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DISCUSSION RESPONSE

Lawfare? We need the states to interpret international humanitarian law

ANTON PETROV — 28 December, 2015

A response to Raphael Schäfer

Raphael Schäfer has thoughtfully worked out the main issues surrounding lawfare and counter-lawfare. I will take up his analysis and develop it further in order to provide a complementary perspective. I will explain the struggles over the law – quickly termed "counter-lawfare" by some –as the ordinary course rather than the exception.

Lawfare and Counter-Lawfare: Breaking the law

Raphael distinguishes between lawfare usually conducted by armed non-state actors (NSA) and counter-lawfare as the states' response. Lawfare entails a deliberate breach of one's own legal duties to make compliance with legal obligations unbearable for the adversary. For example, when Hamas hides in hospitals, the principle of distinction and the status of hospitals appear to disadvantage Israel: Israel may comply with the law and accept strategic military disadvantage, or attack arguably in violation of international humanitarian law (IHL), and thereby suffer indirect disadvantage because it will be stigmatized in public as a lawbreaker – so goes the rationale of lawfare. Counter-lawfare describes the state's response which does not mean actual military action, but legal argumentation.

Lawfare and counter-lawfare, in this sense, are understood effectively as breaking the rules: lawfare as a conscious violation, and counter-lawfare as a "wrong" interpretation of the law. Moreover, both utilize IHL in the political process: by stigmatizing the opponent as a law-breaker, and by legitimizing one's own action, respectively. Yet, there are fundamental differences on the legal side. Lawfare does not carry a legal claim: it neither purports to interpret the law nor to legally justify the conduct. Doctrinally, such non-state practice does not qualify as relevant (state) practice. Counter-lawfare, on the contrary, appears in the form of legal argumentation.

I would like to offer a more nuanced view than Raphael on what he terms counter-lawfare. Basically, I take issue with his distinction between "regime-immanent vs. intended interpretations". While Raphael seems to acknowledge that there is no objective interpretation – he sets "correct" in quotation marks in connection with interpretation – he

appears to equate flawed interpretations with intended and politicized interpretations. I agree that some interpretations go beyond what is methodologically permissible and may be considered outside the regime, thus not "regime-immanent". In my view, however, intentions and political considerations do not per se make an interpretation invalid, but are natural features of interpretation and inevitable in a system of auto-interpretation where legal rules are interpreted by the addressees themselves.

IHL in political discourse

Why are states so concerned not to appear as lawbreakers although the risk to end up before an (international) court for breaches of IHL is effectively very low? IHL is not designed for judicial settlement, but is in fact rather discursive. Warring parties worry about public opinion and political discourse to which legal arguments have become central. The label of (il)legality regularly replaces genuinely political or ethical arguments, and accounts for publicly perceived (il)legitimacy of military action.

Since many of the founding premises of IHL are unpopular – or would be if they were known to the general public – states are often inclined to avoid public statements on IHL. Already the basic permissions of killing humans and collateral damage face public concern. Germany recently experienced this when it refused to sign the Oslo Safe Schools Declaration. The German position that schools are implicitly already sufficiently protected in IHL may well accord with existing law, however, the government faced harsh critique.

Instead of shying away from public condemnation, states can actively promote their legal positions. With law's legitimizing function in mind, coating their interest in legal argumentation may advance their positions in the political sphere. Of course, they may be inclined to employ the interpretation of the law that best serves their interest. While the argument is brought forward in political fora, it is legal in nature and raises the question which interpretations are legally permissible and which are beyond the confines of legality. I submit that including political considerations into the interpretive process is not the red line when states interpret IHL. The finding that extra-legal considerations guide the choice among several legally permissible interpretations goes already back to Hans Kelsen. The issue becomes one of allocating competence in a legal order to choose one interpretation over the others.

Auto-interpretation is the default

Auto-interpretations should be scrutinized with a degree of skepticism, in particular where there is no central decision-making or interpreting institution, as Raphael argues. Yet, I would like to point to the other side of the coin: it is because there is no central institution that we need states' auto-interpretations. Of course, it may be problematic with a view to law's fairness and legitimacy that states make and interpret the law while NSA should follow. However, doctrinally only state action shapes the law.

For these reasons states should rather be encouraged to openly pronounce their views of the law; otherwise many provisions remain an empty shell, and other actors will fill it with their content. Raphael refers to the ICRC's Interpretive Guidance in this regard. Similar projects abound – starting

from the 1994 San Remo Manual on Naval Warfare to the 2013 Tallinn Manual on Cyberwarfare, or NGO activism like the Campaign to Stop Killer Robots. Each outcome may be commendable – but what is the value when states do not agree? We may call the reactions to the Interpretive Guidance "intended interpretations" as Raphael does – but I would submit that in this sense the Interpretive Guidance is an intended interpretation itself. In a time of flourishing counter-terrorism operations and targeted killings, such an interpretation promoting the humanitarian principle of IHL vis-à-vis military necessity was itself a political move. Thus, I would object to disposing of certain interpretations for being politically motivated or "intended".

As Janina Dill pointed out in a conference on "Legitimacy and Law-Making in International Humanitarian Law" in November 2015 in Berlin, we need a better understanding of what abuse and (counter-)lawfare are, and, moreover, that not every purpose-driven interpretation constitutes (counter-)lawfare. Of course, we have to critically assess every interpretation, and conflicting unilateral interpretations can unsettle a normative order. Nonetheless, from the point of the law it appears more desirable to have engaged relevant actors who take clear legal positions and face contestation than hesitant states who keep the law indeterminate. We may regret that IHL is not a detached and pure ad legal field, but part of the political discourse – or we may face it, and look for the best response which may be to foster open interpretive struggles that can potentially build consensus around what humane warfare means in practice today.

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