyers, of 'non-Western' invocations of the laws of war, which seek to constrain the policies or practices of the US or Israeli governments. I show how these authors cast such invocations as not law at all, but as tools of war. I suggest that this move rests on, and reproduces, colonial discourses of 'non-Western' legal inadequacy or excess, which serve to render 'non-Western' law 'violent' or 'war-like'. I show that the referents and boundaries of law and war are stabilised by notions of civilisational difference, which serve to give meaning to what law is, what war is, and whether particular claims or practices are understood as martial or legal.

Keywords

Lawfare; Liberal War; Humanitarian Law; Postcolonial

Introduction

In 2001, Charles Dunlap, then a colonel in the US Air Force and a member of the Judge Advocate General Corps,[1] used the term 'lawfare' to suggest the recent development or popularisation of a particular practice – the practice of 'us[ing]' law 'as a means of realizing a military objective'.[2] In a paper delivered at a conference sponsored by Harvard's Carr Center for Human Rights, Dunlap claimed that, '[r]ather than seeking battlefield victories, per se, challengers [of the United States] try to destroy the *will* to fight by undermining the public support that is indispensable when democracies

* Correspondence to: Dr Freya Irani, Mellon-Sawyer Postdoctoral Associate, Department of Political Science, University of Minnesota – Twin Cities, Social Sciences Building, 267 19th Ave, S., Minneapolis, MN 55455, United States. Author's email: iran0004@umn.edu

[1] In the United States, Judge Advocate Generals (JAGs) are lawyers and commissioned officers in the military: each branch of the armed services has its own JAG 'corps'. JAGs perform a range of tasks – advising members of the armed services, participating in courts-martial, and (increasingly) providing operational advice concerning the legality of, for example, targeting decisions.

[2] Charles J. Dunlap, 'Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts', paper presented to the Humanitarian Challenges in Military Intervention Conference, Carr Center for Human Rights Policy, Washington, DC (29 November 2001), p. 4, available at: {http://people.duke.edu/~pfeaver/dunlap.pdf} accessed 12 March 2016.

like the U.S. conduct military interventions.'[3] A principle way challengers do this, he claimed, is by 'mak[ing] it appear that the U.S. is waging war in violation of the letter or spirit of LOAC [that is, the Law of Armed Conflict]'.[4]

Dunlap's writings were enormously influential, giving rise to the body of work that I refer to as 'dominant' lawfare literature (distinguishable from the 'critical' lawfare literature discussed later in this article).[5] This dominant literature – contained in articles, blog posts, conference talks, and books – was produced by high-ranking former or current military or other governmental lawyers, law professors, and members of conservative advocacy groups – generally in the United States or affiliated with the US government (but also sometimes in Israel or affiliated with the Israeli government). Many of these writers meet frequently, often at annual gatherings hosted by US military academies, which they describe as '*de rigueur* for any serious military lawyer or academic specializing in the *jus ad bellum*, the *jus in bello* or the law of the sea'.[6] They see themselves as 'traveling the same road'.[7]

[3] Ibid.

[4] Ibid.

[5] Dunlap's was not the only use of the term. In the same year, John Comaroff used the term to refer to 'the effort to conquer and control indigenous peoples by the coercive use of legal means'. John Comaroff, 'Colonialism, culture and the law: a foreword', *Law and Social Inquiry*, 26:2 (2001), p. 306. Comaroff's emphasis has been taken up by a small, but growing, number of writers, who have used the term 'lawfare' to describe the historical and contemporary imbrications of liberal law and liberal war. These are the 'critical' lawfare writings I discuss in Section III.

[6] Yoram Dinstein, 'Concluding remarks: LOAC and attempts to abuse or subvert it', *International Law Studies (International Law and the Changing Character of War)*, 87 (2011), p. 483.

[7] Ibid., p. 492. I refer to this literature as 'dominant' not only because the works reflect and reproduce broadly hegemonic assumptions (about the existence of, and desirability of protecting, US and Israeli 'national interests'), but also because of the governmental connections and cultural influence of the relevant authors. A brief look at three biographies is instructive: Dunlap spent 34 years in the JAG Corps, attaining the rank of Major General. He has testified before the US House of Representatives, and has been published in military journals, law reviews, news magazines like *Time*, and on blogs like 'Just Security'. He is currently a Professor at Duke Law School, and Executive Director of the Center on Law, Ethics and National Security at Duke. Duke Law School, 'Maj. Gen. Charles J. Dunlap, Jr., USAF (Ret.)', available at: {https://law.duke.edu/fac/dunlap/} accessed 26 March 2017. Dunlap popularised the term 'lawfare', and is widely cited in both the dominant literature and in critical works.

Orde Kittrie is a Professor of Law at Arizona State University's Sandra Day O'Connor College of Law, and a Senior Fellow at the Foundation for Defense of Democracies (a policy institute aimed at 'fighting terrorism and promoting freedom'). Kittrie was previously the Department of State's lead nuclear affairs attorney and, in addition to testifying before several Congressional committees, has appeared as a commentator on NBC, ABC, Fox, PBS and Al Jazeera. Foundation for Defense of Democracies, 'Orde Kittrie', available at: {http://www.defenddemocracy.org/about-fdd/team-overview/orde-kittrie/} accessed 26 March 2017. Kittrie is the author of a key book-length study of lawfare, entitled *Lawfare: Law as a Weapon of War* (New York: Oxford University Press, 2016).

Unlike Dunlap and Kittrie, Yoram Dinstein spent much of his career in academia: he is considered an 'expert on the laws of war' and is a prolific writer in the field. Uri Blau, 'Documents reveal how Israel made Amnesty's local branch a front for the foreign ministry in the 70s', *Haaretz* (18 March 2017), available at: {http://www.haaretz.com/israel-news/.premium-1.777770} accessed 28 March 2017. Dinstein is a Professor Emeritus at Tel Aviv University and has held numerous visiting positions at law schools in the US. His relationship with the Israeli government is particularly interesting. He has worked for the Foreign Ministry and served as Israeli consul in New York; however, much of his contact with the government has been less formal. A recent article in the Israeli newspaper *Haaretz* traces how, in the 1970s, Dinstein, then chairman of Amnesty Israel, reported to his former colleagues in the Foreign Ministry on the activities of the human rights organisation. Blau, 'Documents reveal'.

The above-described writers described a range of moves as 'lawfare'.[8] Initially, they used the term to refer to attempts by prisoners at Guantánamo Bay, and by their lawyers, to challenge their torture and imprisonment in US courts. Subsequently, they applied the term to law-based challenges to the massive Israeli attacks on Gaza in 2008–9 and 2014 (including, most prominently, to the Goldstone Report), as well as to alleged attempts by Hamas to 'hijack' international law by placing weapons in civilian areas to shield them from attack.[9] In fact, the Palestine-Israel conflict may today be the most-cited example in the dominant literature: one writer describes it as 'the closest thing the world has to a lawfare laboratory'.[10]

In early dominant discourse, lawfare was generally characterised as something done by 'challengers' or 'foes'[11] of the US and Israel, and by their advocates.[12] Such representations were sometimes implicit, sometimes explicit. Some authors did not deny that lawfare could be practiced by liberal states: rather, they simply focused mostly or solely on invocations of law by the above-described 'challengers' or 'foes'.[13] Other writers ruled out the possibility of liberal lawfare through their very definitions.[14] Liberal lawfare often seemed not to exist in these accounts: international humanitarian law, in this context, was seen as moral constraint on, rather than tool of, liberal states. Not coincidentally, in these accounts, lawfare was generally characterised as an undesirable practice, as 'inherently negative'.[15]

Such an understanding of the practice of lawfare (as negative and practiced by others) reached its culmination in the 2005 *National Defense Strategy of the United States*. The document did not use the term 'lawfare' itself, but infamously predicted that '[o]ur strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, *judicial processes*, and terrorism'.[16] The statement resulted in an indignant outcry from (mostly) liberal

[8] Lawfare, as defined in the dominant scholarship, would seem to refer to the use of any law 'as a means of realizing a military objective'. Dunlap, 'Law and Military Interventions', p. 4. The most common contention, however, is that it is international humanitarian law, of which the Geneva Conventions are the centerpiece, that is being so used.

[9] See, for example, Charles J. Dunlap, 'Does lawfare need an apologia?', *Case Western Reserve Journal of International Law*, 43 (2010), p. 136; Michael A. Newton, 'Illustrating illegitimate lawfare', *Case Western Reserve Journal of International Law*, 43 (2010), pp. 268–72.

[10] Kittrie, *Lawfare*, p. 197.

[11] Dunlap, 'Law and Military Interventions', p. 4.

[12] In the dominant literature, writers often represent the lawyers, who generally hail from US human rights or civil liberties groups, as unwittingly aiding the insurgents' causes – as well-meaning but dangerously naïve, dupes. Dinstein writes: 'The human rights-niks in the back are by no means to be confused with the barbarians in front: far from endorsing methods of barbarism, the human rights-niks would prefer a non-violent solution to every conflict. Nevertheless, the danger that the human rights-niks pose is equally acute, since they threaten to pull the legal rug from under our feet. They thus aid and abet the lawfare of the enemy by leaving the civil society with the impression that we are acting (or reacting) in a manner that is incompatible with the loftier aspirations of the law.' Dinstein, 'LOAC and attempts to abuse or subvert it', p. 488.

[13] See, for example, Dunlap, 'Law and Military Interventions'; Council on Foreign Relations, 'Lawfare: The Latest in Asymmetries' (2003), available at: {http://www.cfr.org/defense-and-security/lawfare-latest-asymmetries/p5772} accessed 12 March 2016.

[14] The 'Lawfare Project' continues to define lawfare as an 'abuse of the law as a weapon of war against Western democracy'. 'Mission' (no date), available at: {http://thelawfareproject.org/mission-2/} accessed 10 June 2016.

[15] The Lawfare Project, 'What is Lawfare?' (no date), available at: {http://thelawfareproject.org/lawfare/what-is-lawfare-1/} accessed 25 July 2017.

[16] Department of Defense, 'National Defense Strategy of the United States of America' (March 2005), p. 5, available at: {http://archive.defense.gov/news/Mar2005/d20050318nds1.pdf} accessed 10 June 2016, emphasis added.

lawyers and law professors in the US, who objected to the statement's elision of 'legal' and 'terrorist' methods, which they assumed were fundamentally opposed.[17]

This 'negative' understanding of lawfare is still prominent in some quarters. However, in the years since the publication of the *Strategy*, there has been a change within much of the dominant literature. Not only have writers increasingly acknowledged that liberal states *could* also use law as a 'weapon of war': they have begun to explicitly *advocate* or *promote* such use.[18] In particular, they have characterised law as an invaluable tool of US *counterinsurgency* strategy and practice.[19] However, as I show in this article, these writers represent liberal lawfare as being of a fundamentally distinct sort. Although the term certainly seems to bring together liberal law and liberal war, when used in the context of the US or Israel, law is characterised as a way to avoid the infliction of 'physical' violence, 'physical' force. Law, in this account, comes to be represented as a non-violent, even a humanitarian, technology of war.

My goal in this article is not to argue that liberal states *also* use law as a tool, technology or weapon of warfare, and that such uses of law are inherently or effectively violent.[20] Rather, my primary goal is to show that the referents and boundaries of 'law', 'war', and 'violence' are contextual and contingent (which is not to say easily changeable), constantly in need of fixing and stabilisation. More specifically, it is to demonstrate that, in dominant lawfare discourse, the referents and boundaries of law, war and violence are crucially fixed and stabilised by notions of civilisational difference, which serve to give meaning to what law is, what war and violence are, and whether particular claims or practices are understood, in particular contexts, to be martial, legal or violent.

To analyse dominant lawfare writings, I draw loosely on a now-substantial body of critical constructivist work in International Relations (IR), which examines how meanings are produced through discourse, and how meanings work to render particular courses of action reasonable, and others unreasonable.[21] Adopting analytical strategies from these writings, I examine how, in dominant lawfare discourse, particular claims and practices (for example, legal appeals by inmates at Guantánamo, or US military lawyers' targeting advice) are cast as legal or martial, how they are *articulated* to law or war.[22] So too, I examine the implications of these representations, in rendering

[17] See, for example, Melissa A. Waters, '"Lawfare" in the war on terrorism: a reclamation project', *Case Western Reserve Journal of International Law*, 43 (2010), p. 330; Scott Horton, 'The dangers of lawfare', *Case Western Reserve Journal of International Law*, 43 (2010), p. 167.

[18] See, for example, Charles J. Dunlap, 'Lawfare today … and tomorrow', *International Law Studies (International Law and the Changing Character of War)*, 87 (2011), pp. 315–25; Ganesh Sitaram, *The Counterinsurgent's Constitution: Law in the Age of Small Wars* (New York: Oxford University Press, 2013); Kittrie, *Lawfare*.

[19] See, for example, Sitaram, *The Counterinsurgent's Constitution*.

[20] This is for two reasons, both discussed in Section III. First, critical scholars have already made this important argument very convincingly. Second, there can be disadvantages to characterising law as a 'tool' of war.

[21] See, for example, Roxanne L. Doty, *Imperial Encounters* (Minneapolis: University of Minnesota Press, 1996); Jutta Weldes, 'Constructing national interests', *European Journal of International Relations*, 2:3 (1996), pp. 275–318. For an overview of this scholarship, see Jennifer Milliken, 'The study of discourse in International Relations: a critique of research and methods', *European Journal of International Relations*, 5:2 (1999), pp. 225–54.

[22] I draw here on Weldes's theorisation of 'articulation', which builds on the work of Stuart Hall. Weldes draws on many of Hall's works, which can't all be cited here. But, one particularly relevant work is: Stuart Hall, 'On postmodernism and articulation: an interview with Stuart Hall', *Journal of Communication Inquiry*, 10:2 (1986), pp. 45–60. For Weldes, the process of articulation is key in understanding how meaning is produced through discourse. Articulation involves the (temporary) bringing together of linguistic elements that begin to

some claims and practices legitimate, others illegitimate. I suggest that, in dominant lawfare discourse, the very notions of 'non-Western' lawfulness or 'Western' lawlessness remain impossibilities, given the constitutive role of civilisational difference in giving meaning to law itself.[23]

On the one hand, then, my primary goal in this article is to demonstrate how colonial discourses of legal inadequacy or excess both underlie, and are reproduced through, *dominant* lawfare discourse. However, I also draw on my above-described argument, about the instability of the categories and boundaries of law and war, to sympathetically reorient *critical* lawfare writings. Critical writers have challenged the dominant literature both directly and indirectly, by showing how US and Israeli military lawyers and governmental advisers have 'used' law as a 'tool' to enable the killing of civilians in Palestine, as well as US torture, incarceration, and assassination practices around the world.[24] These are vital contributions, which demonstrate that violence is not produced by the failure or misuse of liberal law, but by its presence and proliferation. Nonetheless, I argue that, in embracing the term 'lawfare' and characterising law as a 'tool' of war, some critical writers impute an unwarranted stability and separateness to 'law' and 'war', which they elsewhere work hard to undermine. I suggest that, rather than adopting such language from dominant lawfare discourse, these writers more extensively examine, first, the bordering and bounding of the category of 'law', and second, how particular people, places, practices, and institutions come to be articulated to 'war'.

My argument proceeds as follows. In the first section of this article, I trace how, in the dominant lawfare literature, non-Western invocations of law are forged *into* violent martial technologies.

connote one another: each element in the connotative chain gains meaning from the elements to which it is attached. Weldes points out that '[w]ith their successful repeated articulation, these linguistic elements come to seem as though they are inherently or necessarily connected and the meanings they produce come to seem natural'. Weldes, 'Constructing national interests', p. 285 (citations removed). Of course, contrary to appearances, these linguistic elements are not naturally linked, and so, under certain circumstances, can be detached or 'uncoupled' from their connotative chains and reattached (or rearticulated) to new chains, gaining new connotations or meanings in the process. Weldes, 'Constructing national interests', p. 285.

Weldes's theorisation helps us examine not only how particular practices or claims come to be attached to, or separated from, law and war, but how the concepts of law and war come to be linked and de-linked to and from one another.

[23] A note on terminology: I use the terms 'West'/'Western'/'Westerner'/'non-West'/'non-Western'/'non-Westerner' in this article not because people, places, or institutions can ever actually be so classified, but because I am critiquing a discourse that divides the world into these categories (and related dichotomies – Europe/non-Europe, the Occident/Orient). The terms, then, are used to describe how people, places and institutions are understood and identified within this discourse.

In using the terms, I do not mean to suggest that their (internal and external) borders are stable: they are constructed, contextual, constantly shifting. See, for example, Tarak Barkawi and Mark Laffey, 'The post-colonial moment in security studies', *Review of International Studies*, 32 (2006), p. 341 (discussing the characterisation of Germany as 'non-Western' following the Holocaust); Joseph Massad, 'Zionism's internal others: Israel and the Oriental Jews', *Journal of Palestine Studies*, 25:4 (1996), pp. 53–68 (describing the contested process of constituting Israel as 'European'). In the dominant lawfare literature, Israel is represented as part of 'the West'.

[24] See, for example, Lisa Hajjar, 'Lawfare and Armed Conflict: Comparing Israeli and US Targeted Killing Policies and Challenges Against Them', International Affairs Research Report, Issam Fares Institute for Public Policy and International Affairs, American University of Beirut (January 2013), available at: {https://www.aub.edu.lb/ifi/international_affairs/Documents/20130129ifi_pc_IA_research_report_lawfare.pdf} accessed 25 March 2017; Craig A. Jones, 'Frames of law: Targeting advice and operational law in the Israeli military', *Environment and Planning D: Society and Space*, 33:4 (2015); Eyal Weizman, 'Legislative attack', *Theory, Culture and Society*, 27:6 (2010), pp. 11–32.

I suggest that, in a context in which law itself, and legally constrained warfare in particular, have long been considered the preserve of the West, invocations of law, and particularly international humanitarian law, by those understood as non-Western pose a challenge. Dominant writings function to domesticate this challenge by suggesting that such invocations of law are not law at all (or not quite/not properly law): rather, they are simply martial technologies, tools of war.

There is now a substantial body of writing on the intertwined histories of law, colonialism, and imperialism, which demonstrates that non-Western law has long been characterised as something else: despotic will, custom, or simply politics.[25] Such representations have served not only to enable practices of colonial law-making and extraterritorial jurisdiction, but also to define 'law' as rational, unbiased, distinct from politics.[26] Drawing on these insights, in the second section, I show how, even as they characterise law as violent *when misused or manipulated* (as by non-Westerners), dominant writings constitute law *itself* as non-violent – as an alternative to physical violence or force.

In the third section, I consider the implications of my argument for critical lawfare scholarship, suggesting two reorientations.

Section I. Non-Western law as a martial technology

In this section, I show how, *in dominant lawfare discourse*, non-Western invocations of law are represented as violent martial technologies. By 'martial', I mean that writers characterise non-Western invocations of law as somehow similar, or related, to war.[27] By 'technologies', I mean that writers suggest that non-Western invocations of law are purposive and instrumental: these invocations are characterised as tools or implements of war.

I begin by describing how invocations of international humanitarian law by those identified as non-Western destabilise the civilisation-barbarianism distinction so central to dominant lawfare literature. Next, I argue that, in this literature, writers respond to this destabilisation by representing such invocations, first, as not law at all or as not quite or not properly law, and second, as violent technologies of warfare.

[25] See, for example, Comaroff, 'Colonialism, culture and the law'; Nasser Hussain, *The Jurisprudence of Emergency* (Ann Arbor: The University of Michigan Press, 2003); Teemu Ruskola, 'Legal Orientalism', *Michigan Law Review*, 101:1 (2002), pp. 179–234; and Teemu Ruskola, *Legal Orientalism: China, the United States, and Modern Law* (Cambridge: Harvard University Press, 2013).

[26] For example, Frédéric Mégret shows that the 'savage' is international humanitarian law's 'constitutive other' – that is, 'both a figure excluded from the various categories of protection, and an elaborate metaphor of what the laws of war do not want to be'. Frédéric Mégret, 'From "savages" to "unlawful combatants": a post-colonial look at international humanitarian law's "other"', in Anne Orford (ed.), *International Law and Its Others* (New York: Cambridge University Press, 2006), pp. 266–7.

[27] The term 'martial' is not commonly used in IR or security scholarship. Nonetheless, Alison Howell suggests its usefulness in calling attention to 'war-like relations or technologies and knowledges that are "of war".' Alison Howell, 'Forget "Militarization": Race, Disability and the Martial Politics of the Police and the University', paper presented at the International Studies Association Annual Conference, Baltimore, MD (23 February 2017), p. 2. The term helpfully highlights how the logics, practices, and forms of knowledge or relations that we usually associate with 'war' are also found 'outside' of war. Howell further proposes the term 'martial politics' in order to 'signal the indivisibility of war and peace, military and civilian, and national and social security'. Howell, 'Forget "Militarization"', p. 2.

I.i. The challenge

In her critical history of the principle of distinction (between civilians and combatants), which forms the centrepiece of the laws of war, Helen Kinsella points out that the principle is not simply regulative.[28] Rather, it is productive – first, of 'the subjects it ostensibly protects' (that is, civilians and combatants), and second, of 'international orders organized according to differences of civilization and sex'.[29] Kinsella traces how adherence to the principle of distinction (and to the laws of war more generally) has served, in colonial and imperial contexts, to produce civilised and barbarian entities, even as notions of civilisation and barbarity have served to delineate the categories of civilian and combatants themselves. She demonstrates, in other words, that 'barbarians' were not only marked as such by their failure to follow the laws of war: rather, their 'constant potential for insurrection' also meant that they were not 'innocent' enough to count as civilians, even when not actively involved in hostilities.[30] So, against them, the protections of the principle of distinction often did not apply.

Yet, Kinsella points out, the categories of civilian and barbarian have not been stable:

> Although the barbarian was presumed to demarcate a clear opposite or absolute limit of civilization, the barbarian was, in fact, immanent to civilization. The barbarian was said to wage war unconstrained and without discipline: these were, in fact, some of the characteristics of barbarism. Yet, against the barbarian, civilized entities were allowed to wage a war unconstrained and without discipline. Consider the effects of this on the entire distinction between barbarian and civilized, which was believed to arise from the putative self-discipline, restraint, and moderation of civilized entities. Does the distinction disappear? Or was it simply never there?[31]

The distinction between civilised and barbarian is not simply *historically* important – although it is certainly that.[32] Rather, it is central to, and explicitly invoked in, dominant lawfare discourse. For example, in his concluding remarks in a symposium issue of the Naval War College's law journal, Dinstein writes:

> On one side, you have the modern barbarians who are conducting hostilities in an utterly lawless fashion: not only do they ignore LOAC; they trample it underfoot. Specifically, the barbarians do not hesitate to kill civilians (including a sacrifice of their own civilians) on a large scale … On the other side, you have civilized nations. Generally speaking, civilized nations abide by LOAC. They do so notwithstanding the complications resulting from the diametrically opposite conduct of the enemy.[33]

For Dinstein, writing in 2011, alleged adherence to, or violation of, the laws of war serves to distinguish between the barbarian and the civilised, and to designate certain people or groups as such.

As Kinsella points out, adherence to the principle of distinction (and to the laws of war more generally) has long-been represented as requiring and demonstrating a capacity for control, a capacity for mercy,

[28] Helen Kinsella, *The Image Before the Weapon: A Critical History of the Distinction between Combatant and Civilian* (Ithaca, NY: Cornell University Press, 2011), p. 190.
[29] Ibid., p. 190.
[30] Ibid., p. 19.
[31] Ibid., p. 108.
[32] Kinsella, *The Image Before the Weapon*; Mégret, 'From "savages" to "unlawful combatants"'.
[33] Dinstein, 'LOAC and attempts to abuse or subvert it', p. 485.

and mastery of the 'savage within' – all signifiers of civilisation at different historical moments.[34] However, the very notion of adherence to the laws of war seems to require something more: a capacity for law itself. This is a capacity that non-Westerners have long been represented as lacking, or only possessing as potential – whether in nineteenth-century European debates about codification in India or legal extraterritoriality in the Ottoman Empire and Japan, or in US debates during the same period about the appropriateness of granting legal rights to Chinese immigrants.[35]

In this context, invocations of law by (those identified as) non-Westerners against (those identified as) Westerners (primarily with regard to Israeli and US policies and practices in Palestine, Afghanistan, and Iraq) raise a dual challenge. First, invocations of law by (those identified as) non-Westerners suggest that the 'barbarians' might not be so 'barbarian' – if barbarity is defined, in part, by a refusal or inability to adhere to the laws of war, and by a lack of capacity for law itself. Second, accusations of violations, by the US and Israeli governments, of the laws of war suggest that the 'civilised' might not, in fact, be so 'civilised' (that is, if they do not adhere to the laws of war).

I.ii. Law as not-law

This dual challenge does not lead writers to question the civilisation-barbarianism distinction, or to reconsider their articulations – of law to 'civilisation', and of both law and 'civilisation' to 'Europe' or 'the West'. Rather, in the dominant literature, writers respond to this challenge by representing non-Western invocations of law as not law at all – or as not quite or not properly law.

The characterisations of non-Western invocations of law as not law, or not properly law, are explicit in the dominant literature. Terms like 'misuse', 'abuse', and 'manipulation' (of law) appear over and over again in these writings. For example, describing insurgent warfare, Newton writes: 'law is *misused* not to facilitate effective operations that minimize civilian casualties and preserve human dignity but to create greater military parity between mismatched forces'.[36] Similarly, Dinstein writes: '[W]hat the barbarians do is use – and generally *abuse* – legal arguments to foil any military success that may be scored by the armed forces of civilized nations.'[37] Dunlap writes that 'U.S. opponents' engage in 'a cynical *manipulation* of the rule of law and the humanitarian values it represents'.[38]

[34] Kinsella, *The Image Before the Weapon*, p. 109.

[35] See, for example, Hussain, *The Jurisprudence of Emergency*, ch. 2 (describing British debates about codification, which hinged partly on the question of whether Indians were capable of law, given traditions of 'Oriental despotism'); Ruskola, 'Legal Orientalism'; Ruskola, *Legal Orientalism* (for genealogies of the notion, common in comparative legal scholarship, of a lack of law in China and a Chinese lack of capacity for law); Turan Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China* (New York: Cambridge University Press, 2010) (for an account of European legal extraterritoriality in China, Japan and the Ottoman Empire, a practice which was enabled, in part, by discourses of non-European legal inadequacy).

The above-described debates were all ones in which Europeans debated whether non-Europeans had the capacity for 'law' itself. A related debate, also taking place in the nineteenth century among (primarily positivist) European legal scholars, was whether non-Europeans had *international* legal personality, whether they were sovereign subjects of international law – and so entitled to its protections. In his *Imperialism, Sovereignty and the Making of International Law* (New York: Cambridge University Press, 2004), Antony Anghie describes this debate, showing how European definitions of sovereignty were forged through colonial encounters. Classed as non- or quasi-sovereigns by these definitions, non-Europeans were denied full legal personality and excluded from the protections of international law.

[36] Newton, 'Illustrating illegitimate lawfare', pp. 259–60, emphasis added.

[37] Dinstein, 'LOAC and attempts to abuse or subvert it', p. 484, emphasis added.

[38] Dunlap, 'Law and Military Interventions', p. 4, emphasis added.

Often, these terms appear without being related to any particular practices: that these invocations are misuses appears self-evident in this discourse.

How, beyond explicitly describing them as abuses or misuses, are non-Western invocations of law constituted as not, or not properly, law in the dominant literature? Almost without exception, writers cast these invocations as wholly instrumental. In these accounts, law is used to reach one of two goals. *First, the contention is that law is being used to prevent or limit the enemy's military attacks*. This is most often alleged to take place through the practice, often attributed to the Taliban and to Hamas, of using homes and hospitals to hide weapons and using humans as shields.[39] It is less often alleged to take place through broader legal campaigns, for example, to ban particular classes of weapons[40] or to raise international legal thresholds for attacks on civilians or their property.[41] *Second, the contention is that law is used to win 'hearts and minds'* (primarily in Western democracies), to 'drive a wedge between our military community and the civil society' through '[a]llegations of breaches of LOAC by our troops'.[42] The alleged goal here, in Dunlap's words, is to 'diminish the strength of [popular] support for the military effort'.[43] Some writers further claim that attacks on civilians are deliberately instigated or 'orchestrat[ed]' so they can then be legally critiqued.[44] For example, the website of the Council on Foreign Relations suggests that lawfare can be used to 'goad American forces into violations of the Law of Armed Combat, which are then used against the United States in the court of world opinion'.[45]

In these accounts, writers clearly allege that law is being approached instrumentally. However, instrumentalism does not itself seem to be the problem: in their later works, these same authors *advocate* a more instrumentalist approach to law by the United States.[46] Rather, the problem, as constructed in the dominant literature, is that law is being invoked *by those who feel little or no need to abide by law, against those who feel a great, even an excessive, need to abide by law* – so the charges of manipulation and exploitation.[47]

This point becomes most apparent in the work of Orde Kittie. In a recent book that has garnered much attention, Kittrie creates a lawfare 'typology', distinguishing between 'instrumental' lawfare and 'compliance-leverage disparity lawfare'.[48] Instrumental lawfare is 'the instrumental use of legal tools to achieve the same or similar effects as those traditionally sought from conventional kinetic military action': such lawfare is 'typically waged by Western state actors and Western non-state actors' and is often desirable.[49] In contrast, compliance-leverage disparity lawfare is 'designed to

[39] See, for example, ibid., p. 5; Kittrie, *Lawfare*, p. 287.
[40] See, for example, Dunlap, 'Law and Military Interventions', pp. 12–16.
[41] For instance, Newton warns of the dangers of campaigns to replace the requisite threshold for seizure of property from 'military necessity' to 'imperative military necessity'. Newton, 'Illustrating illegitimate lawfare', p. 264.
[42] Dinstein, 'LOAC and attempts to abuse or subvert it', p. 484.
[43] Dunlap 'Law and Military Interventions', p. 4.
[44] Ibid., p. 5.
[45] Council on Foreign Relations, 'Lawfare'.
[46] See, for example, Dunlap, 'Does lawfare need an apologia?'; Kittrie, *Lawfare*.
[47] Dale Stephens, 'The age of lawfare', *International Law Studies (International Law and the Changing Character of War)*, 87 (2011), p. 328.
[48] Kittrie, *Lawfare*, p. 11.
[49] Ibid.

gain advantage from the greater influence that law, typically the law of armed conflict, and its processes exerts over an adversary'.[50] For Kittrie, this is a more problematic form of warfare that is 'necessarily waged by state or non-state actors against adversaries over which law has significantly greater leverage or which otherwise feel more compelled to comply with the relevant provisions or type of law'.[51] Compliance-leverage disparity lawfare, according to Kittrie, has 'typically' been used 'by terrorist groups and other non-state actors against Western state actors': examples of such users are ISIS, Hamas, the Taliban, and China.[52] The problem with such lawfare, according to Lieutenant Colonel Eric Jensen of the Office of the Judge Advocate General, is that it benefits the less law-abiding party. Jensen writes: '[A] group or state that is facing a nation committed to comply with the laws of war will choose to openly violate the law not only for the tactical advantage gained but also for the strategic benefit that arises. The compliant nation, still committed to law of war compliance, is thus disadvantaged.'[53]

The problem with compliance-leverage disparity lawfare,[54] then, is not simply that law is being used instrumentally: rather, it lies at least partly in who is 'using' law, against whom. Dunlap writes: '[L]awfare is much like a tool or weapon that can be used properly in accordance with the higher virtues of the rule of law – or not. It all depends on *who is wielding it*, how they do it, and why.'[55] Crucially, the 'who/whom' is defined culturally: often explicitly in terms of the West versus the non-West. For Kittrie, the first factor that 'substantially contribute[s] to the different leverage that law and its processes exert over some actors as opposed to others' is the legal 'propensity' or 'law abidingness' of a 'political and legal culture and subculture'.[56] The US 'propensity' for law, he contends, may be favourably compared with the 'dismissive' approach to law of China and Iran.[57]

Expanding upon this notion of cultural legal incapacity, Kittrie begins a later chapter of his work, on China's 'embrace of lawfare', with a section entitled 'Lawfare in Chinese Strategy and Culture'.[58] Explaining how it has come to pass that 'the PRC is currently waging lawfare much more diligently and systematically than is the United States', even though the latter 'is a far more law-oriented society', Kittrie gives a brief and remarkably reductionist history of China's 'lawless[ness]' and legal

[50] Ibid.
[51] Ibid.
[52] Ibid., pp. 11–12.
[53] Eric Talbot Jensen, 'The ICJ's "Uganda Wall": a barrier to the principle of distinction and an entry point for lawfare', *Denver Journal of International Law and Policy*, 35 (2007), p. 269, citations removed.
[54] A note about terminology is necessary. As mentioned in the Introduction and as will be discussed in the next section, there is much disagreement about the meaning of the term 'lawfare' in the dominant literature, with writers differing, or even changing their minds, about whether lawfare is 'inherently negative' and whether it is used by liberal states. So what Kittrie calls 'compliance leverage disparity lawfare' (what Kittrie understands as only one kind of lawfare), others would simply describe as 'lawfare' (as the entirety of the practice). These latter writers have a narrower understanding of lawfare. For them, all lawfare is 'designed to gain advantage from the greater influence that law and its processes exerts over an adversary': as such, all lawfare is practiced against (more law-abiding) liberal states. For such authors, the instrumental use of law by Western states (which Kittrie would define as 'instrumental lawfare') should not be defined as lawfare at all.
[55] Charles J. Dunlap, 'Lawfare today: a perspective', *Yale Journal of International Affairs*, 3:1 (2008), p. 148, emphasis added.
[56] Kittrie, *Lawfare*, pp. 20–2.
[57] Ibid., pp. 21–2.
[58] Ibid., p. 161.

deviance (jumping between Mao Zedong, Sun Tzu and 'the Marxist view' of law in order to support his sweeping claims):

> China's vigorous use of lawfare is rooted in the exceptionally instrumental role of law in historical and contemporary Chinese culture. In pre-Communist imperial China, law served as a tool of authority, not a constraint upon it. Following the Communist revolution of 1949, China adopted the Marxist view that law serves as an instrument of politics (rather than, for example, a check on politics and an autonomous, objective arbiter of justice).
>
> Then, during the Cultural Revolution of 1966 to 1976, China dismantled its legal system, including by closing down its Ministry of Justice, abolishing its law schools, and re-educating lawyers by ordering them to work as farmers and factory workers. China became practically a 'lawless nation'.[59]

In his history, Kittrie draws liberally on tropes of Oriental despotism – of a strong, unrestrained and corrupt state – to suggest that invocations of law by the Chinese government can rarely be anything other than instrumental: even at its best, 'Chinese law was largely an instrument of (rather than a constraint upon) state power'.[60] In doing so, he follows a long tradition of comparative legal scholarship that suggests that China, for instance, does not have law (or the rule of law).[61]

Non-Western legal incapacity, however, is not enough, alone, for the prosecution of compliance leverage disparity lawfare. Rather, the very notion of compliance leverage *disparity* lawfare depends on the claim that 'different political and legal cultures and subcultures … *vary* in their general ideological senses of obligation to follow the law'.[62] Kittrie's argument depends centrally on the positing of *difference*: both non-Western legal lack and Western law-abidingness. In these accounts, non-Westerners are characterised as taking advantage of the law-respecting or law-abiding nature of Western militaries and populations: so the description of lawfare as a vehicle to 'exploit American values'.[63] Not only would such militaries be unlikely to *violate* the laws of war, the claim is that they would be unlikely to allow even the *appearance* of impropriety or illegality, because of the need to maintain the 'public support that is indispensable when democracies like the U.S. conduct military interventions'.[64]

In this way, the very charge of illegality by those not identified with the West, against those identified as Western, becomes a signifier of the lawful nature of the West, of its vigilance about abiding with international law – rather than as reasons to rethink the notions of Western lawfulness and non-Western legal lack.

But what is the precise nature of this lack? The lack, as suggested in dominant lawfare discourse, is not in ability to master legal intricacies and technicalities, or to use them strategically: it is not a shortfall in lawyering or litigating. Here, there is excess: excess litigiousness. The lack is just the opposite: it is in an ability to approach law other than superficially or strategically, other than as a tool or technology. It is a lack of law-*abidingness*,[65] an inability to understand law's *deeper* purpose,

[59] Ibid., pp. 161–4.
[60] Ibid., p. 164.
[61] For a brilliant description of this scholarship, see Ruskola, 'Legal Orientalism'; Ruskola, *Legal Orientalism*.
[62] Kittrie, *Lawfare*, p. 21 (emphasis added).
[63] Dunlap, 'Law and Military Interventions', p. 1.
[64] Ibid., p. 4.
[65] See, for example, Kittrie, *Lawfare*, p. 21.

its deeper logic or ends. For example, critiquing the report of the United Nations Fact Finding Mission on the Gaza Conflict (also known as the 'Goldstone Report'), Newton writes: 'When purported legal "developments" actually undermine the ends of the law, they are illegitimate and inappropriate.'[66] Of course, that law even has such a deeper logic, such deeper ends, is debatable. However, in dominant lawfare writings, there remains a notion of a kind of central legal 'corpus',[67] which can be separated from 'mere' invocations of or changes in law. The latter, when inconsistent with the former, are not really law at all: in this way, law and civilisation may be rearticulated with 'Europe' and 'the West'.

Implicit in these characterisations is a particular attribution of, and arrogation of, authority to determine the proper use and ultimate ends of international law. The above-described writers posit themselves as arbiters of the propriety of particular invocations of law, quite literally, as the 'proper guardians of the laws and customs of war'.[68] Non-Westerners, then, become interlopers in the world of international humanitarian law even as they invoke such law: so we have Dinstein's closing exhortation to his audience at a 2011 conference at the US Naval Academy to 'keep poachers off the grass'.[69]

But the above-described writers do more than suggest that non-Western invocations of international humanitarian are *not law at all*. They also suggest that such invocations are *martial* technologies, describing them as 'means', 'method[s]', or 'weapon[s]' of warfare.[70] Dinstein even terms such invocations 'weapon[s] of mass destruction'.[71]

In the dominant literature, non-Western invocations of law are represented as weapons or tools of war in two senses: first, in the sense that such invocations are instrumental (as discussed above), and second, in the sense that such invocations have effects similar to those of 'traditional' weapons of war – that is, violent effects.[72] Violence (understood narrowly in these accounts, as physical violence, inflicted directly, usually through contact) is alleged to be both a short- and a long-term effect of non-Western invocations of law.

In the short term, as previously mentioned, the contention is that insurgents provoke attack. For example, Dale Stephens claims that 'non-State groups engaged in asymmetric warfare' 'invite the

[66] Newton, 'Illustrating illegitimate lawfare', p. 277.
[67] Ibid., p. 255.
[68] Ibid., p. 261.
[69] Dinstein, 'LOAC and attempts to abuse or subvert it', p. 493.
[70] See, for example, ibid., p. 484; Dunlap, 'Law and Military Interventions', p. 4; Charles J. Dunlap, 'Lawfare', in John N. Moore, Guy B. Roberts, and Robert F. Turner (eds), *National Security Law and Policy* (Durham, NC: Carolina Academic Press, 2015), p. 825; Kittrie, *Lawfare*.
[71] Dinstein, 'LOAC and attempts to abuse or subvert it', p. 484.
[72] It should be noted that, in the dominant lawfare literature, writers do not only describe non-Western invocations of law as 'means', 'methods', or 'weapons' of warfare: rather, in later works, they sometimes also characterise liberal lawfare as involving, or potentially involving, the use of law as a 'weapon'. See, for example, Dunlap, 'Lawfare', p. 823. However, they use the term differently in the two contexts. For lawfare writers, liberal lawfare involves the use of law as a 'tool' or 'weapon' only in the sense that law is used instrumentally 'to achieve an operational objective'. Dunlap, 'Does lawfare need an apologia?', p. 122. Liberal law, in this context, has the potential to be 'a non-violent substitute for [the] traditional arms' that would usually be used to achieve such an objective. Dunlap, 'Does lawfare need an apologia?', p. 121. In contrast, non-Western invocations of law are alleged to not only be *instrumental*, but also to *inflict* violence, much like traditional arms. These differing representations are the focus of Section II.

application of force against themselves or their proxies, innocent civilians …, or ostensibly civilian objects'.[73] Similarly, Dunlap asserts that 'opponents unconstrained by humanitarian ethics now … *orchestrat*[e] situations that deliberately endanger noncombatants'.[74] In these excerpts, violence is not represented as an unfortunate consequence of non-Western lawfare: rather, it is cast as the intended effect. For the most part, these writers give flimsy (or no) evidence to support these claims about intentionality. The ease with which such intentions can be imputed has much to do with the long-standing Orientalist notion that, as stated by the chief counsel for war crimes at Nuremberg, 'individual lives are not valued so highly in Eastern mores'.[75] This notion serves to render reasonable the possibility that non-Westerners deliberately engineer attacks on civilians in their own communities for public relations purposes – think, for example, of the amount of evidence that a US newspaper or law journal would likely require before a similar accusation could be leveled at the US government.

In the long term, the suggestion is that non-Western invocations of law could lead to violence by 'undermin[ing] respect for the application and enforcement of humanitarian law' among law-abiding militaries.[76] For example, Newton claims that 'spurious allegations and misrepresentations of the actual state of the law' by lawfare practioners could 'lead to a cycle of cynicism and second-guessing that could weaken the commitment of some military forces to actually follow the law'.[77] Some lawfare writers additionally make the realist point that 'if no feasible options of conducting hostilities were left to belligerent parties in war [because of the efforts of lawfare practioners seeking to stymie their opponents] – ultimately, no rules would survive, inasmuch as the legal paper-constraints would simply be ignored by clashing armies'.[78]

The attributions of responsibility in these accounts are notable: US attacks on civilians become the product of insurgent goading; (potential) US violations of international humanitarian law become the product of insurgent lawfare; (potential) 'lawlessess' becomes something that is 'inflicted on our own side'.[79] In these dominant accounts, as often in colonial and liberal warfare, our 'lawlessness' or 'barbarity' becomes a response to their 'lawlessness' or 'barbarity' – *and so not 'lawlessness' or 'barbarity' at all*.[80]

Section II. Excising violence from liberal law

Above, I have argued that, in the dominant lawfare literature, writers confront the challenge posed by non-Western invocations of international humanitarian law by suggesting that such invocations of law are not law at all, but are violent martial technologies. What, then, of liberal invocations of

[73] Stephens, 'The age of lawfare', p. 328.
[74] Dunlap, 'Law and Military Interventions', p. 5, emphasis added.
[75] T. Taylor, 'Letter to the *New York Times*' (16 July 1950), as quoted in Bruce Cumings, 'American Orientalism at war in Korea and the U.S.', in Tarak Barkawi and Keith Stanski (eds), *Orientalism and War* (London: C. Hurst and Co., 2012), p. 47.
[76] Newton, 'Illustrating illegitimate lawfare', p. 271.
[77] Ibid., p. 256.
[78] Dinstein, 'LOAC and attempts to abuse or subvert it', p. 489.
[79] Ibid., p. 489.
[80] See, for example, Cumings, 'American Orientalism at war', p. 44 (highlighting a similar logic at play in Truman's attempts to justify the United States' indiscriminate killing at Hiroshima); Kinsella, *The Image Before the Weapon*, pp. 107–8 (highlighting a similar logic at play in arguments made, at the end of the nineteenth century, in favour of using the dum-dum bullet in colonial warfare).

international humanitarian law in a context of war? In this section, I trace the shift that takes place *within the dominant literature* over the course of the first decade of the twenty-first century, as many writers move from often not recognising, to advocating, liberal lawfare. I argue that this shift is made possible by these writers' representation of law *as not itself violent, and as only leading to violence if misused (as by non-Westerners)*. Such a representation enables these writers to distinguish between liberal and non-Western lawfare, and to promote the former even as they condemn the latter.

As mentioned in the Introduction, in dominant lawfare discourse, prior to about 2007 or 2008, liberal lawfare was rarely discussed or seemed not to exist.[81] Not by coincidence, in these early writings, 'lawfare' was generally considered a pejorative term. However, around this time, a change began to occur in the dominant literature. In a context in which the US military and its affiliates were devoting considerable attention to (supposedly) 'non-traditional' and 'non-kinetic' forms of warfare, some authors began to advocate lawfare by the United States – often using exactly that term. These authors began to argue that law should be made an integral part of US counterinsurgency strategy and practice.[82] Given the previously negative connotations of the term and its identification with the practices of opponents of the United States, the rehabilitation of lawfare required substantial representational work.[83]

The changing meanings and connotations of the term 'lawfare' within dominant lawfare discourse are best exemplified by Dunlap's work. In his early work, Dunlap focuses mostly on the lawfare engaged in by 'challengers [of the United States]';[84] furthermore, as Kittrie points out, he 'describe[s] lawfare's impact as largely malign'.[85] For example, Dunlap states that 'there is disturbing evidence that the rule of law is being hijacked into just another way of fighting (lawfare) to the detriment of humanitarian values as well as the law itself'.[86] However, in later articles, Dunlap departs from this negative understanding of lawfare.[87] In 2010, he asks whether lawfare requires an 'apologia', going on to defend both the concept and the practice. As a concept, he contends, lawfare is 'ideologically *neutral*'.[88] So too, as a practice, lawfare is 'simply another kind of weapon' that can 'be used for good or bad purposes, depending upon the mind set of those who use it'.[89]

As the above-described writers began to advocate US lawfare, they explicitly redefined the term itself. In his original article, Dunlap defines lawfare as a 'method of warfare where law is used as a means of realizing a military objective'.[90] Although this definition is agnostic as to whether such a use of law is 'good' or 'bad' (and so does allow for the possibility of 'good' lawfare), Dunlap later amends it in a way that makes this possibility much clearer. Lawfare, in later works, is a 'strategy of *using – or misusing* – law as a substitute for traditional military means to achieve an operational [or, in some

[81] See, for example, Dunlap, 'Law and Military Interventions', p. 4; Council on Foreign Relations, 'Lawfare'.
[82] See, for example, Dunlap, 'Does lawfare need an apologia?'; Dunlap, 'Lawfare today … and tomorrow'; Sitaram, *The Counterinsurgent's Constitution*; Kittrie, *Lawfare*.
[83] For a dominant account of the changing meanings of the term 'lawfare', see Kittrie, *Lawfare*, pp. 4–8. For a critical account of the evolution of the dominant lawfare literature more generally, see Craig A. Jones, 'Lawfare and the juridification of law modern war', *Progress in Human Geography*, 40:2 (2016), p. 224.
[84] Dunlap, 'Law and Military Interventions', p. 4.
[85] Kittrie, *Lawfare*, p. 6.
[86] Dunlap, 'Law and Military Interventions', p. 2.
[87] Kittrie, *Lawfare*, p. 6.
[88] Dunlap, 'Does lawfare need an apologia?', p. 122; Dunlap, 'Lawfare today … and tomorrow', p. 315.
[89] Dunlap, 'Does lawfare need an apologia?', p. 122.
[90] Dunlap, 'Law and Military Interventions', p. 4.

accounts, a military] objective'.[91] This definition, which is widely cited as authoritative, clearly stresses the division of lawfare into the desirable and the undesirable, the proper and the improper, into that which should be promoted and that which should be condemned.[92] To advocate the former practice – to 'communicat[e] to non-specialists [in the US military] how law might be used as a positive good in modern war' – is Dunlap's explicit goal in his later works.[93]

What reasons are given for this new advocacy of US lawfare in the dominant literature? According to Orde Kittrie, the US should embrace lawfare because to do so would have the benefit of 'saving … some U.S. and foreign lives'.[94] The suggestion here is that law, when used by the United States, would not inflict or effect violence. Contrast this to the effects attributed to, or predicted for, non-Western lawfare, described in the previous section. Non-Western lawfare is alleged to cause civilian deaths (when civilians are used as shields), the destruction of property (near which weapons are hidden), and the long-term decline of respect for international humanitarian law (and so any rise in physical violence that this might entail).

Again, Dunlap's work is illustrative of the change. In his early work, when he is mostly concerned with the lawfare of opponents of the United States, Dunlap explains: '[t]hough at first blush one might assume lawfare would result in less suffering in war (and it sometimes does), in practice it too often produces behaviors that jeopardize the protection of the truly innocent.'[95] By 2011, however, when he is more concerned with US lawfare, Dunlap emphasises that many uses of lawfare 'serve[] to reduce the destructiveness of conflicts'.[96]

The fact that US lawfare would save lives is not simply an unintended happy outcome of the US use of law: rather, it is precisely *why* the United States would engage in lawfare. Dunlap writes: '[M]any uses of legal "weapons" and methodologies avoid the need to resort to physical violence and other more deadly means. This is one *reason*, for example, that the United States and other nations seek to use sanctions before resorting to the use of force, wherever possible'.[97] In contrast, the contention is, non-Westerners do not turn to law out of a desire to *avoid violence*. Rather, non-Westerners are routinely portrayed as invoking law because of their inferiority in conventional warfare.[98] For example, Dinstein writes that '[s]*ince* the modern barbarians are unable to win discrete battles against the technological superior armed forces arrayed against them, they try to win the war by using lawfare.'[99] So we see descriptions of non-Western lawfare as the 'latest in asymmetries' and a 'strategy of the weak'.[100]

[91] Dunlap, 'Lawfare today: a perspective', p. 146; Dunlap, 'Does lawfare need an apologia?', p. 122, emphasis added.
[92] See, for example, Stephens, 'The age of lawfare', p. 327; Kittrie, *Lawfare*, pp. 6–7.
[93] Dunlap, 'Does lawfare need an apologia?', p. 142.
[94] Kittrie, *Lawfare*, p. 343.
[95] Dunlap, 'Law and Military Interventions', p. 4 (citation removed). The example Dunlap gives, in a citation here, of an occasional instance in which lawfare might result in less suffering in war, is that of the US government buying up commercial satellite imagery of Afghanistan. Dunlap, 'Law and Military Interventions', p. 4, fn. 17. In this early work, this kind of lawfare is cast as the exception, not the rule, as the above sentence illustrates.
[96] Dunlap, 'Lawfare today … and tomorrow', p. 316.
[97] Ibid., pp. 315–16, emphasis added.
[98] See Department of Defense, 'National Defense Strategy of the United States of America', p. 5.
[99] Dinstein, 'LOAC and attempts to abuse or subvert it', p. 484, emphasis added.
[100] Council on Foreign Relations, 'Lawfare'; Department of Defense, 'National Defense Strategy of the United States of America', p. 5.

For Western states, then, law is cast as the preference, precisely because it allows for the avoidance or reduction of violence. For non-Westerners, on the other hand, violence is cast as the preference: law is a second-choice, brought on by the necessity of perceived inferiority in conventional warfare. It should be noted, however, that in *both* cases, lawful and violent or forceful means are cast as distinct, as alternatives. In these accounts, law may effect violence (if *mis*used): it is precisely because of such infliction that non-Western lawfare is to be condemned. However, violence or force is not integral to the very functioning of law. So, in the later dominant literature (that is, when authors are concerned with liberal lawfare), we see references to law as a 'non-violent substitute for traditional arms' or a 'bloodless' alternative to 'bloody traditional warfare'.[101] Kittrie, for example, contrasts 'legal' and 'lethal' weapons, 'legal' warfare and 'traditional, kinetic warfare ("shooting warfare")'.[102] The implication is that legal weapons are not also lethal, that law does not involve execution (and, further, that warfare 'traditionally' has not involved law).

The above-described lawfare writers do not generally explicitly refer to non-Western invocations of law as non-violent, given the violent effects predicted for such invocations.[103] However, it should be noted that, so strong is the tendency to distinguish between law and violence that, as Jones usefully points out, even non-Western invocations of law *work* primarily because the invokers are able to take advantage of the *normative* pull that law has on the militaries and populations of the United States and Israel.[104] Recall the contentions about the techniques of non-Western lawfare commonly-made in the dominant literature. Writers contend that insurgents protect their bodies and their weapons by using homes and humans as shields. So too, they contend that insurgents turn liberal populations against their militaries, through false accusations of illegality. In both these instances, it is the *normative* power of law that is at play – whether in preventing particular military attacks (for example, those that violate the principle of distinction) or in provoking population responses.

In these dominant accounts, there is little recognition that, as critical scholars have demonstrated, violence and law are more *integrally* related, that law (at least in its dominant manifestations) does not simply *inflict* or *effect* violence (if misused), but itself *depends* on violence, that violence is a *part of* law.[105] For example, Former Army Officer and Pentagon official Phillip Carter writes, 'I would far prefer to have motions and discovery requests fired at me than incoming mortar or rocket-propelled grenade fire.'[106] Law, in Carter's account, involves simply paperwork – not confinement, physical punishment, deprivation, and death. There is little recognition here, as Craig A. Jones points out, that law does not exist without corporeal en*force*ment, without 'the discrete acts of law's agents – the gun fired by the police, the sentence pronounced by the judge, the execution carried out behind

[101] Dunlap, 'Does lawfare need an apologia?', p. 121; Dunlap, 'Lawfare', p. 829.
[102] Kittrie, *Lawfare*, p. 3.
[103] An exception is Phillip Carter, 'Legal combat', *Slate* (4 April 2005), available at: {http://www.slate.com/articles/news_and_politics/jurisprudence/2005/04/legal_combat.html} accessed 9 June 2016.
[104] Jones, 'Lawfare and the juridification of law modern war', p. 224.
[105] For examples of such critical works, see Robert M. Cover, 'Violence and the word', *Yale Law Journal*, 95:8 (1986), pp. 1601–29; Nathaniel Berman, 'Privileging combat? Contemporary conflict and the legal construction of war', *Columbia Journal of Transnational Law*, 43:1 (2004), pp. 1–72; David Kennedy, *Of War and Law* (Princeton: Princeton University Press, 2006), p. 22; Weizman, 'Legislative attack'; Lawrence Douglas, Austin Sarat, and Martha M. Umphrey, 'Law and war: an introduction', in Austin Sarat, Lawrence Douglas, and Martha M. Umphrey (eds), *Law and War* (Stanford: Stanford University Press, 2014), p. 13.
[106] Carter, 'Legal combat'.

prison walls'.[107] There is little recognition that, as David Kennedy points out, 'to use law is also to invoke violence, at least the violence that stands behind legal authority'.[108] Instead, in the dominant accounts, violence becomes something that *could* come after law, something that is a *possible* byproduct of (a misuse of) law, rather than something that is internal to or inherent in it. Such representations crucially allow for the promotion of (proper) US lawfare, specifically, as a way to avoid the infliction of violence and as an alternative to the use of force.

Section III. Beyond 'lawfare'

Above, I have shown how, in dominant lawfare writings, war's violence is characterised as a product not of law itself, but only of its misuse or abuse by non-Westerners. In recent years, a number of critical writers in law, geography, and IR have countered these characterisations, instead demonstrating the violence inherent to, or inflicted by, liberal law. In this section, I describe some of the key contributions of these writings, to which I am much indebted. However, I also suggest two modifications or reorientations.

In an early but seminal work, legal scholar Nathaniel Berman demonstrated the permissive effect of the *jus in bello* rules of war.[109] Berman showed how, by mandating that certain 'privileged' combatants not be prosecuted for 'mere participation in armed conflict', the laws of war immunised, and so enabled, violent acts that might otherwise be prohibited (for example, under domestic law prohibitions on assault or murder).[110] A few years later, in *Of Law and War*, David Kennedy echoed Berman's insight that law is 'war-generative' rather than war-limiting.[111] However, he went further in detailing the multiple ways in which law enables the *mundane* and *everyday* practices of warfare – 'buying and selling weaponry, recruiting soldiers, managing armed forces, encouraging technological innovation, making the spoils of war profitable'.[112]

The above-described works were not directly responsive to the dominant lawfare literature. Nor, in some cases, did they focus on or even mention 'lawfare'.[113] Nonetheless, these writings provided the crucial groundwork for the later writings of 'critical lawfare writers' – those who *explicitly challenged* dominant lawfare discourse. Critical lawfare writers responded to the characterisation of 'lawfare' in the early dominant literature as a 'weapon of the weak', by arguing that the practice is often used by the strong.[114] So too, they challenged the suggestion, common in dominant lawfare writings, that Western states use law as an *alternative to violence*, by showing how military lawyers and government advisers have wielded law precisely in order to authorise *ever-rising* levels of force. For example, Hajjar and Jones detailed the crucial roles played by Israeli military lawyers in developing

[107] Austin Sarat and Thomas R. Kearns (eds), *Law's Violence* (Ann Arbor: University of Michigan Press, 1995), p. 1, as quoted in Jones, 'Lawfare and the juridification of law modern war', p. 224.
[108] Kennedy, *Of War and Law*, p. 22.
[109] Berman, 'Privileging combat?'.
[110] Ibid., pp. 3–4. The *jus in* bello rules are those rules governing 'the methods of war and the protection of those not engaged in combat'. Berman, 'Privileging combat?', p. 3. For a more recent account that demonstrates the permissive power of the *jus ad bellum* rules of war (that is, the rules governing the resort to war itself), see Ian Hurd, 'The permissive power of the ban on war', *European Journal of International Security*, 2:1 (2016), pp. 1–18.
[111] Kennedy, *Of War and Law*, p. 32.
[112] Ibid.
[113] Berman, 'Privileging combat?'.
[114] Jones, 'Lawfare and the juridification of law modern war'; Weizman, 'Legislative attack', p. 13.

Israel's 'targeted killing' policy, and in authorising particular killings.[115] Eyal Weizman described how the Israeli military uses 'warning' attacks to shift Palestinian civilians 'between legal designations', by characterising those who fail to heed the warnings as 'voluntary human shields' – and so allegedly-legal targets.[116] Katia Snukal and Emily Gilbert showed how US laws 'have been wielded, articulated and interpreted to secure the impunity of private military security contractors … in Iraq'.[117]

These writers adopt much of the language of the dominant lawfare literature, but apply this language to the practices of liberal states. Most common is the language of 'lawfare' itself.[118] For example, John Morrissey speaks of the 'lawfare of the U.S. military' and of 'liberal lawfare';[119] Weizman describes our current time as an 'age of lawfare';[120] and Snukal and Gilbert refer to the creation of a legal regime for US military contractors as an 'exemplary tactic of lawfare'.[121] In addition, we see references in critical writings to law being used as a tool or weapon of war, and to law being 'weaponised'. For example, Michael D. Smith describes the 'central, *instrumental*, and political role that law continues to play in the US-led intervention in Afghanistan', while Jones describes the '*weaponization* of law at the heart of empire and colonialism'.[122] Weizman explicitly adopts Dunlap's early definition of lawfare – 'the use of law as a weapon of war' – but emphasises that 'lawfare could also be used by the state'.[123]

When critical lawfare scholars characterise particular practices as 'lawfare' or discuss the 'weaponisation of law', they clearly aim to *bring together* law and war. Lawfare, Jones writes, 'is important … because it shows that war and law are entangled'.[124] Furthermore, as shown above, scholars often *succeed* in breaking down these oppositions through their empirical descriptions – and this is one of their most crucial contributions. Nonetheless, I want to suggest that critical lawfare scholars' adoption of the language of lawfare, their characterisations of law as something that is 'weaponised' or 'used' as a weapon of war, may have discursive implications that cut against the (productively destabilising) general tenor and thrust of their work.

For example, the description – without more – of a particular practice as involving the use of law as a 'tool of war' suggests that we can easily identify particular *means* as 'legal' and particular *ends* as 'martial'. Similarly, the easy description of a particular practice as 'lawfare' implies that that practice is somehow 'of' law and 'of' war. The problem with these characterisations is that they

[115] Jones, 'Frames of law'; Hajjar, 'Lawfare and Armed Conflict'.
[116] Weizman, 'Legislative attack', p. 22.
[117] Katia Snukal and Emily Gilbert, 'War, law, jurisdiction and juridical othering: Private military security contractors and the Nisour Square massacre', *Environment and Planning D: Society and Space*, 33 (2015), p. 661.
[118] But see Neve Gordon, 'Human rights as a security threat: Lawfare and the campaign against human rights NGOs', *Law & Society Review*, 48:2 (2014), p. 312 (adopting an approach that does not use lawfare as a 'descriptive term' but instead, 'focus[es] on *what lawfare does*.')
[119] John Morrissey, 'Liberal lawfare and biopolitics: US juridical warfare in the war on terror', *Geopolitics*, 16:2 (2011), p. 291.
[120] Weizman, 'Legislative attack', p. 16.
[121] Snukal and Gilbert, 'War, law, jurisdiction and juridical othering', p. 662.
[122] Michael D. Smith, 'States that come and go: Mapping the geolegalities of the Afghanistan intervention', in Irus Braverman, Nicholas Blomley, and David Delaney, *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford: Stanford Law Books, 2014), p. 143, emphasis added; Jones, 'Lawfare and the juridification of law modern war', p. 232, emphasis added.
[123] Weizman, 'Legislative attack', p. 13.
[124] Jones, 'Lawfare and the juridification of law modern war', p. 223.

imply that we know what law and war are: they impute a *stable, self-evident* quantity to the legal and the martial. As such, they obscure the very shifting, contextual nature of the meanings of law and war that critical lawfare writers elsewhere do so much to highlight. In particular, the characterisations obscure the ways in which colonial (or as many scholars have shown, Eurocentric or Orientalist) logics have structured our very understandings of these core concepts, with crucial implications for our judgements about the legality, legitimacy, and violence of particular acts and claims.[125]

The language of lawfare, the characterisations of law as something that is 'weaponised' or 'used' as a weapon of war, however, does not simply impute *self-evidence* and *stability* to the categories and boundaries of law and war. These characterisations further impute a *separateness* to these categories. The very use of the term 'lawfare' to describe *some* invocations of law suggests that there are *other* invocations of law that are *not* war-related, are just 'law' (and, by implication, are either 'peaceful' or 'non-violent'). The characterisation of law as something that is 'used' as a tool of war similarly suggests the existence of separate practices or institutions that can, *but need not*, be brought together. Even more clearly, the language of weaponisation suggests a realm of law prior to such weaponisation – a moment when law was non-violent and unrelated to war.[126] As such, these characterisations work against critical scholars' own attempts, elsewhere in their works, to break down the barrier between law, violence, and/or war.

On the one hand, my point here is to point out the difficulties of the language of lawfare, of characterising law as a tool or weapon of war. But I also want to draw on my above-described account – and on strategies adopted in existing critical scholarship on law and war – to suggest two ways forward: first, examining the bordering and bounding of the category of 'law' itself, and second, examining how particular people, places, practices, and institutions come to be articulated to 'war'.

First, the 'legal'. In this article, I have traced how, in dominant lawfare writings, non-Western invocations of law are characterised as not law at all, but as misuses or abuses of law. In doing so,

[125] There are now substantial literatures that trace how 'Eurocentric [and colonial, and Orientalist] ideas and historiographies have informed the basic categories of social and political thought – literatures on which this article draws (Tarak Barkawi, 'Decolonizing war', *European Journal of International Security*, 1:2 (2016), p. 199).

Barkawi's work has been key in tracing how these ideas and historiographies have informed our understandings of *war*. In 'Decolonizing war', he shows that 'European histories of war provide the (provincial) basis for the putatively universal concepts and definitions in which we study war in *both* the global South and North'. Barkawi, 'Decolonizing war', p. 200. In *Orientalism and War*, he and his coauthors and collaborators trace the ways in which 'orientalism participates in war through interpretation, by providing an account of the meaning of a war and the identities of the parties involved in it'. Tarak Barkawi and Keith Stanski, 'Introduction: Orientalism and war', in Barkawi and Stanski (eds), *Orientalism and War*, p. 3.

[126] Here, I am drawing on Alison Howell's critique of the concept of 'militarization', a concept which, she suggests, 'falsely presumes a peaceful liberal order that is encroached on by military values and institutions'. Howell, 'Forget "Militarization"', p. 1. Howell suggests that '[e]mbedded in the term "militarization" is a theorization of "before and after" – of movement from a non-militarized (or less-militarized) state, to a militarized one. This, however, erroneously assumes that there ever was a peaceful domain of "normal" or "civilian" politics unsullied by military intrusion.' Howell, 'Forget "Militarization"', p. 2. My point here is similar: the very notion of the 'weaponisation' of law suggests the possibility of a non-weaponised law, much as the characterisation of only some invocations of law as 'lawfare' suggest that other invocations are 'peaceful'.

I have drawn attention to how these writers bound the category of law itself, how they eject particular non-Western claims and practices from within those bounds. So my first suggestion is that IR scholars pay much more attention to these processes of bounding (of law) and ejection (from law), drawing on existing legal literatures that address these processes. Such an enquiry would enable us to better understand not only how particular claims, peoples, spaces, and practices come to be seen as *non-legal*, but would also help us understand how other claims and practices come to be seen as law, *tout court* (rather than as *particular* forms or understanding of law).[127] As such, such an enquiry would require us to rethink our own working definitions of law (as well as the very practice of defining law), whether in IR works on compliance, or in works that seek to demonstrate international law's violent effects.

Second, the constitution of the 'martial'. In this article, I have examined how, in dominant lawfare writings, *law* comes to be represented as a tool of war. However, law is not the only practice or institution that has been so represented in recent years. Rather, homes, hospitals, and even people in Palestine, Iraq, and Afghanistan (and elsewhere) have been characterised as weapons of war. Homes, hospitals, and people are alleged to function as tools or technologies of war in a manner very similar to law: in fact, they are said to work in tandem. By hiding weapons in or below homes and hospitals, and by using humans as shields, it is alleged that insurgents are attempting, first, to prevent attacks on themselves and on their weapons, and second, to wrest public relations victories from those attacks that do occur.[128]

The language of 'weapons' and 'weaponisation', however, has not simply been used by those seeking to *legitimise* liberal violence by casting such violence as defensive (and so legal). Rather, much as they have adopted the dominant language of 'lawfare', many critical writers have seized upon this language of 'weapons' and 'weaponisation' to *critique* liberal violence. They have discussed the weaponisation of maps, of academic disciplines like anthropology, and of neuroscience – by the US government.[129] Of course, these characterisations absolutely should not be equated to the above-described characterisations of homes and hospitals as weapons of war: they are used for different political purposes and with very different political effects. Nonetheless, as Alison Howell has suggested, these latter characterisations also raise (different) difficulties, for example, in suggesting a prior separation, only recently overcome, between these disciplines and war.[130]

[127] Kinsella's 2011 book (*The Image Before the Weapon*) is a prime example of a work that undertakes such an enquiry in the context of humanitarian law. For other examples that do not focus on humanitarian law, see generally Orford, *International Law and Its Others*; Ruskola, 'Legal orientalism'; Ruskola, *Legal Orientalism*; Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011).

[128] Crucially, in these accounts, homes, humans and hospitals are portrayed not simply as 'defensive' mechanisms, but as having 'offensive' potential. For example, during Operation 'Protective Edge', Israel produced an infographic, widely disseminated on social media, which had a picture of a house, labelled 'Gaza', forming the head of a rocket. The tagline was: 'Hamas Uses its Civilians to Harm Ours.' Neve Gordon and Nicola Perugrini, 'The politics of human shielding: On the resignification of space and the constitution of civilians as shields in liberal wars', *Environment and Planning D: Society and Space*, 34:1 (2016), p. 181. The implication here was that Palestinian civilians, and homes (and indeed, all of Gaza) were not simply shields, but weapons, since the shielded weapons could ultimately be used against civilians in Israel.

[129] Joe Bryan and Denis Wood, *Weaponizing Maps: Indigenous Peoples and Counterinsurgency in the Americas* (New York: The Guilford Press, 2015); David H. Price, *Weaponizing Anthropology* (Petrolia and Oakland, CA: Counterpunch and AK Press, 2011); Alison Howell, 'Neuroscience and war: Human enhancement, soldier rehabilitation, and the ethical limits of dual-use frameworks', *Millennium: Journal of International Studies*, 45:2 (2017), pp. 133–50 (critiquing the argument that neuroscience has been 'weaponised').

[130] Howell, 'Forget "Militarization"'; Howell, Neuroscience and war'.

So, rather than characterising homes or hospitals, on the one hand, or academic disciplines, on the other, as martial technologies, critical writers should examine how some people, places, practices, and institutions *come to be articulated to, and others disarticulated from, war itself*, paying special attention to the role of discourses of civilisation and barbarity in settling and unsettling these articulations. How, for example, are the homes of Palestinians, of Israeli settlers, or, for that matter, suburban homes in the US, differently constituted – as offensive weapons, as spaces to be defended, or as disconnected from war in every way? And what assumptions, for example, about disciplinary boundaries, underlie critical scholars' own characterisations of cartography, anthropology, and neuroscience (for example), as 'weapons' or as forms of knowledge that can be 'weaponised'?

Conclusion

Liberal warfare in the twenty-first century is crucially legitimised by its alleged lawfulness (and the law-abiding nature of its wagers), and its furtherance of the rule of law. Therefore, non-Western invocations of law that challenge the actions or policies of the US or Israeli governments pose a challenge. In this article, I have shown that, in the dominant lawfare literature, the response to this challenge is to characterise non-Western invocations of law as 'not law' at all, but instead, as violent martial technologies. Such characterisations work to re-inscribe the border between those who do, and those who do not, have the capacity for law, which is also the border between the civilised and the barbarian. Such characterisations additionally work to re-inscribe the border between law and violence, by characterising the latter as not inherent to, but a product of perversions of, the latter.

Unlike many critical scholars, I have not responded to the dominant lawfare literature by pointing out that lawfare is also used, violently, by liberal states. Rather, I have attempted to reorient the enquiry in question, from examining whether law is a constraint on or enabler of war's violence, to considering how law comes to be understood as such. In addition to tracing the ways in which *law* comes to be bounded and articulated to, or disarticulated from, war, I have suggest the necessity of similarly tracing how people, places, practices, and institutions (besides law) come to be so articulated or disarticulated. These enquiries involve approaching law, war, and violence as concepts of (colonial) social and political theory, concepts with (colonial) histories – rather than stable practices or institutions, albeit ones whose *relationships* are open to reconsideration.

Acknowledgements

I would like to thank Tracey Blasenheim, Pablo Kalmanovitz, Arnulf Becker Lorca, and Jutta Weldes for their comments on, and generous engagement with, this work.

Biographical information

Freya Irani is a Mellon-Sawyer Postdoctoral Associate in the Department of Political Science, University of Minnesota-Twin Cities. She received her Juris Doctor from NYU School of Law, and her PhD in Politics and International Studies from SOAS, University of London. Her work examines struggles over legal authority between the global South and global North.