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Abuse of Law on the Twenty-First-Century Battlefield: A Typology of Lawfare

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WARFARE, LAW, AND LAWFARE

Is international law (IL) a substitute for armed force in international relations? Put differently, can IL be state A's means of getting state B to do its bidding against B's will? Ideally, that is exactly what law is: a means of coercion that pre-empts the use of force. In the face of competing claims, divergent perceptions, or conflicting interests, law tells us who or which side is in the right, saving us the trouble of a physical confrontation. Of course, we rely on law to be effective in this task because it is typically backed by a threat of enforcement. Those who break a law tend to incur a penalty. In the archetypal understanding of enforcement that penalty is force or violence. Law is hence at best a temporary substitute for force. When push comes to shove the coercive power of law depends on violence.

To the extent that this is still the dominant way in which we think about law, international lawyers have to engage in what Thomas Franck aptly called "defensive ontology" (Franck 1995, 6). If association with the coercive power of the state is what renders a rule a law, then IL cannot really be law. After all, international relations are anarchical in the sense that states are not subject to a superior authority with a monopoly on the use of force that could enforce this "law." States comply with it either because that is how they want to behave anyway or because a rule of IL is backed by the material power of another state (for this view see Goldsmith and Posner 2005; Grieco 1988; Krasner 1999; Nardin 2008; Thompson 2012). As enforcement accounts for the coercive power of law, the answer to the initial question – can IL be a substitute for armed force in international relations – must be no. It cannot even be relied on to be the temporary substitute that domestic law is. As Eric Posner puts it: "[l]aws do not enforce themselves. If a weak country cannot coerce a more powerful country through force of arms, then it cannot coerce the other country with law either" (Posner 2011).

The term "lawfare" expresses the observation that this story, which is associated with the realist tradition of International Relations (IR) scholarship, no longer holds true. Since John Austin offered the definition of law as a command laid down by a sovereign and backed by a threat of sanctions, (Austin 1832, lecture I; also Austin/Campbell 1879/2002) a wealth of alternative theories of law have emerged. They criticize that a credible threat of sanctions is neither what characterizes most laws, nor the dominant reason why laws are obeyed (Cotterell 2003). By the same token, IR scholarship has shown that IL can have effects on state behavior that are not reducible to an underlying threat of force (Brunnée and Toope 2010; Dill 2015a, 50ff). Like domestic law, IL often relies for its compliance pull on actors' desire to be deemed legitimate (Dill 2015b). The coercive power of IL then stems from the association of legality with legitimacy and the reputational costs that states in defiance of IL incur as a result. Moreover, compliance with IL is connected to many contemporary societies' identities. That means a number of states obey IL habitually and even beyond what is instrumentally rational. IL is thus a means not just of coercion, but also of persuasion. Far from IL's originally dominant characterization as an epiphenomenon of material power, (Carr 1946, 170; Morgenthau 1948, 249; Waltz 1979, 88) it is now widely recognized as exerting influence on state behavior even when it is not backed by force.

While sometimes used to refer to the strategic use of IL in general, lawfare has most often been the banner under which scholars discuss the observation that this coercive and persuasive capacity of IL does not disappear with the outbreak of armed conflict. Quite the contrary; in the twenty-first century, legitimacy in war, like in peace, is predominantly measured in terms of legality (Dill 2015a, 154ff, 239ff; Kennedy 2006 and 2012, 160). Since the use of force is prima facie illegitimate, state belligerents clamor for the legitimacy afforded by international humanitarian law (IHL). Specifically when the world is watching, most states go to considerable length to avoid the appearance of non-compliance, the usually high stakes in war notwithstanding. As a result, evoking IL can serve as "a substitute for traditional military means" to shape the behavior of states at war (Dunlap 2009, 54).

Not surprisingly, this is particularly true for states whose societies' identities are connected to the rule of law, such as the United States and Israel. The Israel Defense Forces (IDF) as well as the US Armed Forces have institutionalized legal argument in the conduct of hostilities through IHL training, the presence of lawyers in or alongside the chain of command, and legal review of military practices (Attorney General's 2015; US Department of Defense 1974). They vociferously defy allegations of non-compliance (State of Israel 2015) and consider those that are substantiated a strategic defeat. Of course, both states have considerable material power and they have largely kept their soldiers beyond the jurisdictional reach of international adjudication and thus enforcement of IHL. The exercise of the coercive and persuasive power of law in war even against such belligerents then signals the emancipation of the laws

of war from material power. "Lawfare" denotes IL's ability to serve as a substitute for armed force in international relations even, as it were, when push comes to shove.

But why did we need the semantic fusion of law with warfare to grasp this phenomenon? An alternative, admittedly less catchy, way of describing what is going on would be "law operates like law, even in war." Two prescriptive projects, which are in tension with each other, explain the popularity of the term lawfare. One strives to draw attention to the role and also the usefulness of IL. Despite the mounting empirical evidence for IL's impact, in IR scholarship IL's acceptance as a variable in its own right is only partial. The equivalence of legal argument and the use of force suggested by one neat compound noun may convince the realist scholar that IL is a worthwhile object of inquiry. After all, no one ever doubted the crucial role of war in international relations. Even more importantly, the term lawfare may help convince the military practitioner that the maxims "*inter arma silent leges*" or "*Kriegsraison geht vor Kriegsmanier*" belong in the past. A "bumper sticker to help military personnel understand why the law needs to be incorporated into their thinking and planning," (Dunlap 2010, 126) is what General Charles Dunlap, who popularized the term, meant it to be (Dunlap 2008 and 2011).

The second prescriptive project responds to the demand for a delineation of legitimate uses of IL as a means of coercion from illegitimate ones. This demand has risen in lock-step with the proliferation of legal arguments about and in war. In recent years, a myriad of articles have probed the term "lawfare," some mapping how the term is usually used, (Ansah 2010; Luban 2010; Werner 2010) others arguing how it should be used (Noone, 2010; Tiefenbrun 2010). The most common understanding of lawfare is not state A's use of law to get state B to do its bidding against B's will, but A's *abuse* of law to that end. (Blank 2010; Horton 2007; Horton 2010; Jensen 2007; Lebowitz 2010; Posner 2011; Rivkin, Casey, and Delaquil 2004; Rivkin and Casey 2005; Samson 2009; Schmitt 2010; Williams 2010). This "lawfare critique" seeks to draw attention to the misuse of the coercive and persuasive power of law in war.

Calling *all* recourse to law in the context of war lawfare should indeed be rejected. It might help convince realist skeptics of the importance of IL, but the price of suggesting equivalence between legal argument and violence would be a considerable discreditation of the former. IL asks for a "duel . . . with words rather than Swords" (Carlson and Yeomans 1975). It is therefore not a weapon of war like an F-16 jet or an M24 rifle, which can cause immediate physical harm. It is not a strategy of war like effects-based targeting or shock and awe either. Neither is an evocation of law a tactic akin to an ambush or the use of white phosphorous to obscure the battlespace. The success of the latter is determined by physical strength, chance, and possibly cleverness. In contrast, who wins a legal argument is determined, or so we hope, by who has the better claim to being in the right. An additional difference is, of course, that a resort to legal argument can amount to coercion (if it is backed by a threat of violence,

reputational or economic costs), but it can also be genuinely persuasive. I doubt that an air strike has ever truly convinced anyone that they were in the wrong.

If abuse of law robs law of what distinguishes it from a firefight, we may then want to reserve the term lawfare as a synonym only for abuse of law (I will use the terms interchangeably in the following). But what distinguishes the use of IL in war from its abuse? The experts participating in an influential symposium on lawfare in 2010 correspondingly "agreed that the legitimate application of international law against participants in an armed conflict should not be labelled 'lawfare'." Yet they were unable to agree on a definition of "legitimate application" (Scharf and Andersen 2010–2011, 20f), or so the record of the meeting relates. Before giving a positive answer to the question by proposing a definition and a typology of lawfare, I will discuss several closely related ways of delineating the use from the abuse of IHL, which we encounter in the literature that denounces lawfare as the wrong way to use law. They all ultimately determine whether law is used or abused not based on the merit of the legal argument, but with regard to the perceived merit of the belligerent for or against whom the law is invoked.

A CRITIQUE OF THE LAWFARE CRITIQUE

The most straightforward of these delineations simply asserts that certain actors use the laws of war legitimately while others do not. Posner (2011) provides the most striking example of this approach when he defines lawfare as "both the efforts of enemy nations, terrorist organizations and their supporters to counter American military superiority by threatening US policy makers and soldiers with prosecution and civil litigation, and the pressure brought to bear by NGOs who take to the media marketplace insisting that IL places sharp limits on military action." Glenn Sulmasy and John Yoo (2007, 1836) famously lamented that "our commitment to adhere to the law of armed conflict, [has] been a catalyst for our opponents to use legal rules and processes as part of their operations, what military observers term 'lawfare'." The US Department of Defense in 2005 echoed the notion that "lawfare is what others do" by suggesting that recourse to IL, much like terrorism, is for the weak and generally in defiance of US interests: "Our strength as a nation will be continued to be challenged by those who employ a strategy of the weak, using international fora, judicial processes and terrorism."

Few scholars would endorse the stark simplification that the laws of war are properly used in the furtherance of US interests, and lawfare is chiefly defined by its potential to constrain US freedom of action in the realm of national security. However, the notion that we can recognize lawfare by asking against whom IL is invoked is surprisingly common. In this view "[l]awfare tends to be used as a weapon against countries where the rule of law is strong" (Tiefenbrun 2010, 52). The charge of "lawfare" is then routinely leveled against legal challenges aimed at liberal state belligerents that are generally thought to be committed to

IL, but fight non-compliant non-state actors in so-called asymmetric wars (Blank 2010; Dunlap 2014a; Dunlap 2014b; Samson 2009; Schmitt 2010). The contention is that legal criticism of these belligerents, namely Israel and the United States, gives their militarily weak adversaries an unexpected and, most maintain unfair, advantage. Such "lawfare" hampers the militarily superior belligerent's victory on the battlefield and/or undermines it in the "court" of public opinion. In this view, evoking legal argument to challenge states that are (1) at war, (2) presumed to be law-abiding, and (3) facing a non-compliant adversary is an abuse of the law or lawfare.

Of course, nothing guarantees that a belligerent that generally upholds the law and incorporates legal considerations into the conduct of hostilities does never circumvent or violate IHL. Legal compliance is also not measured in relative terms, meaning in comparison to how well or badly one's enemy does. Finally, the often implicit demand that the threat these countries face should be taken into account when their practices are scrutinized before the law (for instance, Schmitt and Merriman 2015) would be questioning the very idea that war can be subject to legal rules. Before every war at least one belligerent is threatened and once in war, as a matter of logic, all sides are. If an existential threat impedes the force of law in war, all we have in war is law thus impeded. Yet, this line of argument very rarely culminates in the explicit conclusion that a redrafting or rejection of the laws of war is necessary (for exceptions, see Ricks 2002; Sulmasy and Yoo 2007). After all, the defended belligerents benefit from the legitimacy afforded by the notion that war can be waged legally.

This delineation of use from abuse of IL according to a belligerent's records of legal compliance is seemingly more convincing when it turns on the belligerent who makes the legal argument, rather than the belligerent against whom law is invoked. Elizabeth Samson concedes that in principle any actor is capable of "lawfare," "but presently Lawfare is being pursued largely by Islamic ideologues, their supporters, and their financiers who sympathize with the actions of Islamic militants" (Samson 2009, 61). Can Hamas, which violates IHL by firing rockets indiscriminately at Israel's population centers (UN Human Rights Council 2015, 29ff), demand that Israel use force proportionately when attacking targets in the Gaza Strip? Or is that an abuse of IHL? By breaking the law I lose certain rights, but I do not lose the right to evoke any and all law or to avail myself of legal protections in the future. Of course, continued violation of a law will tarnish my appeals to that very law with hypocrisy. But to dismiss a legal argument purely on the basis of the speaker's attitude to IL in general is to confuse its logos, the substantive merit of an argument, with its ethos, the credibility or merit of the speaker (Aristotle/Ross 2010, 7 – 1356a; for a similar argument about the "lawfare critique" in general, see Luban 2010, 460). The legal argument of a hypocrite may be as valid as that of a saint.

Of course, third parties may call on a belligerent to comply with the law vis-a-vis a population whose belligerents defy that law even without the stain of

hypocrisy. A civilian population does not lose any protections under IHL because their fighting forces violate it (Article 51(8) Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts Adopted 1977, herein API). It is uncontested that non-compliance of one belligerent does not release another from their legal obligations. The age of legally privileged reprisals against civilian populations is long over. Demanding the protection of a population whose military forces violate the law is therefore by no means an abuse of IHL. Just as we cannot simply recognize abuse of law by asking who the law is used against, we cannot recognize "lawfare" or an abuse of law by asking who appeals to the law or on whose behalf the law is invoked.

A more sophisticated approach to the distinction between use and abuse does not hinge on who makes the argument, but on how and why it is made. General Dunlap says in his defense of lawfare that "a weapon can be used for good or bad purposes, depending upon the mind-set of those who wield it. Much the same can be said about the law" (Dunlap 2010, 122). While related, the mindset behind and the purpose of a legal argument are not quite the same. We can think of the purpose as the substantive goal or end to which law is invoked. Why does a belligerent appeal to IHL: to halt the use of a specific weapon or tactic, to shame the adversary, to gain the attention of the ICC Prosecutor's office etc. I will return to the question of law's "proper purpose" below. The mindset could refer to an actor's general attitude toward law, which I dismissed as the appropriate criterion for defining abuse or lawfare above. Alternatively, mindset could denote the "how" of a legal argument, something that might be better grasped with a term like state or frame of mind in which the argument is made or law is used in a particular instance. This is what commentators who express "concern that the credibility and independence of legal arguments is undermined by their strategic use" worry about (Werner 2010, 68).

I venture that the way in which law is invoked in war is almost always strategic or instrumental. The state of mind of a belligerent resorting to legal argument can be expected to be self-interested. Belligerents may comply with law habitually or sometimes because they think it is the right thing to do, hence in a non-instrumental way. But when a belligerent at war alleges an IHL violation by their adversary or asks for the legal opinion from a third party, it is not because being aware of the errors of their ways might do the adversary some good. As David Luban puts it, "[a]nyone who voluntarily has recourse to the institutions of the law has ulterior motives: nobody ever files a lawsuit out of disinterested curiosity in the answer to a legal question" (Luban 2010). If in peace time we do not consider the strategic use of law reprehensible or a threat to the law, why should it be considered abusive in war? War is the ideal type of a zero-sum game, in which the stakes are so high that the survival of the participants may be threatened. We should not expect "disinterested curiosity" from the rational belligerent.

Denouncing the strategic use of law as abuse is a red herring all too often connected to one of the delineations of abuse and allegations of lawfare discussed above, which really hinge on who is using law against whom. The proliferation of this kind of argument has a straightforward explanation. When law meets war, it creates two specific temptations to allege abuse disconnected from the legal argument's validity. First, if law never ruled out courses of action that are militarily expedient or even necessary, we would hardly need it. It is hence extremely likely that at one point or another every belligerent in war will be confronted with a legal argument that is highly inconvenient. At least for one side the constraints of IHL will regularly be prohibitive of victory. The allegation of abuse seems a ready means to dismiss such inconvenient arguments, which are the very linchpin of IHL's restraining capacity. Second, IHL affords the same permissions to and imposes the same constraints on the belligerent that is the aggressor as on the belligerent that acts in legitimate self-defense. This is as necessary for IL to elicit compliance as it is counterintuitive, even somewhat distasteful. There is a temptation to satisfy our desire to express the moral and legal asymmetry we (sometimes correctly) perceive between belligerents by accepting the defender's resort to law as appropriate use, while denouncing the aggressor availing herself of legal justifications or protections as abuse. The notion that invoking law to help an unjust aggressor achieve victory must be a use of the law for an improper purpose may be intuitively compelling, but it is mistaken.

The second temptation brings into sharp relief why it is nowhere more important than in war to abstract from the credibility of the speaker when determining the validity of resort to law or when alleging abuse of law. The descent of divergent perceptions or conflicting interests into war tends to signal that two sides no longer consider each other valid interlocutors. IL ideally affords a language in which we can nonetheless formulate, make intelligible, and adjudicate competing claims. The grounding of the definition of the proper use of law in the merit of the invoker robs IL of this capacity as legal argument becomes nothing more than a reproduction of the state of enmity that defines war. This, in turn, challenges the association of legality with legitimacy, on which, I argued above, law depends for its coercive and persuasive capacity much more than on actual enforcement. It is not per se a threat to the law if speakers use IHL in ways that assist the side they hope will prevail in a military confrontation. It is a threat to the law if they refuse to engage with and denounce as abusive and thus invalid this strategic use of law every time it assists the other side. That is an abuse of the abuse charge.

USE AND ABUSE OF LAW

In the following, I will propose a definition of abuse of IHL or lawfare properly so-called, with two closely related aims. The first aim is to ground the delineation of use from abuse in what IL has to say about the state of mind in,

and purpose for, which it should properly be invoked. This supports the second aim of coming to an understanding of abuse of IL that hinges on the visibility of an improper state of mind and faulty purpose in the use of law itself. Of course, no definition of abuse or lawfare is abuse-proof, which is why I will highlight the difference between what counts as abuse of IHL in theory and what an invocation of IHL looks like that we can call out as such without risking the de-legitimization of IL. I will use the terms abuse of law and lawfare synonymously.

General Dunlap's reference to the mindset in which law is used strikes us as compelling because the law itself seemingly asks for a specific state of mind when it demands that it be used in good faith. The Declaration on Principles of IL Concerning Friendly Relations and Cooperation among States, like the United Nations Charter, enjoins states to fulfill their legal obligations in good faith. Article 31(1) of the Vienna Convention on the Law of Treaties insists that treaties are interpreted in good faith. The importance of good faith for IL is as obvious (see Farnsworth 1995; Zoller 1977) as its meaning is obscure. It is not itself "a source of an obligation where none would otherwise exist" (ICJ 1988, 105). Nor is good faith an interpretive approach that reveals parts of an otherwise obscured meaning of law (Ipsen 2004, 11). One way to understand it is as "a phrase which has no general meaning or meanings of its own, but which serves to exclude many heterogeneous forms of bad faith" (Summers 1968). Bad faith denotes dishonesty, duplicity, or deception. Examples of using law in bad faith include negotiating without any intention to settle or adopting a legal argument one knows to be false.

The requirement of good faith might at first appear like interference with the ideal that legal arguments are judged on their own merit rather than on the honesty of the speaker. Crucially, we do not say someone "is" or "has" bad faith, like someone is dishonest or has a duplicitous character, but someone acts or reasons in bad faith. It is never "taken into consideration by law in the abstract, as a purely psychological disposition" (Virally 1983). A dishonest state of mind becomes bad faith when it is invested in a specific legal argument or action and can thus (in theory) be diagnosed as an attribute of that argument or action rather than just of the speaker. It is precisely because the specific mode of persuasion associated with law centers on the argument, asking us not to take into account what we know about the speaker that law needs to draw a line at the deliberate misrepresentation of rule or fact. So the difference between a mere instrumentalization of law and the instrumentalization of law in bad faith is that in the latter case I know the facts or the reasoning I use to further my own ends to be wrong.

Making a legal argument in bad faith is failing to use law in the way law itself prescribes. With a view to the integrity of the law we might therefore be tempted to call the "mere" use of law in bad faith abuse. It certainly is a misuse. For instance, publicly alleging war crimes and demanding an investigation, while I do not myself think war crimes were committed, is a use of law in bad faith that is neither trivial nor easily excused. But the subjection of war to law is not an

end in itself and neither is the law's integrity. More important than showing respect for the law in the resort to law is using law to further compliance, i.e. that practices in warfare meet the standard set by IHL. I therefore propose to reserve the term abuse for the use of law in bad faith in order to facilitate or cover up a violation of the law. Lawfare is then the coincidence of two necessary conditions: the use of law in bad faith and an actual breach of law.

Does this definition really serve the purpose of minimizing spurious claims of abuse, the aim of making abuse discernible? The legal ideal notwithstanding, bad faith alone, even though it is invested into a legal argument, is extremely hard to diagnose in an argument that could in principle be valid. Who knows whether I really believe that war crimes have been committed when I call for the ICC to step in or whether I merely want to cast aspersions. This difficulty is compounded in the context of war. The declared antagonism makes us prone to diverging perceptions of reality. Is there enough preliminary evidence for a reasonable person to call for an investigation or is the claim so outlandish that it must be in bad faith? As mentioned above, enmity tends to carry the attribution of bad faith in its wake, which accounts for the not unusual confusion in the literature and political commentary of the strategic use of law and the use of law in bad faith. The former looks like the latter if who is speaking is on the other side of an M24. An allegation of bad faith regarding an argument that could in theory be made in good faith is therefore, without further evidence, even if it is connected to a breach of law, likely ad hominem. To safely call it abuse the argument needs to not only strike me as being made in bad faith, but should ideally be beyond the possibility of good faith.

To illuminate what it means for a legal argument to be "beyond good faith" for the outside observer we need to connect the way in which law is used (the state of mind) to the purposes for which it is used. Again we should not expect that belligerents evoke law for purposes other than their own. But, like the way in which arguments are made, the law itself limits the ends to which it should be used. The object and purpose of a rule is a guide to which practices or what kind of behavior a law seeks to forbid. Article 31(1) of the Vienna Convention demands that a treaty be interpreted "in light of its object and purpose." Legal doctrine teaches that when a legal argument is made to endorse practices against the object and purpose of that law we know the interpretation to be invalid (Holmes 1998). Law proscribes its use for the purpose of undermining its own regulative goal.

Both elements of lawfare, the breach of law and the use of law in bad faith, can, but do not have to, amount to a use of law in defiance of its object and purpose. While many breaches of law will also defy the violated law's regulative goal, not all do. I could violate the law simply by falling short of the prescribed standard. By the same token, I could conceivably use the law in bad faith and still further its object and purpose: for instance, when I deliberately misrepresent the facts to induce compliance in a belligerent. However, some uses of law in bad faith also amount to a defiance of the law's object and

purpose, such as the use of a duplicitous legal argument to facilitate a breach of law. Neither a mere breach nor a mere use of the law in bad faith is negligible, but each tends to be less contestable when amounting to a defiance of the law's object and purpose.

In the remaining space of this chapter I discuss four types of abuse that we may encounter on the twenty-first-century battlefield corresponding with four different ways in which bad faith, a violation, and a defiance of the law's object and purpose can coincide (for an overview see Table 8.1).

A TYPOLOGY OF LAWFARE

I call "indeterminacy-based lawfare" a deliberate exploitation of the open-endedness of all language and hence the contestability of a law's meaning to justify breaches of the rule that defy its own object and purpose. If I make a legal argument to justify my behavior, which I know is contrary to the object and purpose of the law I am invoking, I am not only making an argument in bad faith in that I knowingly misrepresent reality, I am also using law against itself to enable the violation in the sense of limiting its reputational costs. One actor who knowingly uses law to justify another actor's practices contrary to the object and purpose of law, does not violate a substantive obligation, but still abuses the law as her use of law in bad faith facilitates a practice in violation and indeed defiance of the law. This type of abuse has been alleged against the United States in the context of the war on terror. A body of literature documents how the contestability of the definition of torture was used in order to legitimize the notorious treatment of detainees at Guantanamo Bay (Luban 2005a; Luban 2007; Waldron 2010a, chapter 9).

While the interrogation techniques in question clearly amounted to a breach of the prohibition on torture under IL, whether the authors of the so-called torture memos were aware of this, i.e. used law in bad faith, is controversial (for the gamut of views, see Clark and Mertens 2004; Luban 2005b; Posner and Vermule 2004; Wedgwood and Woosley 2004). In this case, the recourse to legal argument was made by lawyers acting in an official capacity so that the line between strategic use and abuse in bad faith is drawn by the applicable code of professional ethics, here the Rules of the American Bar Association. In the "court" of public opinion, the seriousness of the justified breach is a crucial ingredient for the validity of the allegation of bad faith. Conceptually, knowingly justifying mere non-compliance is an abuse of law. After all, it involves both the use of law in bad faith and against itself. However, even in good faith different interpretations of a legal text are possible and an actor may well in good faith deem herself or the belligerent she defends in compliance with a law while that is not the case. It is because violations that defy the object and purpose of the law tend to be more obvious and in principle incontestably violations that we can more readily assume that someone who justifies them does so knowingly, hence in bad faith.

TABLE 8.1 *Lawfare typology*

	The relationship between the two elements: use in bad faith and the breach of IHL	The connection of the two elements to the threshold of gravity: the defiance of IHL's object and purpose	The same law is breached and used in bad faith	The use in bad faith is a speech act
Indeterminacy-based lawfare	The use in bad faith is meant to enable (make less costly) the breach	The use in bad faith defies the law's object and purpose – "ideally" so does the breach	Yes	Yes
Perfidy-based lawfare	The breach is meant to enable the use in bad faith	The breach contains the defiance of the law's object and purpose and also reveals bad faith	Yes	No
Reputation-destroying lawfare	The breach is meant to enable the use in bad faith	The breach and use both defy the law's object and purpose	No	Yes
Reputation-preserving lawfare	The use in bad faith is meant to enable (make less costly) the breach	The use in bad faith defies the object and purpose – "ideally" so does the breach	No	No

Of course, even what the object and purpose of a treaty or provision are and whether or not a practice defies them, are by no means always beyond contestation (Buffard and Zemanek 1998; Jonas and Saunders 2010, 566). While the prohibition on torture has one overriding goal, which practices such as waterboarding clearly defy (for a dismissal of a purposive interpretation even of the prohibition on torture, see Waldron 2010a), identifying practices against the object and purpose of IHL is often more difficult. IHL has a split regulative purpose (Dill 2015a, 83). It neither seeks to simply render war humane, nor does it just bow to military necessity. It strives for a compromise between these often directly contradictory goals. That means that a legal argument justifying the harming of civilians is not necessarily invalid. At the same time, it is very well possible that an argument justifying a militarily necessary practice is. That is the military price for the mantle of legitimacy afforded by IL. It may be contestable when exactly an interpretation has tilted too far toward either humanitarianism or military pragmatism, defying the law's purpose of striking a balance. Specifically for IHL, the qualification of the breach as defying the object and purpose of the law to demonstrate bad faith is hence crucial. In addition, for this type of indeterminacy-based lawfare bad faith should ideally be demonstrated separately before we cry foul.

An abuse of law does not have to be a speech act. Breaches of law that rely on the compliance with law of the other side to generate an advantage on the battlefield also amount to an abuse. The most straightforward example of this is perfidy. In the case of what I want to call "perfidy-based lawfare," the belligerent acts in a way that invites the adversary's trust grounded in a legal rule: for instance, the trust not to be threatened by a civilian. Many non-state belligerents in contemporary wars have a track record of failure to distinguish themselves, which is under most circumstances a violation of IHL (Article 44(3) API). If the failure to distinguish takes the form of feigning civilian status (Article 37(1)c API), it engages the commitment of the other side to the principle of distinction (Article 48 API) and its corollary civilian immunity. For instance, in the recent military confrontation between Israel and Hamas, allegedly booby-trapped persons in civilian clothes relied on the IDF's upholding distinction in order to get close to troops before detonating their explosives (Breaking the Silence 2015, 47). Using the rule of distinction in order to gain a military advantage from a breach of distinction counts as a use of the rule against its own object and purpose. The strategic success of the violation of distinction arises from the violator knowing that the other side does not expect the practice because it is a violation. Bad faith is hence manifest in the violation itself.

Of course, not every breach that defies a law's object and purpose is perfidy-based lawfare, hence an abuse of law. Abuse suggests purposeful engagement. Non-compliance, however serious, might stem from ignorance of law or a prioritization of other imperatives, hence from a failure to engage with the

law. Is it abuse of IL if my non-compliance is due to my hope that it will give me a military advantage vis-a-vis an enemy that is committed to IHL? Well, I may hope that my own lack of casualty aversion gives me a leg-up over an enemy who is very risk averse, but unless I actively engage that risk aversion to maximize the strategic benefit accruing from this difference, I am not using the enemy's casualty aversion, let alone abusing it. Abuse requires use. Given the difference between non-compliance and abusive breaches of law, we cannot simply refer to a belligerent's general compliance record as a proxy for abuse and thus as grounds for alleging perfidy-based lawfare.

Both indeterminacy- and perfidy-based lawfare use in bad faith the legal principle or rule that is also violated (in the examples, the prohibition on torture and the principle of distinction respectively). They differ in that in the case of indeterminacy-based lawfare the use of law in bad faith and against itself is a speech act, which though connected, is an act separate from the violation. In the case of perfidy-based lawfare, an act on the battlefield is a material breach that is both a use of law against its own object and purpose and a use of law in bad faith. Indeterminacy-based lawfare is associated with belligerents beholden to the law, whose temptation is to weaken the law's constraining force while not incurring the reputational costs of being found violating IL. Perfidy-based lawfare capitalizes on an asymmetry of commitment to IL for the achievement of an advantage on the battlefield. This is the specific temptation of non-state actors who are less (some not at all) susceptible to the imposition of reputational costs and thus the constraints of IHL than their adversaries.

According to the definition of abuse proposed here, there are two additional types of potential lawfare, which are less obvious because they are a combination of the use in bad faith of one rule and the breach of another. What I call reputation-destroying lawfare, like perfidy, violates law in order to use it in bad faith to gain an advantage. What I call reputation-preserving lawfare, like indeterminacy-based lawfare, uses law in bad faith for the purpose of a successful violation. Reputation-destroying lawfare, like indeterminacy-based lawfare, relies on speech acts. To the contrary, in the case of reputation-preserving and perfidy-based lawfare, both the violation and the use of law in bad faith are acts on the battlefield. The following examples discuss potential cases of reputation-destroying and – preserving lawfare and highlight the respective challenges in establishing that the elements of abuse – the use of law in bad faith and a violation –are actually present and that the threshold of gravity of a defiance of the law's object and purpose is met.

It is a fairly recent phenomenon that non-state belligerents engage in legal arguments. In line with the definition proposed, it is not an abuse of law when the Taliban alleges a violation of IL by coalition forces (see Islamic Emirate of Afghanistan 2015) even if the collateral damage that is denounced as disproportionate is not manifestly so and the argument may well be made in bad faith. That is true even if the proximity of military equipment to civilians

contributed to the civilian death toll. However, comingling can amount to a breach of the defender's duty to take precautions in attack (Article 58 API). Moreover, the deliberate use of civilians to protect military equipment falls foul of the prohibition on using human shields (Article 51(7) API). If such a breach is meant to enable the claim that the adversary broke the principle of proportionality, it is a breach defying the law's object and purpose. The allegation against the other side to have caused disproportionate collateral damage is then a use of Article 51(5)b API in bad faith. If the allegation is made by the belligerent that "created" the civilian casualties, the speech act betrays that the belligerent knows the practice to be a violation. It hence reveals bad faith. In the case of reputation-destroying lawfare, the challenge is to prove the breach and its purpose. If the allegation is made by an actor other than the one who violated the law, it may in addition be difficult to prove bad faith.

Reputation-preserving lawfare seeks to ward off the reputational costs of an IHL violation, which reputation-destroying lawfare seeks to impose. In both the 2009 and 2014 military campaigns in Gaza, the IDF issued warnings on an unprecedented scale to motivate the civilian population to leave areas to be attacked (Schmitt and Merriman 2015; State of Israel 2015, 170ff). According to the accounts of returning soldiers, individuals remaining in warned neighborhoods were presumed to be open to attack, amounting to a breach of the principle of distinction. "[T]he directive [was] 'Whoever you identify is an enemy' ... the justification that's behind it is that the IDF distributed hundreds of thousands of flyers warning the residents to evacuate" (Breaking the Silence 2015, 159, similar 37, 58f, 88, 106, 137, 144, 170, 180; see also UN Human Rights Council 2015, 68; Human Rights Watch 2014; for a denial of this claim see State of Israel 2015, 177, para 306f). While by no means all rules of IL for the conduct of hostilities have an overriding humanitarian purpose, Article 57(2)c API, the duty to warn civilians if possible, does. An interpretation of the provision that seeks to justify the weakening of civilian protection, indeed a breach of distinction, defies its object and purpose. While considerable evidence points to the violation of distinction and the connection to the warnings, proving bad faith, i.e. the use of warnings to cloak in legitimacy a practice the IDF *knows* violates the law, would require separate evidence.

CONCLUSION

Lawfare, or the abuse of IL in war, is testimony to its coercive and persuasive power. You can only effectively abuse law if you can in principle effectively use it. That effectiveness largely depends on IL's association with legitimacy. What threatens this association of legality with legitimacy is not the strategic, self-interested use of law in war. Even abuse as defined here does not necessarily destroy the legitimacy of the legal regulation of war, though it of course can. It may not always be evident or easy to establish, but the use of law in bad faith

to facilitate a violation that is severe enough to amount to a use of law against its own object and purpose tends to ultimately discredit the abuser more than it discredits the law. What risks giving legal argument the dynamic of a firefight rather than an attempt at persuasion is rooting proper use in the merit of the belligerent that it assists and dismissing as abusive recourse to law because it furthers the aims of the belligerent "on the other side." Maybe it is not even abuse of law as defined here that should be called lawfare then, but the abuse of the abuse charge, which robs law of its capacity to be a true alternative and more than a mere substitute for armed force in international relations. This capacity is the driving force of the astonishing subjection of warfare to IL over the last decades. The continued relevance of law in war crucially depends on it.