If God grants me life...the last thing that I would like to study would be the problem of war...There again I would have to cross into the problem of law. (Foucault, 1990: 167)

In developing descriptions and explanations of the international legal landscape, our disciplinary cartography tends to construct borders around the spaces recognized as law, privileging particular spaces and excluding, or rendering invisible, other spaces and the interactions within these spaces from the ambit of 'international law'. (Pearson, 2008: 490)

I. War, law and geography

In a recent Progress Report David Delaney (2014: 4) makes a simple, though frequently overlooked point: “there is nothing in the world of spaces, places, landscapes, and environments that is not affected by the workings of law”. What Nicholas Blomley (1989) once termed the ‘law-space nexus’ extends from city sidewalks (Blomley, 2011) to the global economy (Barkan, 2011), and as far out as the geostationary orbit (Collis, 2009). We live in what Delaney (2010) calls a ‘nomosphere’.

Yet, with some notable exceptions (Delaney, 2009; Smith, 2014), critical legal geography (CLG) has not considered spaces of war as spaces that are defined by – and made through – law. Perhaps there is good reason for this. War is, after all, traditionally understood as the antithesis of law. In spaces and times of war, the ‘rule of law’ gives way to a lawless Kantian ‘state of nature’. Mainstream legal theory distinguishes law from violence, a view that is frequently bolstered with reference to Cicero’s ‘maxim’, inter arma enim silent leges: in times of war, the law falls silent. The logic is a binary one; war represents chaos and violence, and law represents order and peace, Cicero’s point being that the necessities of war drown out the voice of law.

But far from ‘falling silent’, law constantly intervenes in and gives shape to war. For example, International law articulates the ‘right’ to go to war and defines the contours of what shall count as legal and legitimate ‘self-defence’. It also draws lines between ‘legal’ (‘just’) and ‘illegal’ (‘unjust’) wars. In fact, the resort to the use of force – jus ad bellum – is highly regulated in international law under the United Nations Charter. Another set of quite different laws apply...
after battle commences. The laws of war, otherwise known as International Humanitarian Law (IHL) or *jus in bello*, seek to “limit the suffering caused by war by protecting and assisting its victims as far as possible” (ICRC, 2004). It does so by proscribing certain actions and the use of particular weapons, but for every ban exists a permission to do or to use something else. Land mines, for example, are banned but nuclear weapons are not. The laws of war are full of these kinds of paradoxes. The Geneva Conventions of 1949 classify the deliberate killing of civilians as a ‘war crime’. But killing combatants is well within the bounds of the law, as is accidentally – or incidentally – killing civilians (so long as their deaths are ‘proportional’ to the foreseen ‘military advantage’ gained by carrying out an attack). War, it turns out, is saturated with law.

The idea of war as a juridical operation has received renewed interest in the last decade and a half, and has been spurred in no small part by the emergence of the ‘global war on terror’ waged in the wake of 9/11. Central to these accounts has been the assertion that war, violence and law are not separate or oppositional spheres, but rather animate one another in all kinds of ways. New concepts have emerged to grapple with putatively new problems posed by this commingling of the legal and the lethal. In 2001, a prominent US military lawyer proposed the neologism 'lawfare', which he defined as “the use of law as a weapon of war” and he argued that it has become the “most recent feature of twenty-first century combat” (Dunlap, 2001a: 5). Scholars from diverse backgrounds seem to agree. “Warfare”, writes critical legal scholar David Kennedy (2006: 6) “has become a modern legal institution.” Similarly, architect and theorist Eyal Weizman (2011) has written of a 'humanitarian present' animated in large part by the warp and weft of war and law. Meanwhile, Derek Gregory (2006; 2011) has insisted that we read the wars conducted in the shadow of 9/11 not only as a war on law but also as a war conducted through law.

In this paper I use the concept of lawfare to explore the relationship between war and law, but I also want to think about the ways in which this relationship has been forged through time and space. Charles Dunlap, who popularized the term lawfare, argued that it is a 21st Century phenomenon that emerged during what he called the ‘hyperlegalism’ of the US-led NATO bombing of Kosovo and Serbia in 1999. Kosovo and Serbia were distinguished by lawfare because, in his view, the Serbs, the media and the international community strategically used
the language of law to delegitimise the military campaign. In Dunlap’s view, and according to a growing neo-conservative literature, lawfare is a new and negative phenomenon that poses a threat to US – and Israeli – national security (e.g. Goldstein and Meyer, 2009; The Lawfare Project, nd).

There are several other ways of thinking about lawfare. The first aim of this review is to show that the claim that lawfare is new is based on a particularly a-geographical and a-historical reading of the relationship between war and law. The second and related aim is to show how CLG, and its cognate fields third world approaches to international law (TWAIL) and critical legal studies (CLS), can help to recover the geographies (and histories) of lawfare. This will, in turn, help us to construct an explicitly geographical theorization of lawfare and the relationship between war and law. Lawfare is important, I argue, because it shows that war and law are entangled and while the concept lacks reflexivity about the changeable nature of that relationship across space and time, it does identify events and processes that suggest that law is becoming increasingly important in the conduct of what Gregory (2010) has called ‘late-modern war’. If we want to understand how war ‘gets done’, we must also understand the role that law plays in shaping its conduct.

In section II I examine why lawfare matters to geography and what geographical perspectives can offer to current understandings of lawfare. The following three sections consider three different ways of reading lawfare. In the final section I re-situate the recent lawfare debate within a broader and richer set of processes that can be productively thought about in terms of the juridification of war.

II. Why lawfare needs geography… and why it matters to Geography

Legalization has expanded in contemporary world politics, but that expansion is uneven. (Goldstein et al, 2001: 388)

A sizeable literature on lawfare has emerged over the last decade and a half. Most of its interlocutors have been military lawyers and international legal scholars. The debate has mostly been confined to law and military journals, but has also recently appeared in news and media accounts (Gordon, 2014). While ostensibly distant from the immediate interests of
geographers, lawfare provides geography with series of entry points into broader conversations concerning what we might call the legal geopolitics of war. In turn, and as the above quote suggests, lawfare and processes of legalization require geographical explanation and interpretation.

Lawfare is particularly salient for CLG. The concept of lawfare is an amalgamation of the terms ‘law’ and ‘warfare’. By bringing these terms together, proponents of lawfare suggest that law and war (and by extension, violence) are coterminous with one another. Lawfare’s recognition that law and violence have a synergistic – rather than oppositional – relation is interesting because it resembles a key tenet of critical approaches to law. And yet, surprisingly, these literatures do not cite one another. The encounter could be both interesting and productive. What do these approaches – a militarist conception of law as a weapon and a critical legal perspective that identifies law as inherently violent – have in common, and how do they differ? For its part, lawfare offers CLG an opportunity to engage with timely and important questions about the (changing) relationship between war and law and to consider the legal geographies of war, a point I revisit below. Part of the problem with the lawfare literature is that it tacitly assumes that all wars, everywhere and equally, have become wars of law. Proponents of lawfare have not considered space, or the geographies of lawfare, an endeavour that geographers have recently begun to undertake (e.g. Jones, forthcoming(a); Morrissey, 2011; Smith, 2014).

But conventional accounts of lawfare offer less of a theory of the relation between law and violence – and even less a history or geography of that relation – so much as they represent contemporary ideological battles for legitimacy in the ‘war on terror’. When Dunlap and subsequent commentators say that law is being used as a weapon, they mean first that it is the enemy ‘Other’ who has turned law into a weapon but also, second, that the ‘weapon’ in question is primarily discursive or metaphorical, and is not physically violent. Proponents of lawfare are worried that the opponents of US and Israeli militarism are using law as a political tool to achieve their own military ends; lawfare is therefore a discursive charge against those who ‘abuse’ the word and rule of law. The classic example is the enemies’ use of civilian populations as ‘human shields’. This is a form of ‘guerilla’ tactic adopted by Iraqi insurgents, Hezbollah, and Hamas alike, and it inverts the asymmetric power relations between two
warring parties first by making the ‘weak’ enemy difficult to locate (they ‘hide’ in densely populated urban areas) and second by making the attacking party look immoral, reckless and ultimately criminal if and when innocent people are killed. By this logic, lawfare disproportionately harms technologically advanced militaries that purportedly go to great pains to abide by the laws and norms of international law; meanwhile, it empowers those who deliberately break the law.

More recently, however, a ‘positive’ definition of lawfare has emerged. Proponents of lawfare (mainly from Israel and the US) have realized that it is not only the ‘enemy’ who can use law as a weapon, but that “democratic militaries” can and should do too (Dunlap, 2009: 35). While the ‘Others’ lawfare remains illegitimate (Newton, 2011), ‘democratic’ lawfare is variously described as an ‘affirmative’ (Dunlap, 2009) ‘counterlawfare strategy’ (Bilsborough, 2011), giving it a benign and defensive gloss. But the admission by military thinkers that ‘democratic militaries’ should use law as a weapon does something else: it undermines the legitimacy of those militaries that claim to be invested in spreading the ‘rule of law’. That claim only works if law is seen as an impartial arbiter of conflict, and not if law is viewed as an instrument of power. The point to emphasize here is that according to the lawfare literature, those who wield law as a weapon are not inflicting the same physical or bodily violence that are the hallmarks of war; they are deploying law to gain legitimacy.

But what if lawfare were capable of inscribing more than discursive or metaphorical violence? Lawfare’s simplistic account of the relation between violence and law could be greatly enriched by CLG and its theorizations of the relationship between law, violence and space. In particular, it could show that law(fare) is not merely a discursive construction but a performative ‘speech act’ (Austin, 1975) that has ‘worldly effects’ (Delaney, 2010) on the battlefield, and in the flesh. Indeed, as Blomley (2003: 121) points out, CLG draws from rich philosophical debates about the relation between (state) law and violence that go back to at least John Locke and his assertion that “the sine qua non of political power was law’s right to create the penalty of death.” More recently, in his famous essay on the Critique of Violence, Benjamin (1978) argued that law is founded on violence (through revolution, colonization, coup d’etat) and is maintained by violence (through police and military power). Speaking to Benjamin’s foundational legal violence, Foucault claimed, “law is born of real battles, victories, massacres and conquests,”
and that “law was born in burning towns and ravaged fields” (quoted in Coleman, 2011: 133). In a similar vein, and writing about the quotidian violence of the courtroom, Robert M. Cover (1986: 1601) famously argued, “legal interpretation takes place in a field of death and pain.” The death and pain of which Cover wrote referred not to some aberration within law, or to some metaphorical violence, but to a corporeal violence that he considered inherent to the law. Continuing this line of thought, Sarat and Kearns (1991: 1) argue, “law is a creator of both literal violence, and of imaginings and threats of force, disorder and pain.” The association of law and violence is visible, they contend (1991: 6), “in the discrete acts of law’s agents – the gun fired by the police, the sentence pronounced by the judge, the execution carried out behind prison walls.” But as Derrida reminds us (1992: 925), all law contains and unleashes force, for “there is no law without enforceability, and no applicability or enforceability without force, whether this force be direct or indirect, physical or symbolic.”

Attending to the violence of lawfare is important, not least because contemporary commentators on lawfare seem to equate the use of law as a weapon with immaterial violence. The critical legal literature, however, shows that the violent manifestations of law are, to speak with Delaney (2010), quite literally ‘worlded’, and TWAIL shows that international law visited untold – and quite real – violence upon the colonies. As Cover (1986: 1605) reminds us, “[…] the normative world-building which constitutes “Law” is never just a mental or spiritual act. A legal world is built only to the extent that there are commitments that bodies are placed on the line.” The violence of law, that is, is ultimately realised, “in the flesh”. This kind of violence is missing from contemporary conversations about lawfare, but CLG, CLS and TWAIL can help us to recover this meaning of law’s violence and to examine what Kedar (2014: 108) has called its “violent spatialization[s]”. This is to read lawfare as a form of ‘doing’ that has material effects in the world. It is to ask not so much what lawfare is – the question that has preoccupied the lawfare debate – but rather what lawfare does, where and to whom. Following Delaney (2010: 8) we may therefore ask: how, under what conditions, and with what consequence is lawfare “spaced or spatialized, how is it worlded?” Working toward this will provide a geographically and historically informed theorization of law, war and violence. The concepts of jurisdiction and interlegality provide another fruitful avenue for further work on lawfare and the legal geographies of war and violence. I mentioned above that spaces of war are saturated by international legal regimes. But more than international law governs war.
Domestic laws, and domestic interpretations of international laws also govern its conduct. For example, in seeking Congressional authorization of the US war against the Islamic State in November 2014, President Obama was seeking a legal basis for military action, one more broad-based and deliberative than the Executive (and yet constitutionally legal) fiat he used to justify bombing Iraq and Syria only a few months earlier. To take a quite different example, the existence of military courts and the military justice system in all advanced militaries bears testimony to the fact that war, or at least the conduct of soldiers in war, is regulated – however unevenly or seemingly ineffectively – by law. Another scale and site of law that shapes the conduct of war is ‘operational law’ (OPSLAW) or the ‘rules of engagement’ (ROE) (Smith, 2014). These laws combine international and domestic law with military objectives and represent a compromise between legal and political restraints on the use of force and the simultaneous need to protect one’s own troops while also fulfilling military objectives. As such, OPSLAW and ROE are a particularly militarized articulation of law and are used by military commanders as a kind of ‘checklist’ for what they are and are not allowed to do in war (Jones, forthcoming(a)).

There are multiple and overlapping legal regimes of war. Attending to these regimes in their multiplicity is an important way for CLG to engage with the international and transnational scales of law that have been “curiously absent” (Barkan, 2011: 589), from legal geography and which are also largely absent from political-geographical accounts of war. But this means more, or rather something different than replacing one scale and site of law (the national, the municipal) with a wider legal frame (the international, the global). Political and legal geography would benefit from bringing these larger legal frames into view in order to better understand how it is that war ‘gets done’ in and through international and transnational spaces (see Jeffrey, 2011; Pearson, 2008). But this does not render other scales and sites of law such as domestic courts, local legal protests, or even seemingly idiosyncratic legal technicalities and procedures redundant (Benson, 2014; Riles, 2005). To the contrary, engaging perspectives on what Boaventura de Sousa Santos (1987: 288) called ‘interlegality’ could be very useful: “More important than the identification of the different legal orders is the tracing of the complex and changing relations among them.” The concept of interlegality recognises the multi and overlapping jurisdictionality of legal space. Meanwhile, recent work on legal temporality and legal
‘chronotopes’ (Valverde, 2014) shows the value of a spatio-temporal understanding of interlegality, because legal regimes and jurisdictions fade in and out across time.

As Valverde (2009) contends, jurisdiction is an inherently spatial concept that involves a demarcation in physical space of an ‘inside’ and ‘outside’. Jurisdiction is not simply a rule but governs which rules will apply – when, where, and to whom. When and where jurisdictions overlap, legal contests and spatial disputes inevitably arise, exposing the political work that jurisdiction conceals. One example of this is drone warfare and the conduct of ‘targeted killing’ strikes in areas where there is no internationally recognized warzone. The US maintains that drone strikes in places like Yemen, Somalia and Pakistan fall under the laws of war and are legal as long as they conform to the basic rules of war. Opponents of drone warfare, however, argue that the laws of war do not apply because the US has not declared war on these states or has not been invited into these states to kill ‘terrorists’ (e.g. O’Connell, 2009). They argue that the correct framework is human rights law, which imposes greater restrictions on the use of force, rendering most – if not all – drone strikes illegal. Ultimately, this debate is about jurisdiction, its application and its limits. This example highlights the value of an approach which understands jurisdiction as politically contentious and performative, and which also highlights the fact that both spaces of war and spaces of peace are legally plural and interwoven. The work on legal pluralism and jurisdiction would be immensely instructive to the study of lawfare because lawfare takes place across various legal scales, in domestic and international courts, and on the battlefield itself. It would also be a useful tool for critical legal geographers wishing to engage with questions of war, law and space.

Finally, the lawfare literature is devoid of any sense that there is a geography and history of lawfare beyond the US and Israel and before 9/11. Such accounts require a more nuanced understanding of a phenomenon that may have been captured only recently by the neologism ‘lawfare’, but which lived a worldly and itinerant life avant le lettre. A simple, yet important set of questions for the lawfare debate therefore concerns the potential wider geographies and histories of lawfare. What geographies give rise to discourses and practices of lawfare? Is lawfare a manifestation of asymmetrical (state versus non-state) war or are civil and inter-state wars also marked by discourses of il/legality? To put this another way: if we take war – broadly and historically conceived – as opposed to the recent manifestations of the US and Israeli ‘war
on terror’ (which, as Gregory (2004) famously showed, had its roots in various colonial pasts) as our frame of reference, to what extent can war be said to be marked by lawfare, or by issues of il/legality, and how new is this concept? The legal historical geographies of war are important in articulating what lawfare does in different places (and what is or isn’t new about it). Without historically sensitive geographies, it is impossible to assess the newness but crucially also the salience and consequences of the putative ‘rise of the legal’ in war and the (re)emergence of lawfare in the early twenty-first century. Is law a dominant frame for all wars, or is it restricted to the types of war that may, potentially, be everywhere (Gregory, 2011) yet which seem to emanate from very particular military constellations (e.g. drone warfare, global ‘counter-terrorism’, and cyberwarfare)? This posits the salience of lawfare as a spatial and historical question, rather than the universal and foregone conclusion. Borrowing tools from legal, political and historical geography, we are very well equipped to contribute to the critical legal geographies of war.

III. Military lawfare: (an)Other weapon

This section introduces the lawfare debate and offers a critical reading of the a-geographical and a-historical ways in which lawfare has been deployed. The crucial thing to note here is the way in which a very narrow and politically charged set of juridical processes emanating in particular places – namely the US and Israel – has come to define the lawfare debate.

The term lawfare gained currency only after 9/11. At the turn of the century, commentators began using the term to describe the expanding role of law in relation to war. The practice of universal jurisdiction became especially important in circulating discourses of lawfare. As Gordon (2014) argues, the US had for a long time been cautious about the use of universal jurisdiction but as soon as international law, and especially human rights law, began being deployed to check certain practices in the ‘war on terror’ it adopted a decidedly oppositional stance. This is evidenced in the US opposition in 2002 of the passing of the Rome Statute that established the International Criminal Court (ICC) as a “permanent tribunal to prosecute individuals for genocide, crimes against humanity and war crimes.” (Gordon, 2014: 324). Despite this opposition, in the early 2000s European national courts indicted several high-ranking US government officials and military persons and began trying them in abestentia (Human Rights Watch, 2006). By 2005, following several legal challenges emanating from the
wars in Iraq and Afghanistan and Guantanamo Bay, the annual US National Defense Strategy defined the use of courts and other legal instruments against the US as a form of terrorism: “our strength as a nation will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism” (DoD, 2005: 5).

Several other factors contributed to this radical equation of international law with terrorism, but two policies were particularly salient. The practice of torture, extraordinary rendition and imprisonment without trial in what became known as the ‘global war prison’ propelled US militarism into the international legal spotlight (D’Arcus, 2014; Reid-Henry, 2007). Specifically, the publication of images of torture and prisoner abuse at Abu Gharib in 2003-4 and the subsequent leaking of the infamous ‘Torture Memos’ in 2004 placed US war practices at the centre of a global legal controversy. Dunlap (2001b: 293) insists that developments in communications technology began to have a big impact on the way that ‘democratic states’ fought wars at the turn of the 21st Century. Specifically, he worried about the “raw images of war”, which could include “LOAC [law of armed conflict] violations”, which in-turn are made available “almost instantaneously to publics around the world.” He argued that in “order to maintain the kind of public support the militaries need to prosecute a war, adherence to LOAC in fact and perception is essential (Dunlap, 2001b: 293, emphasis in original). Abu Gharib and Guantanamo Bay undid any legitimacy that the US may have had; it was a personal relations disaster but more importantly it signified the ultimate abuse of law and the Torture Memos were artefacts of lawfare par excellence.

Neoconservatives in the US felt differently, however. Lebowitz (2010) argued that the ‘real’ abuse of law in Guantanamo came not from those who conducted and authorized torture but from the ‘unlawful enemy combatants’ (another term of lawfare art) and the NGO’s and lawyers who represented them. According to her, the detainees constructed a “mistreatment narrative” which they used “as ammunition for waging tactical law-fare” (Lebowitz, 2010: 361). She contends that “[b]y following what was tantamount to scripted legal advice, detainees and their advocates in the aftermath of the 9/11 attacks launched a massive campaign through various court systems worldwide” (Lebowitz, 2010: 359). What is interesting here is the extension of the lawfare label to US lawyers in particular and to the human rights community.
in general, because in this discursive space human rights law itself becomes indistinguishable from the enemy Other and must therefore be militated against.

The second – and related – policy that has drawn international legal criticism and which has inspired several judicial appeals and court cases in the US is the practice of extra-judicial assassination. The practice, which precedes the ‘war on terror’ by several decades, is now synonymous with ‘drone warfare’ in Pakistan, Yemen and Somalia (see Gregory, 2011). The assassination/drone policy, which began under Bush and accelerated under Obama has attracted widespread forms of condemnation, but noteworthy here are the legal petitions and accusations of illegality made against both individuals and departments within the US Government (e.g. Al-Aulaqi v. Obama et al. 2010, 10-1469 (JDB); ACLU vs. Dept. of Justice et al. 2009, 08-cv-1157 (JR)). These cases point to a distinctly juridical battle that is still taking place. But these litigious attempts to achieve justice for an increasing number of victims have been dismissed as an illegitimate use of law and a dangerous ‘politicization’ of human rights (Newton, 2011).

Israel is the other place where the lawfare discourse has been prominent. Here, most commentators begin their analysis of lawfare with the publication of a UN investigation into war crimes committed by Israel and Hamas during ‘Operation Cast-Lead’ – Israel’s massive military onslaught on Gaza in 2008-9. Dubbed the ‘Goldstone Report’, after its author Richard Goldstone (a former prosecutor at the UN International Criminal Tribunal for the former Yugoslavia and Rwanda), it was a damning condemnation of both Israeli and Hamas actions during the three-week war. But most commentators’ gloss over the fact that the UN also investigated Hamas’ war crimes and instead focus on Goldstone as a powerful symbol of the ultimate politicisation of law by the UN (e.g. Blank, 2011).

The lawfare debate reached fever pitch in Israel in 2010 when Prime Minister Binyamin Netanyahu told the press that Goldstone is but a “code word for an attempt to delegitimise Israel’s right to self-defense”. He listed Goldstone as “one of Israel’s most serious security challenges” alongside Iran’s nuclear program, and Hamas rocket fire (quoted in Nelson, 2010). More recently, defenders of Israeli national security have blamed the large number of civilian deaths in the 2014 invasion of Gaza on the UN, claiming that the UN Relief and Work Agency
UNRWA) harbour ‘terrorists’ and help to store Hamas weapons (The Lawfare Project, 2014). Such contorted and unfounded claims work to counter the widespread belief that, once again, the Israeli military used disproportionate force in Gaza, and did so against civilian and government infrastructure, which are not legitimate targets even in modern urban warfare.

Several neoconservative think tanks championing a similarly militant view have sprung up over the last few years (e.g. NGO Monitor; The Lawfare Project; BBC Watch). The Lawfare Project (TLP) is an organisation established by lawyer Brook Goldstein in the wake of the Goldstone Report to defend Israeli (and US) interests from international criticism. TLP acts as a “safeguard against the abuse of the law as a weapon of war”, according to its website. TLP defines lawfare as “the abuse of Western laws and judicial systems to achieve strategic military or political ends.” The qualification of lawfare as something that is done to Western legal systems is highly significant and as TLP’s website notes, lawfare:

“[…] must be defined as a negative phenomenon to have any real meaning. Otherwise, we risk diluting the threat and feeding the inability to distinguish between that which is the correct application of the law, on the one hand, and that which is lawfare, on the other. […]” (TLP, n.d.)

Renderings like these, which juxtapose ‘our’ rule of law against ‘their’ abusive practices, have become fundamental to the lawfare debate. ‘We’ do not do lawfare (we merely ‘correctly apply’ laws). When we view Western legal and military practice against the pre-modern tactics of the Other it becomes apparent that the Other has not yet reached the civilized standards that mark ‘us’ as societies of the ‘rule of law’ and them as pre-legal savages. Indeed, what lawfare boils down to, according to Laurie Blank (2011: 16), is the “exploitation of the law of war” by “insurgent groups”. Law in the hands of the Other constitutes a ‘legal jihad’ according to Goldstein and Meyer (2009). Dunlap (2008: 421-422) does not merely call the enemy savages, but refers rather to the “savagery of the[ir] illegality?”, suggesting that the enemy has not yet been civilized through law. Lawfare, then, according to both the TLP and a growing jurisprudence, is a barbaric politicisation of law, something that is allegedly above the fray of politics in the ‘West’.
Lawfare is very much a creature of the ‘war on terror’ and what Derek Gregory (2004) memorably called its ‘architectures of enmity’ have invariably shaped its discourses. Lawfare conducts war by other means. It shifts the battle to the legal domain, to spaces where the legitimacy of war is defined by lawyers and legal scholars and also to spaces where war is consumed by publics who develop their own legal consciousness of war (see Delaney, 2009). But the fact that lawfare has emanated from the US and Israel does not mean that its discourses and practices are confined to these narrow geographies. In tracing these geographies of lawfare above, I seek not to privilege but rather to undo them, for they represent and reveal a highly partial and particularly narrow set of ideas concerning the relationship between war and law and the geographies of lawfare. To broader geographies and richer conceptualizations of lawfare we now turn.

IV. Colonial lawfare and TWAIL

As I have suggested, CLS and CLG are well placed to offer a critique of the ‘lawfare is new and unique to the US and Israel’ argument because they are attentive to questions of how law, power and violence intersect in time and space. But in this section I cast our attention to the specifically colonial antecedents of lawfare, and to third world approaches to international law – or TWAIL. TWAIL has escaped the attention of both CLG and the lawfare debate but it offers rich insights into the colonial histories and geographies of lawfare. Importantly, it also focuses on the violent manifestations of international law and the role that war and violence have played in its creation. Attending to the colonial historical geographies of lawfare via TWAIL enriches our understanding of lawfare because it offers an explicitly geographical theorization of lawfare, one that understands the spaces of war/law as necessarily multiple, contested and mutable, even as they inscribe and are inscribed by unequal power relations.

TWAIL is a critical school of international legal scholarship and an intellectual and political movement that emerged in the mid-1990s. Its origins lay in the decolonization movement that swept parts of the globe after World War II (Mutua, 2000). Its symbolic birth was in 1955 at an Asian African Conference held in Bandung, Indonesia. As Willets attests: “The importance of Bandung was that for the first time a group of former colonial territories [sic] had met together without any of the European powers […] this was an assertion of their independence” (quoted in Chimni, 2006: 6). Although TWAIL speaks with no single authoritative voice,
combining a variety of theoretical approaches – including Marxist and Feminist critiques of law – its *raison d’être* is three-fold according to Mutua (2001: 31):

The first [objective] is to understand, deconstruct, and unpack the uses of international law as a medium for the creation and perpetuation of a racialized hierarchy of international norms and institutions that subordinate non-Europeans to Europeans. Second, it seeks to construct and present an alternative normative legal edifice for international governance. Finally, TWAIL seeks through scholarship, policy, and politics to eradicate the conditions of underdevelopment in the Third World.

TWAIL therefore rejects the claim that international law is objective, universal, and benign. Indeed, as one prominent Third World jurist on the International Court of Justice observed: “classical international law […] consisted of a set of rules with a geographical bias (it was a European law), a religious-ethical aspiration (it was a Christian law), an economic motivation (it was a mercantilist law), and political aims (it was an imperialist law)” (Bedjaoui, 1985: 153).

And yet, as the brilliant Antony Anghie has argued, international law “consistently attempts to obscure its colonial origins, its connections with the inequalities and exploitation inherent in the colonial encounter” (Anghie, 1999: 107). Lawfare must confront these erasures if it is to have anything to say about the role of law in modern war.

Prior to the 1990s the discipline and history of international law tended to be narrated as a simple and benign shift from natural to positive law. As late as 1996 Antony Carthy claimed of international law scholarship: “no systematic undertaking is usually offered of the influence of colonialism in the development of the basic conceptual framework of the subject” (quoted in Neocleous, 2014: 49). Today, however, there is a burgeoning literature on international law and colonialism (e.g. Benton, 2010; Orford, 2006). Anghie (2007) traces the colonial origins of international law to the works of Francisco de Vitoria (a sixteenth-century Spanish theologian and jurist) and the Spanish conquest of the Americas, though it should be noted that several modes of *imperial* law pre-dated the origins of international law (Benton, 2010). Anghie argues that the language of law has been used for centuries by colonial and imperialist powers to justify and legitimise untold violence. Seen thus, international law has never been a project that universalises benign principles across difference, but has been a key institution in the production and management of difference, a tool of governance for the ‘First World’ to rule over the ‘Third World’. For Anne Orford (2006), the ‘Other’ of international law
constitutes the limit of the law, creating an 'inside' of what is to be protected and an 'outside' which is excluded. This line of inquiry prompts us to consider international law as a project that, in its bid to include all, has excluded many. Looping back to Angchie (2007: 315), TWAIL scholarship is insistent that law has "disparate and unpredictable effects on differentially situated people" which, crucially, is to say that an uneven geography underpins international law.

This variegated geography of international law warrants further attention from both CLG and lawfare. TWAIL and cognate fields such as legal anthropology offer several specific tools and metaphors that are instructive toward this end. First is a cluster of concepts that deal with law as a mobile phenomenon (Benda-Beckmann and Benda-Beckman, 2005) and which emphasizes the geographies of legal comparativism (Kedar, 2014). Born in the age of colonialism, comparative law is traditionally scientific, formal and classificatory; it compares two or more legal regimes according to ‘the law in the books’ (Kedar, 2014: 108), and treats them as a separate and isolated set of rules and procedures. Such formalistic accounts have recently been challenged by what Kedar calls a nascent ‘critical comparative legal geography’ (CCLG). In this regard, the work of legal scholar William Twining (2009) is groundbreaking. Using the metaphor of mapping (Santos, 1987; Mahmud, 2010), Twining questions the neat, ordered and hierarchical organization of legal relations and argues that the local, national, and international scales of law are muddied by:

“empires, alliances coalitions, diasporas, networks, trade routes and movements . . . Special groupings of power such as the G7, the G8, NATO, the European Union, the Commonwealth, multi-national corporations, crime syndicates and other non-governmental organizations and networks.” (Quoted in Kedar, 2014: 99).

Twining’s analysis of what he calls ‘legal diffusion’ is important because, like the lawfare literature, traditional legal comparative work has neglected to consider the social, cultural and – crucially – spatial relations and settings in which law is made and ‘worlded’. But critical comparative work is also important because it traces legal relations across space and time and dispenses with the idea that history and geography are inert. Rather, CCLG treats space and time as practices that actively shape and re-shape legal configurations and jurisdictional maps.
Legal comparativism has spawned a literature on legal diffusion and circulation, which focuses explicitly on law as a mobile and mutable phenomenon. In her study of what she calls the 'circulations of law' in the context of British colonial rule in India, Malaya and Egypt, Iza Hussin (2012: 21) writes that law is a "travelling phenomenon". Hussin’s wonderful analysis of mobile law reminds us that law leads a worldly and social life:

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

The work on legal mobilities is instructive to lawfare because it alerts us to the itinerant life of law and the importance of space in forging particular legal systems and discourses. It also brings to the fore the fact that legal realities and particular legal spatializations are the result of the work of several agents and actors; to paraphrase Hussin, law does not travel alone – which, of course, begs the question of how law travels, where and why? There is space for interesting conversations between legal mobilities and legal diffusion, and other mobilities literatures such as policy mobilities in geography (e.g. Peck, 2011) and the work on travelling theory (Said, 1983, 1999) and travelling culture (Clifford, 1997), none of which have engaged each other. These literatures offer lawfare and TWAIL rich understandings of the mobility of things and ideas and they remain “sensitive to the constitutive roles of spatiotemporal context” (Peck, 2011: 1). There is also potential for an analysis of the movability and mutability of ‘legal technicalities’ (Riles, 2005) and methods from Actor Network Theory (ANT) could assist in approaching law as a set of things and practices which are iterated, changed and re-signified in different contexts.

Once viewed through the prisms of interlegality, critical comparativism and mobility, international law in general, and lawfare specifically, take on quite new shapes and possibilities. These concepts may also help “to encourage exploration of the unlikely spaces where international law may indeed be found, but which are not visible on traditional 'maps’” (Pearson, 2008: 491). In short, TWAIL, and cognate work in legal anthropology and legal comparativism could contribute to a re-mapping of international law and lawfare. Such a
mapping exercise would take ‘worlded’ violence seriously, though it need not “solely focus on the dark heritage of colonial dispossession but also should look at some contemporary inspiring transformations, which can serve in planning reforms and imagining progressive solutions.” (Kedar, 2014: 111).

The TWAIL scholarship is relevant to the lawfare debate in many ways but it is through its insistence on prying open the violent historical geographies of international law that it is most powerful, for by doing so it exposes as fallacy the claim that law has only recently been weaponised and that ‘terrorists’, non-state actors and the ‘Other’ were the first to deploy in the post 9/11 era. This is to read law not only through a historical axes but crucially also through a geographical one, because if we can recognise the weaponisation of law at the heart of empire and colonialism, we can trace lawfare’s legacy like a red thread through the metropole to the colony and beyond to the post-colony. The military lawfare literature would benefit from the insights provided by TWAIL and CCLG (even if it may not agree with them) and borrowing from their critical and historical methodologies would strengthen and help contextualise future studies of lawfare and the geographies of international law.

V. Toward a critical geography of lawfare?
In the very same year that Charles Dunlap first began writing about lawfare, anthropologist John Comaroff proposed a competing – though seldom noted – definition. For Comaroff (2001: 306), lawfare signified “the effort to conquer and control indigenous peoples by the coercive use of legal means”. Comaroff’s definition directly challenges Dunlap’s vision of lawfare by placing the smoking gun – law as weapon – in the hands of the colonial state (and not in the hands of colonial subjects). Yet the lawfare debate teaches us that lawfare is characterised by a multiplicity of processes and is performed by manifold actors. Lawfare may have its antecedents in the colonial encounter, but Comaroff (2001: 306) also realised that it “had many theaters, many dramatis personae, many scripts.” What he meant was that lawfare is not uniform and unidirectional but has what he called a “counterinsurgent” potential. Given this potential, and given the prominence of lawfare discourses today, does it make sense to only speak of lawfare as a colonial tool? Might it not also be a ‘post’-colonial tool, and could it not also be put to ‘insurgent’, counter-colonial use?
In 2007, and writing with Jean Comaroff, John Comaroff returned to the topic of lawfare and offered a new definition not so dissimilar to that originally proposed by Dunlap. For them, lawfare had come to mean “the resort to legal instruments, to the violence inherent in the law, to commit acts of political coercion, even erasure” (Comaroff and Comaroff, 2007: 30). Yet their understanding of lawfare differs from Dunlap’s definition in two crucial respects. First, pace the critical legal traditions, they are extremely attentive to questions of history, space and power. For them, lawfare did originate with colonialism but this is not one and the same thing as saying that only colonial powers can wield it. As they go on to write, sometimes lawfare:

“is put to work, as it was in many colonial contexts, to make new sorts of human subjects; sometimes it is the vehicle by which oligarchs seize the sinews of state to further their economic ends; sometimes it is a weapon of the weak, turning authority back on itself by commissioning the sanction of the court to make claims for resources, recognition, voice, integrity, sovereignty. But ultimately, it is neither the weak nor the meek nor the marginal who predominate in such things. It is those equipped to play most potently inside the dialectic of law and disorder. (Comaroff and Comaroff, 2007: 31, emphasis added).

Examining lawfare as a practice and something that is performed by social actors acting in a milieu of power relations is an important line of enquiry that is missing from mainstream accounts of lawfare. This is somewhat surprising given that lawfare is supposed to have emerged as a result of asymmetric war as a way of redressing the imbalance of power between advanced militaries and smaller, less militarily powerful groups and nations. Beyond rhetoric from think tanks like TLP, there is little sense of how effective these groups and nations have actually been at harnessing lawfare and there have been very few studies that compare state lawfare alongside non-state lawfare. But these economies of power are important because they move us beyond thinking about lawfare as a political or social construction and encourage us to think about performances of lawfare and to ask what lawfare does and for whom.

Although it does not identify itself as such, a nascent critical lawfare literature has emerged over the last decade. This literature questions conservative and military understandings of lawfare as a one-way phenomenon, and focuses our attention on state lawfare. The emergence of this literature owes much to the work of David Kennedy (2006), whose book Of War and Law has been widely cited (e.g. Weizman 2011, 2012; Morrissey 2011; Snukal and Gilbert,
forthcoming). In his writing on war and law Kennedy identified processes of juridification and emergent relationships between war and law that are arguably wider and more salient than the narrow questions raised by Dunlap and others:

Warfare has become a modern legal institution. At the same time, as law has increasingly become the vocabulary for international politics and diplomacy, it has become the rhetoric through which we debate-and assert-the boundaries of warfare, and insist upon the distinction between war and peace or civilian and combatant. Law has built practical as well as the rhetorical bridges between war and peace, and is the stuff of their connection and differentiation. (Kennedy, 2006: 5)

Kennedy never says when (or where) warfare became a ‘legal institution’ but his work has inspired several scholars to take up the concept of lawfare and to critically interrogate the interstices of war and law. Eyal Weizman (2010; 2011), Lisa Hajjar (2013) and Jones (forthcoming(a)), for example, have explored the lawfare tactics used by Israel in the 2008-9 war on Gaza and more generally of Israel’s legal regimes of Occupation in the Palestinian Territories. For Weizman, the adoption of the language of IHL and lawfare is a slippery slope and he believes that its vocabulary has been used to justify a political-juridical reawakening of the philosophy of the ‘lesser evil’ (Weizman, 2011). This philosophy has a temporal referent that he calls the “humanitarian present” (p. 1) and for him the “age of lawfare” (p. 16) portends worrying signs for humanitarians and those who care about the rule of law. The conclusion he reaches sounds a note of caution to those who oppose war in the name of law; to do so, he argues, is to misunderstand the relationship between war and law and misses the point that war takes place through law, and not in opposition to it.

Taking up this point, John Morrissey (2011) has provided an account of what he calls “forward juridical warfare” where he argues that we need to understand the offensive component of lawfare. Offensive lawfare is a pre-emptive form of legal conditioning of the battlespace and for Morrissey it involves the legal preparation that goes into the protection of US military personnel stationed around the globe in what are called ‘forward deployments’. Morrissey’s contribution is important because, contra the military lawfare literature, he recognises that ‘we’ do lawfare but he also alerts us to the fact that there are many different types of lawfare and that geographical accounts are required to understand its various practices. Michael Smith
documents a similarly offensive lawfare at work in the US/NATO invasion and intervention in Afghanistan. He argues that what he calls the ‘geolegalities’ of ‘martial law’ have become “essential to grasping the hybrid political and economic formations associated with Western interventionism of the post–Cold War period.” (Smith, 2014: 144). His argument considers several iterations of lawfare and as he explains, Western military interventions:

are wars of law insofar as they are organized, instituted and waged by the ostensibly liberal democracies of the global North; they are wars through law in that [...] they are pervasively governed by law; and they are wars for law, as they aim to establish stable, liberal or quasi-liberal regimes where potential threats can be mollified through development or neutralized through lawfully monopolized force.

From Smith we learn that lawfare takes place not only at the geo-political level (through treaties, agreements etc.), but also on the ground in Afghanistan at specific sites where ‘rule of law operations’ frequently blur into what he calls “counterinsurgency lawfare” (p. 160). Last, but by no means least, a forthcoming paper by Snukal and Gilbert examines lawfare through the lens of legal ‘grey holes’ and discusses the fraught issues of accountability and compensation in the Nisour Square massacre in Iraq in 2008. There, the infamous private military company Blackwater opened fire on civilians, killing 17 and injuring 20 more. Snukal and Gilbert use this as a focal point to examine the legality and ethics of the privatization of military force – something they see as fostering deliberate ambiguities and slippery (mis)uses of law.

While these accounts of lawfare are very critical of the ways in which lawfare is being deployed and while they recognise that it is state militaries that ‘play most potently in the dialectic of law and disorder’, they implicitly re-inscribe the idea that lawfare is somehow a recent development. Against this, and pace the arguments put forward by TWAIL, Mark Neocleous (2014: 46) argues that law and war “have been woven together since the birth of early modern political thought, the birth of the laws of nations and, concomitantly, the transition of feudalism to capitalism.” A critical history of lawfare, Neocleous therefore argues, must attend to its origins not only in the colonial encounter but also in the very formation and development of capitalism itself. Such a project comports with Barkan’s (2011) recent call for further research on the ‘legal geographies of capitalism’ and also has resonances with Lauren Benton’s
(2010) ground-breaking legal-historical work on the European ‘search for sovereignty’, wedded as it was to the emergence of a new capitalist order (see also Morrissey, forthcoming; Smith, 2014).

A nascent critical lawfare is emerging then, but it is still limited in its historical and geographical scope and there is space for a much broader engagement with the historical geographies of war and law. As I have suggested, TWAIL perspectives offer one way to enrich critical lawfare but to broaden the project further critical lawfare would also benefit from searching beyond US and Israeli militarism to sites where law and lawfare play a less obvious or somehow different role in the conduct of war. Indeed, critical lawfare might do well to explicitly recognise that not all wars are marked by discourses of legality and lawfare. Lawfare is but one form of war, one that operates alongside and through many other ways of waging later modern war. Interrogating the geographies of lawfare is important but this does not mean that ‘juridical wars’ should be analytically or empirically privileged over wars that are not – or are lesser – shaped and defined by law. Critical lawfare faces a challenging set of questions concerning precisely this geography: what wars are marked by the juridical and which are not? Why and with what consequences have legal discourses come to predominate in some wars and not others? In other words, what does the geography of lawfare look like and how is it changing?

VI. Conclusion
In this paper I have reviewed the literature on lawfare and have suggested that there are several ways of defining and approaching the concept. I have argued against conceptualisations of lawfare as a post 9/11 phenomenon and have critiqued the military lawfare literature for being historically and geographically myopic. I have suggested that one productive way around such apprehensions is to turn to critical legal approaches and, in particular, to conceive of lawfare as a colonial tool that predates its use and circulation today. Attending to these colonial histories of law necessarily broadens the potential geographies of lawfare because it displaces the centre of laws’ violence from the particular constellations of the colonial present (as important as these clearly are) to the spaces of the colonial pasts, which have their own geographies (even inasmuch as they continue to haunt our present).
The task remains that in order to look forward and to explore putatively ‘new’ and ‘different’ formations of lawfare, we first must look (back) to legal historical geographies of war. This is not simply to argue that history matters. It is to insist that the entire lawfare debate rests on an assumption that, suddenly, law has become important to war without ever interrogating the when or where of that claim. I intend this not as a dismissal of what is a fascinating literature, but more as a provocation for those interested in lawfare to explore its genealogies and geographies. This is an opportunity for CLG, CLS and TWAIL and proponents of military lawfare to examine their (possible) shared intellectual heritage and to articulate where their theoretical and political differences may lay. It is also an opportunity to square a circle between political, historical and legal geography and to attend to the multiple and overlapping spaces and process of war and law.

Work in this direction is already underway. Extending Blomley’s (1989) concept of the ‘law-space nexus’, Jones and Smith (forthcoming) have proposed that we should think about the interconnections between war and law as forming a set of entangled relationships captured by what they call a “war/law/space nexus”. This nexus, Jones and Smith argue, recognises that “war and law have an intimate connection” but it also emphasises that this relationship is “historically and spatially variable.” In positing the relationship between war and law as dynamic, the war/law/space nexus opens up precisely the kind thinking that has been missing from the lawfare literature. Conceptualised thus, lawfare becomes a spatial and historical question, rather than a universal and foregone conclusion. The value of lawfare, therefore, may be realised not so much by thinking about it as a neologism of recent vintage but rather as a broader phenomenon and set of relationships in a changeable war/law/space nexus.

The lawfare literature heralds – and is a manifestation of – a series of vitally important transformations in later modern war. To be sure, war may have always entailed rhetorics of justification and regimes of authorisation yet as Smith and Jones (forthcoming) have argued, today war and law have become inseparable and now, more than ever, “war requires a legal armature to secure its legitimacy and organise its conduct”. The emergence of, and growing interest in lawfare would seem to suggest that something, recently has changed; that there has been an intensified or somehow more duplicitous recourse to the law and to legal argumentation vis-a-vis questions of war. The question of why and how this transformation – or
intensification – has taken place is a complex one beyond the scope of this review but there is little doubt that it is tied intimately to the hyper-mediatisation of war and the growing ‘reflexivity’ of advanced militaries who have become, to borrow from Foucault, obsessed with the conduct of their own conduct. Here, for example, is David Kennedy (2006: 122) connecting the juridification of war with processes of mediatisation and perception: “Communicating the war is fighting the war, and law – legal categorization – is a communication tool. Defining the battlefield is not only a matter of deployed force, or privileging killing; it is also a rhetorical claim.”

These changes require a careful articulation as to what is and what is not novel about the 21st Century (re)weaponisation of law. Here, Historians Strachan and Sheipers (2011) offer a cautionary note about the putative ‘changing character of war’ heralded by several commentators espousing what has become known as the ‘new wars’ thesis (see Kaldor, 2005). Over the last decade or so the thesis has provoked useful discussions as to how war has changed since the end of the Cold War, but its critics have retorted that change and newness have been overstated (e.g. Gregory, 2011). Strachan and Sheipers (2011: 18), however, go even further: “the perception of newness is often not so much a matter of empirical change but of our conceptual perspective on war”.

With this note of caution in mind, and by way of closing I return to Comaroff and Comaroff one last time. In Law and Disorder in the Postcolony they argue that everyday life is becoming increasingly juridified. They claim that politics itself has "migrated to the courts", shrouding itself in "culture of legality" where:

"[c]onflicts once joined in parliaments, by means of street protests, mass demonstrations, and media campaigns, through labor strikes, boycotts, blockades, and other instruments of assertion, tend more and more—if not only, or in just the same way everywhere—to find their way to the judiciary". (Comaroff and Comaroff, 2007: 26)

What is specific about the logic of juridification in comparison to other logics? What specific rhetorical figures and forms do jurists, legal scholars, and (military) lawyers utilize to make something appear as a legal (not ethical, not political) problem, which then needs to be solved
by experts? Law has an audience; it speaks to an addressee, and the field of perception in later modern war has been expanded to include a multiplicity of publics, both at home and abroad (see Smith, 2006). Thus it is not so much that war is 'migrating to the court', but that the courts and the law are migrating elsewhere, into the very spaces and ontologies of war, (re)signifying and (re)presenting it as they do. Alongside the "judicialization of politics" could it be possible that we are witnessing a corresponding juridification of war that is at least partially new and/or different to that which came before? If we are – and that conditional must again be underscored – the task ahead is to chart and examine the legal historical geographies that underwrite and continue to animate the juridification of war. And all the while it will be important to ask: What does the reduction of war to law enable? What are the consequences of thinking about war in distinctly legal terms and what might have been lost? What other registers, whether political-economic, social or ethical have been marginalised as law has sent the gavel down on war? What does law do to war, and war to law? These are questions and problems: invitations for some preliminary critiques on a fascinating and emerging field.

References


Notes

1 The US conducted assassinations in Vietnam under what was called the Phoenix Program and the CIA were involved in assassination attempts in Central and South America, Africa and Asia throughout the 1950s and 1960s (Jones, forthcoming b)
2 I thank an anonymous reviewer for posing these two questions.