

# Performing “Legality” in the Theatre of Hostilities: Asymmetric Conflict, Lawfare and the Rise of Vicarious Litigation

PROF. DR. NIKOLAS M. RAJKOVIC\*

## TABLE OF CONTENTS

I.	A RECONFIGURED THEATRE OF HOSTILITIES: LEGAL PERFORMANCES AND VICARIOUS LITIGATION .....	438
II.	ORIGINS OF VICARIOUS LITIGATION: ASYMMETRIC CONFLICT AND WAR’S DISRUPTED BARGAIN.....	444
III.	LAMENT AND INDIGNATION: NEW WARS, LAWFARE AND IHL’S NARRATIVE STRUGGLE WITH ASYMMETRIC CONFLICT .....	447
IV.	CONCEPTUAL STRAINING AND THE LIMITS OF LAWFARE.....	452
V.	CONCLUSION: VICARIOUS LITIGATION AS A NOVEL INSTITUTIONALIZATION AND BATTLESPACE.....	455

Public performances have assumed critical importance in military hostilities that remains true today<sup>1</sup> with warfare fought both in geophysical places and across varied textual, broadcast or internet media.<sup>2</sup> This dynamic has garnered strategic attention among militaries and scholars alike since the

---

\* © 2020 Prof. Dr. Nikolas M. Rajkovic. Chair of International Law, Department of Public Law and Governance, Tilburg University (The Netherlands). I am grateful for the feedback given on earlier drafts by Tanja Aalberts, Jason Beckett, Gleider Hernandez, Sofia Stolk, Renske Vos, and Wouter Werner.

1. PAUL VIRILIO, *WAR AND CINEMA: THE LOGISTICS OF PERCEPTION* 7 (Patrick Camiller trans., Verso 2009).

2. See MICHAEL DILLON & JULIAN REID, *THE LIBERAL WAY OF WAR: KILLING TO MAKE LIFE LIVE* 108–12 (Routledge, 2009).

First Gulf War and its acknowledged made-for-TV quality.<sup>3</sup> Further, the world's most powerful militaries have become renowned for their preoccupation with "winning" kinetic battles as well as with conquering the narrative portrayal of hostilities.<sup>4</sup> The famous military axiom of controlling the high-ground has expanded beyond topographical geography<sup>5</sup> to include the narrative heights of conflicts.<sup>6</sup> The so-called "mission accomplishment" requires mastery over two essential and interactive confrontations: kinetic and narrative hostilities.<sup>7</sup>

While many have written on related notions of "virtuous war,"<sup>8</sup> the "global battlefield"<sup>9</sup> or "everywhere war,"<sup>10</sup> these approaches have focused largely on: (a) the heightened prominence and implications of asymmetric warfare; and (b) how different technologies and infrastructures are produced to enact what Derek Gregory has coined "death from a distance."<sup>11</sup> Military conflicts have evolved from singular battlefields to a matrix of battlespaces, involving multiple sites and dimensions of kinetic and narrative combat.<sup>12</sup> Correspondingly, the model "theatre of hostilities" has expanded its scope regarding spaces, actors and actants,<sup>13</sup> leaving scholars of international

---

3. James Der Derian, *Virtuous War/Virtual Theory*, 76 INT'L AFF. 771, 772 (2000).

4. Patrick T. Jackson & Ronald R. Krebs, *Twisting Tongues and Twisting Arms: The Power of Political Rhetoric*, 13 EUR. J. OF INT'L REL. 35 (2007).

5. See MICHAEL HOWARD, *WAR AND THE LIBERAL CONSCIENCE* 128 (Rutgers Univ. Press, 1978).

6. See generally RONALD R. KREBS, *NARRATIVE AND THE MAKING OF U.S. NATIONAL SECURITY* (2015) (analyzing how dominant narratives become dominant and their influence in the U.S. national security debate); see also Amanda Alexander, *The "Good War": Preparations for a War against Civilians*, 15 L., CULTURE AND THE HUM. 227, 229 (2019).

7. Ami Ayalon, Elad Popovich & Moran Yarchi, *From Warfare to Imagefare: How States Should Manage Asymmetric Conflicts with Extensive Media Coverage*, 28(2) TERRORISM AND POL. VIOLENCE 254, 256 (2016).

8. See generally JAMES DER DERIAN, *VIRTUOUS WAR: MAPPING THE MILITARY-INDUSTRIAL MEDIA-ENTERTAINMENT NETWORK* (2009) (building upon the existing literature to discuss the use of new technologies in these "new wars," characterized by "virtual" enemies).

9. See generally Noam Lubell & Nathan Derejko, *A Global Battlefield? Drones and the Geographical Scope of Armed Conflict*, 11 J. OF INT'L CRIM. JUST. 65, 65-66 (2013) (discussing the evolution of the geographic scope of war towards a global battlefield).

10. See Derek Gregory, *The everywhere war*, 177 THE GEOGRAPHICAL J. 238 (2011).

11. Derek Gregory, *From a View to a Kill: Drones and Late Modern War*, 28 THEORY, CULTURE AND SOC'Y 188, 192 (2011).

12. David Kennedy, *Modern War and Modern Law*, 12 INT'L LEGAL THEORY 55, 74 (2006).

13. See DAVID KILCULLEN, *OUT OF THE MOUNTAINS: THE COMING AGE OF THE URBAN GUERRILLA* 43-44 (2013).

security and international law struggling to keep pace with the pronounced institutional changes.<sup>14</sup>

This Article explores the extent of the change by looking at the ways in which asymmetric conflict and legalization have reshaped the theatre of hostilities and the implications for the institution of war itself.<sup>15</sup> The shift from one literal battlefield to multiple and disaggregated battlespaces has led to a reconfigured theatre of hostilities,<sup>16</sup> which now involves a complex mix of local and global spaces as well as kinetic and narrative forms of combat.<sup>17</sup> This re-making of armed hostilities in geographical, material, and social terms has increased access to the drama, stage, and audience of military theatres. Further, the more globalized and publicized character of hostilities has allowed a higher number of actors, and actors of higher quality, to participate in and observe hostilities, whether kinetic, narrative, or both.<sup>18</sup> This has given a powerful platform for law to mediate the conduct of warfare, and it is thus unsurprising that the notion of *legality* regularly occupies center stage in a reconstructed theatre of hostilities.<sup>19</sup>

Accordingly, military actors, whether state or non-state, are producing performances of legality in combat to influence not only their adversaries but also, crucially, formal and informal judgments across the theatre’s more expansive and global audience. The term “performances” does not imply cynical theatrics, but rather concerted actions to display legality or illegality as an integral part of warfare. In this way, such performances of legality have become a crucial strategic asset for interacting kinetic and narrative confrontations.<sup>20</sup> This has led to a distinctive struggle between adversaries over appearances of legality and illegality, which has produced

14. See Charles Garraway, ‘To Kill or Not to Kill?’—*Dimensions on the Use of Force*, 14 J. OF CONFLICT & SEC. L. 500, 501 (2010).

15. See generally Emily Crawford, *From Inter-state and Symmetric to Intra-state and Asymmetric*, 17 Y.B. OF INT’L HUMANITARIAN L. 95 (2014) (examining the changing methods of warfare throughout the 20th century and discussing the changes in law to respond these changes).

16. Frederic Megret, *War and the Vanishing Battlefield*, 9 LOY. CHI. U. INT’L L. REV. 131, 132–33 (2011–2012).

17. Michael John-Hopkins, *Mapping War, Peace and Terrorism in the Global Information Environment*, 8 J. OF INT’L HUMANITARIAN LEGAL STUD. 202, 204–08 (2017).

18. Ayalon et al., *supra* note 7.

19. See e.g., Nikolas M. Rajkovic, Tanja Aalberts & Thomas Gammeltoft-Hansen, *Introduction: Legality, Interdisciplinarity, and the Study of Practices*, in THE POWER OF LEGALITY: PRACTICES OF INTERNATIONAL LAW AND THEIR POLITICS 1, 3 (2016).

20. John-Hopkins, *supra* note 17, at 213.

an institutional and narrative battlespace of growing importance that this Article conceptualizes as *vicarious litigation*.

The Article is organized in five sections. Section I introduces and elaborates on the related notions of legal performances and vicarious litigation by bridging sociological theorizing on social performances with noted developments in asymmetric warfare. This conceptual effort draws insight from Performative Sociology<sup>21</sup> and the so-called “practice turn” in international relations theory.<sup>22</sup> Section II describes the origin of vicarious litigation as flowing from the asymmetric warfare’s disruption of the institutional bargain behind modern war and, consequently, International Humanitarian Law (IHL). To understand that institutional disruption, Section II discusses Andrew Mack’s under-examined inquiry into and conceptualization of “asymmetric conflict.”<sup>23</sup> Sections III and IV look at how international lawyers, and specifically IHL scholars, have struggled to grasp the rise of asymmetric conflict and how the dominant “lawfare” literature has suffered from conceptual straining and the incapacity to theorize institutional change precipitated by the prevalence of asymmetric conflict. Section V focuses on the novel notions of legal performances and vicarious litigation and examines how these novel notions provide alternatives to the hobbled semantics of lawfare by offering greater insight into institutional mutations that now define the legalization of contemporary warfare.

#### I. A RECONFIGURED THEATRE OF HOSTILITIES: LEGAL PERFORMANCES AND VICARIOUS LITIGATION

Since 2008, a series of Gazan wars have involved the entry of Israel Defense Forces (IDF) into Gaza for the stated purpose of degrading Hamas militarily.<sup>24</sup> While each Gazan war represents a discrete and episodic military event, this Article argues that this specific sequence of war has produced a consistent and signature model of combat. The regularity and feedback loops of such wars led one scholar to refer to Palestine-Israel

---

21. See generally JEFFREY C. ALEXANDER, *PERFORMANCE AND POWER* (2011) (building upon the theory of social performance to analyze how performativity can help studying politics and society); see also Jeffrey Alexander et al. eds., *SOCIAL PERFORMANCE: SYMBOLIC ACTION, CULTURAL PRAGMATICS, AND RITUAL* (2006) (describing a new theory of social performance).

22. Emmanuel Adler & Vincent Pouliot, *International Practices*, 3 *INT’L THEORIES* 1 (2011) (“approach[ing] world politics through the lens of its manifold practices . . . define[d] as competent performances.”).

23. See Section II, *infra* (discussing how Mack theorized the concept of asymmetric conflict).

24. Jim Zanotti et al., *CONG. RESEARCH SERV.*, R40101, *ISRAEL AND HAMAS: CONFLICT IN GAZA 2008-2009* 2(2009).

confrontations as a kind of military “laboratory.”<sup>25</sup> This signature model gains empirical shape by looking at what a prominent international newspaper reported in an instance of asymmetric combat during Operation Cast Lead.<sup>26</sup> An account and mapping of the combat maneuverers made by each adversary is described below.

The IDF identified a multi-level residential building (building) used by Hamas allegedly for military purposes. The IDF then classified the Building as one having a military objective, and consequently it became an airstrike target. The IDF obtained telephone numbers of some known residents of the Building, and it sent automated voice and text messages—in local Arabic—warning of an imminent attack and instructing them to immediately evacuate. Hamas intercepted those warnings and immediately responded by sending a crack team of civilian-looking militants and supporters to the roof of the Building, so as to complicate the mission for the IDF pilot assigned to the air strike. The appearance of civilians on the roof visibly constituted an invocation of the prohibition against harming civilians under the Geneva Convention. However, the military pilot responded by launching (or dropping) a specially-designed fake ordinance on the roof, which did not explode.<sup>27</sup> The fake ordinance scared away, warned, and effectively dispersed those civilian-looking individuals on the roof top,<sup>28</sup> and thus cleared the pilot’s view as well as the view from the onboard video camera. The tactic facilitated a later strike on the building, this time using an actual explosive ordinance.

This scenario is not a random instance but rather an example of a larger structural change in the contemporary theatre of hostilities.<sup>29</sup> It illustrates how a hybrid model of combat has evolved,<sup>30</sup> where legality assumes a foreground, as opposed to a background, position in combat strategy and

---

25. ORDE KITTRIE, *LAWFARE: LAW AS A WEAPON OF WAR* 197 (Oxford Univ. Press, 2016).

26. Steven Erlanger, *Both Sides in Gaza War Using Lethal New Tricks*, N.Y. TIMES (Jan. 1, 2009), <https://www.nytimes.com/2009/01/11/world/africa/11iht-tactics.1.19248753.html?searchResultPosition=1> [https://perma.cc/N323-FSDJ].

27. *Id.*

28. *Id.*

29. Derek Gregory, *War and Peace*, 35 TRANSACTIONS INST. BRIT. GEOGRAPHERS 154, 155–56 (2010).

30. Robert Wilkie, *Hybrid Warfare: Something Old, Not Something New*, 23 AIR & SPACE POWER J. 13, 14 (2009).

tactics exercised by adversaries.<sup>31</sup> The scenario also exemplifies the nexus between military strategy and IHL.<sup>32</sup> This Article further contends that this interconnection is characterized by a pattern of struggles exceeding the popular characterization of “lawfare” as the use or misuse of law to achieve a military objective.<sup>33</sup> Indeed, warring actors are doing something more institutionally and sociologically than using or misusing law: they produce performances of legality as an integrated feature of the military theatre, and this has engendered a new litigious space of institutional and narrative combat encapsulated, described in this Article as *vicarious litigation*.

To understand the value of vicarious litigation, it is important to first grasp what legal performances are and how such practices now reconfigure the contemporary theatre of hostilities. This brings us to two key questions: (1) What does “legal performances” mean? (2) How do competing legal performances produce vicarious litigation as a new battlespace of narrative combat? First, the emphasis on legal performances draws, in part, from a history of legalistic discourse and rights-based activism that international lawyers already know. Since at least the 1970s, human rights and humanitarian norms have been used by state and non-state actors to reshape the international system by promoting greater civil and social rights, war crimes accountability and even corporate responsibility.<sup>34</sup> Public advocacy campaigns have exposed these efforts, labelled by Keck and Sikkink as “naming and shaming” strategies, or the “boomerang effect”: the strategy consists in pressuring targeted actors to comply with varied kinds of normative obligations.<sup>35</sup>

Moreover, the legality of warfare has evolved considerably beyond these initial and groundbreaking models based on interactions between adversaries, as well as with activists. The way that powerful militaries have also harnessed the influence of legal performances,<sup>36</sup> and thus appearances, in the characterization of specific hostilities,<sup>37</sup> is an important factor of change

---

31. Pascal Vennesson & Nikolas M. Rajkovic, *The Transnational Politics of Warfare Accountability: Human Rights Watch versus the Israel Defense Forces*, 26 INT’L REL. 409, 412 (2012).

32. Laura A. Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 AM. J. INT’L L. 1, 2–3 (2010).

33. Charles J. Dunlap, *Does Lawfare Need an Apologia*, 43 CASE W. RES. J. INT’L L. 121, 122 (2010).

34. Margaret Keck & Kathryn Sikkink, *Activists Beyond Borders* (1998) (arguing that transnational advocacy networks use human rights to create international change); see also Thomas Risse, Stephen C. Ropp, & Kathryn Sikkink, *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* (1999) (describing the socialization process where human rights norms influence state actors); Sanjeev Khagram, James V. Riker & Kathryn Sikkink (eds.), *Restructuring World Politics: Transnational Movements, Networks, and Norms* (2002).

35. Keck & Sikkink, *supra* note 34, at 12.

36. Dickinson, *supra* note 32.

37. Vennesson & Rajkovic, *supra* note 31, at 410–12.

and constitutes an institutional transformation. Then-NATO commander General James Jones, in remarks that have since gained particular fame among IHL scholars, captured this transformation:

It used to be a simple thing to fight a battle . . . In a perfect world, a general would get up and say, “Follow me, men,” and everybody would say, “Aye, sir” and run off. But that’s not the world anymore, . . . [now] you have to have a lawyer or a dozen. It’s become very legalistic and very complex.<sup>38</sup>

Since Jones’ remarks, the scale and impact of legalization upon warfare has continued to spread further: state, non-state, and activist entities have all “lawyered up”<sup>39</sup> in different ways and become skilled and adept in enacting legal performances with convincing effects. The current strategic, legal, and communications environment in which it is difficult for any single actor to outright command the legal characterization of hostilities,<sup>40</sup> especially in a political time dominated by social media and the influences of so-called “fake news,”<sup>41</sup> is a result of these changes,

International lawyers have spent little time theorizing such strategic interactions and their institutionalizing effects—where warring adversaries effectively litigate legal appearances, and thus, weaponize not merely black-letter law but appearances of legality within real-time combat.<sup>42</sup> The recent growth in the “lawfare” literature provides some insight into that profound change, but that represents only a partial window to how legal performances have institutionalized a vicarious litigation space within active hostilities. In other words, real-time combat often involves simultaneous kinetic and litigious dimensions, where legal performances are strategically integral to a more complex theatre of hostilities.<sup>43</sup>

Analyzing “legal performances” both conceptually and with respect to concrete implications for contemporary warfare deepens the understanding of that profound change. Conceptually, legal performances should be understood as patterned actions directed at an organized context and the

---

38. Charles J. Dunlap, *Lawfare Today: A Perspective*, YALE J. OF INT’L AFF. 146, 146 (2008).

39. E.g., Steve Keeva, *Lawyers in the War Room*, 77 AM. B. ASS’N J. 52, 59 (1991).

40. See Vennesson & Rajkovic, *supra* note 31, at 422.

41. See Bjornstjern Baade, *Fake News and International Law*, 29 EUR. J. OF INT’L L. 1357 (2019).

42. See Zoltan Buzas, *Evading International Law: How Agents Comply with the Letter of the Law but Violate its Purpose*, 23 EUR. J. OF INT’L REL. 4 (2016).

43. See, e.g., Safia Swimelar, *Deploying Images of Enemy Bodies: US Image Warfare and Strategic Narratives*, 11 MEDIA, WAR & CONFLICT 179, 179–80 (2018).

wider public; the aim is to construct appearances of lawfulness.<sup>44</sup> The chief goal is to build social resonance, recognition, and ultimately to obtain validation from a global audience of legal experts, public opinion, and sovereign decision-makers.<sup>45</sup> To attain that outcome, such performances appeal to recognized legal interpretations and standards, so as to portray obligation, competence, and imperative compliance.<sup>46</sup> Further, what makes legal performances consequential, and thus strategically powerful, is their discursive coerciveness. For instance, a military actor produces a compelling legal performance during hostilities, e.g., the kinds illustrated earlier by the IDF or Hamas, mobilizing a powerful rhetorical frame that frustrates an adversary's ability to provide "socially sustainable rebuttals."<sup>47</sup> Therefore, competent legal performances generate an impetus where warring adversaries identify and value norms of international law as war-fighting assets, leading to their incorporation within an integrated and dynamic strategy of kinetic and narrative (counter)attack.<sup>48</sup>

However, this evolution in narrative combat continues to mutate. Most warring adversaries now fight with, or know of, the proverbial legal performances "playbook."<sup>49</sup> This new normal has diminished the first-mover advantage some actors, mostly insurgent, had enjoyed with legal performances in real-time combat.<sup>50</sup> As such, warring actors, whether state or non-state, frequently enact legal performances in active hostilities, so as to shape public interpretations of events and impact the material capacities of their rivals.<sup>51</sup> These consistent and ritualized practices have formed a litigious battlespace where actors vicariously sue and counter-sue each other across textual, broadcast, or internet media.<sup>52</sup> What results is a continuous public barrage of legal performances and interpretations, aimed at a global matrix of legal experts, activist groups (e.g., Human Rights Watch), and para-judicial entities (e.g., UN commissions and human rights rapporteurs), to build broader legal backing for a warring adversary.<sup>53</sup>

The net impact of this increasingly ritualized struggle is both rhetorical and material; it also expands the actual theatre of hostilities whenever

---

44. ADLER & POULIOT, *supra* note 22, at 7.

45. Rajkovic et al., *Legality, Interdisciplinarity and the Study of Practices*, *supra* note 19, at 19–20.

46. Vennesson & Rajkovic, *supra* note 31, at 412.

47. Jackson & Krebs, *supra* note 4, at 42.

48. See Daniel Mann, "I am Spartacus": *Individualising visual media and warfare*, 41 *MEDIA, CULTURE AND SOCIETY* 39–40 (2019).

49. David Kennedy, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* 235–37 (2004).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*



powerful states are engaged in combat. Consequently the so-called “mission accomplishment” becomes more complex because a litigious battlespace enables more actors and actants to enter into the narrative, and possibly kinetic combat.<sup>54</sup> There is a quantitative and qualitative enlargement of the audience that may appraise combat conducted.<sup>55</sup> Further, the drama of vicarious litigation readily occupies center stage, because its adversarial process attracts widespread public attention and thus influences which actor may claim superior legality to leverage an adversary in combat. The resulting pivotal non-kinetic struggle is the form of legal logistics encountered in present-day warfare: military actors must vicariously litigate in order to sustain, influence, or augment their kinetic maneuvers on the geographic terrains of confrontation.<sup>56</sup> Put starkly, a compelling YouTube video, exposing an episode of potential grave illegality in combat, could have material consequences similar to an actual ambush of armed forces during live-fire hostilities.<sup>57</sup> This example underscores how war and its interactions, as Lieutenant-General Paul Van Piper explains, became a contest decided by far more than simply kinetic confrontation:

Technology permeates every aspects of war, but the science of war cannot account for the dynamic interaction of the physical and moral elements that come into play, by design or by change, in combat. War will remain predominantly an art, infused with human will, creativity, and judgment.<sup>58</sup>

Re-envisioning the theatre of hostilities, therefore, focuses on a broader and multi-dimensional model of kinetic and narrative combat—which pays attention to the salience of legal performances and the clash of their competing productions. Defining legality in light of contemporary warfare requires deeper investigation into the wider theatre of actors, spectators, and actants that struggle over, socially and juridically, when a combatant is or is not in a perceived state of legal conformity. The outcomes of vicarious litigation are shaped by the public struggles between coalitions of actors, of differing capabilities, each intent upon realizing and validating specific characterizations

---

54. Charles Dunlap Jr., *Lawfare: A Decisive Element of 21st-Century Conflicts*, 54 JOINT FORCES QUARTERLY 34, 35 (2009).

55. See Sebastian Kaempf, *The Mediatization of War in a Transforming Global Media Landscape*, 67 AUSTL. J. OF INT’L AFF. 586, 592 (2013).

56. See Neve Gordon, *Human Rights as a Security Threat: Lawfare and the Campaign against Human Rights NGOs*, 48 LAW & SOCIETY REV. 311, 326 (2014).

57. See JAN MIESZKOWSKI, WATCHING WAR 232 (2012).

58. Paul K. Van Riper, *Information Superiority*, MARINE CORPS GAZETTE (June 1, 1997), <https://mca-marines.org/gazette/information-superiority/> [<https://perma.cc/MLM7-LTMX>].

of legality in combat over competing frames and possibilities.<sup>59</sup> Public struggles with major strategic importance because the notion of legality is used to influence public perceptions of correct military intervention and conduct. Legality, in this more dynamic context, becomes less about demonstrating blackletter compliance with IHL and more about how rival legal performances seek to impose governing appearances of illegality or lawfulness.<sup>60</sup> Ultimately, a meta-war of words and narratives becomes enacted through different types of vicarious litigation operating integrally with military operations.

## II. ORIGINS OF VICARIOUS LITIGATION: ASYMMETRIC CONFLICT AND WAR'S DISRUPTED BARGAIN

The notable rise of vicarious litigation probably falls among what some scholars have described as a crisis afflicting the core “bargain” behind IHL.<sup>61</sup> The notion of bargain refers to how prominent regimes in international law, e.g., the United Nations Charter or the World Trade Organization, are based on key actors agreeing upon essential assumptions of norms and rules that govern the applicable institutional framework.<sup>62</sup> Similarly, IHL is no different. IHL’s underlying bargain has centered pivotally on battlefield victory as the universal aim of warring parties. The resulting bargain compromised between military necessity and the protection of human life, where the right to kill gains legal sanction whenever performed for military advantage and, crucially, victory.<sup>63</sup> However, compromising human life, in recent times, has shown signs of fraying from what seems a decisively new strategic context. Nicolas Lamp explains:

The understanding of IHL as a compromise between the interests of the warring parties and humanitarian concerns is at the heart of IHL’s traditional paradigm . . . . This understanding, however, is . . . based on the ‘old’ conception of war. When the aim of military victory ceases to be the only or even primary motivation for fighting, as is often the case in the ‘new wars’, the fundamental principles of IHL change their character in terms of their factual relevance for the conduct of war (the principle of proportionality), their compatibility with the interests of the

---

59. See Pascal Vennesson, *War Under Transnational Surveillance: Framing Ambiguity and the Politics of Shame*, 40 REV. INT’L STUD. 30, 34–35 (2014).

60. See Roger Stahl, *What the Drone Saw: The Cultural Optics of the Unmanned War*, 67 AUSTL. J. INT’L AFF. 654, 659–60 (2013)

61. See Ian Clark, Sebastian Kaempf, Christian Reus-Smit & Emily Tannock, *Crisis in the Laws of War? Beyond Compliance and Effectiveness*, 24 EUR. J. INT’L REL. 319, 321 (2017).

62. *Id.* at 330.

63. See Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT’L L. 795, 796–98 (2010).

warring parties (the principle of distinction), and thus their sustainability to serve as the foundations of a legal system that relies on voluntary compliance.<sup>64</sup>

Within this dynamic, the notion of vicarious litigation strengthens because it is a parcel of a larger institutional transformation surrounding warfare. Explaining the novel strategic logic driving change, and its implication for the historical assumption and bargain behind IHL, are important to understand the new strategy. For international lawyers, this requires a foregrounding of recent military history and five decades of wars spanning from Algeria to Vietnam, Afghanistan, Iraq, and Gaza. These conflicts are often lumped under the generic label of “asymmetric warfare,”<sup>65</sup> with the term representing a loose empirical marker for much scholarship across International Law and International Relations (IR). More recently, the term “asymmetric warfare” has also been applied to so-called counter-insurgency groups or “war on terror” campaigns conducted in, for example, Afghanistan, Iraq, or Somalia.<sup>66</sup>

Yet, when one further investigates into the adjective and its origin, asymmetric warfare is the stem of a prior analytical concept—“asymmetric conflict”. In the mid-1970s political scientist Andrew Mack developed the concept of asymmetric conflict to theorize a remarkable pattern of military defeats inflicted on French and American forces in North Africa and Southeast Asia.<sup>67</sup> Correspondingly, Mack conceptualized asymmetric conflict to explain how states with overwhelmingly superior military forces lose wars in places like Algeria and Vietnam.<sup>68</sup> Put differently, militaries so capable of battlefield victories managed to consistently lose wars of vital interest because of asymmetric conflict.<sup>69</sup>

---

64. Nicolas Lamp, *Conceptions of War and Paradigms of Compliance: The ‘New War’ Challenge to International Humanitarian Law*, 16 J. CONFLICT AND SECURITY L. 225, 243 (2011).

65. E.g., Michael Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, 62 A.F. L. REV. 1, 2 (2008); Eyal Benvenisti, *The Law of Asymmetric Warfare*, in LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 931; James R. Orr, *Counterinsurgency Law: New Directions in Asymmetric Warfare*, 19 INT’L REV. RED CROSS 763, 763 (2013); see also Ryder McKeown, *Legal Asymmetries in Asymmetric War*, 41 REV. OF INT’L STUD. 117 (2015).

66. Benjamin Lockes, *Bad Guys Know What Works: Asymmetric Warfare in the Third Offset*, TEXAS NAT’L SECURITY REVIEW (June 23, 2015), <https://warontherocks.com/2015/06/bad-guys-know-what-works-asymmetric-warfare-and-the-third-offset/>.

67. See Andrew Mack, *Why Big Nations Lose Small Wars: The Politics of Asymmetric Conflict*, 27 WORLD POL. 175, 175 (1975).

68. See *id.* at 175–76 (1975).

69. See *id.*

For Mack, asymmetric conflict does not derive from examining how military superiority was misapplied, but from understanding: (1) a radical change in how certain actors (state and non-state) view the nature and purpose of military violence; and (2) how those conceptions diverged from the established paradigm of war's purpose and aim.<sup>70</sup> The ensuing gaps became exploited by allegedly inferior insurgents to produce a remarkable pattern of military outcomes.<sup>71</sup> Accordingly, Mack's concept and theory of asymmetric conflict offers an explanation resolving how these historical defeats derived less from conventional military factors than from accurately illustrated fundamental change to the core assumption that defined the modern institution of war—battlefield victory.<sup>72</sup> To understand this change's foreseeable implications on the underlying premise and bargain behind the IHL regime, looking at what Mack revealed in terms of the larger strategic and, ultimately, normative impacts of asymmetric conflict as an increasingly prevalent genre of war helps.

Mack's distinction between asymmetric and symmetric conflicts is a radically altered structure of confrontation. Profound differences in "resource power" between the superior military actor and the materially weaker insurgent actor<sup>73</sup> and the inability of insurgents to deliver a direct threat, e.g., by launching a conventional military attack or invasion against the superior military foe are the two key factors to define asymmetric conflict.<sup>74</sup> The implication is a unique strategic setting with different logics of "victory" for each of the asymmetric belligerents.<sup>75</sup> From the superior military actor's perspective, the theatre of hostilities became extended into public and domestic politics, because "a war with no visible payoff against an opponent who poses no direct threat will come under increasing criticism as . . . costs escalate."<sup>76</sup> From the insurgent actor's perspective, in contrast, military violence was the purpose, with its new, extended opportunity to negate the thrust of conventional military superiority. As Mack explained:

Lacking the technological capacity or the basic resources to destroy the external enemy's military capability, [insurgents] must [sic] of necessity aim to destroy his political capability. If the external power's "will" to continue the struggle is destroyed, then its military capability—no matter how powerful—is totally irrelevant. . . .

To paraphrase Clausewitz, politics may become the continuation of war by other means. Therefore [sic] the military struggle on the ground must be evaluated not

---

70. *See id.* at 175–77.

71. *See id.* at 177, 182, 185.

72. *See id.* at 177, 195.

73. *Id.* at 182.

74. *Id.* at 181.

75. *See id.* at 180–82, 195.

76. *Id.* at 185.

in terms of the narrow calculus of military tactics, but in terms of its political impact in the metropolis: “Battles and campaigns are amenable to analysis as rather self-contained contests of military power . . . . By contrast, the final outcome of wars depends on a much wider range of factors, many of them highly elusive—such as the war’s impact on domestic politics.”<sup>77</sup>

In sum, what Mack brought to light was a vastly different teleology that asymmetric conflicts induce. This flowed from how “winning” in the asymmetric context required a complex mix of both military and political victories. In other words, strategy became less about destroying military capability and more about undermining an adversary’s political capability and will to wage war. Mack’s quote of Henry Kissinger on the Vietnam War emphasized this shift: “[The United States] fought a military war; our opponents fought a political one. We sought physical attrition; our opponents aimed for our psychological exhaustion.”<sup>78</sup> Accordingly, the change in purpose and strategy invoked a novel methodology, which prioritized political attrition over military attrition and the imperative to inflict a “steady accumulation of ‘costs’” against the adversary.<sup>79</sup> This emphasis on political attrition required an understanding of how unconventional “victories” could be obtained, even through situations of military stalemate or defeat since the social significance of battles and hostilities went beyond their outcome as “self-contained contests of military power.”<sup>80</sup> As Mack illustrated, political over simply military impact became essential in asymmetric conflicts:

the aim of insurgents is not the destruction of the military capability of their opponents as an *end in itself*. To attempt such a strategy would be lunatic for a small Third-World power facing a major industrial power. Direct costs become of strategic importance when, and only when, they are translated into indirect costs. These are psychological and political; their objective is to amplify the “contradictions in the enemy’s camp.”<sup>81</sup>

### III. LAMENT AND INDIGNATION: NEW WARS, LAWFARE AND IHL’S NARRATIVE STRUGGLE WITH ASYMMETRIC CONFLICT

The shift from battlefield victory to infliction of political costs had wide-ranging implications, extending beyond military strategy into the broader institutional and normative practice of war, with the scale of implication later

---

77. *Id.* at 179–80.

78. *Id.* at 184.

79. *Id.* at 185.

80. *Id.* at 184–86.

81. *Id.* at 185.

reaching and entering the purview of IHL scholarship, albeit considerably after political science. Yet, what distinguishes that legal literature on asymmetric conflict are distinct postures that this Article characterizes as lament versus indignation. The former variant manifests as a sub-literature on so-called “New Wars,” and the latter variant produces a very extensive and influential scholarship on lawfare.

This section considers whether those respective postures, and their related sub-literatures, have missed a deeper institutional mutation incurred by asymmetric conflicts, which the author’s review of Mack’s work attempts to make visible. In other words, have lament and indignation across the IHL literature distracted from a richer conceptual and legal observation vis-à-vis the conduct of asymmetric hostilities? Have existing narratives deployed by international lawyers come at the price of obscuring a novel institutionalization that flows out of vicarious litigation? To address such questions, some mapping is useful on the sub-literatures, and their perceptions of asymmetric conflict and its institutional impacts. This involves sketching key assertions made across each branch of scholarship. Notably, what unites both sub-literatures are a register of crisis, yet each perception is driven by different logics of consequence and visions of remedy.

The “New Wars” scholarship (NWS), driven by eminent scholars like Antonio Cassese<sup>82</sup> and Cherif Bassiouni,<sup>83</sup> presents asymmetric conflict as a radical development posing a profound compliance dilemma.<sup>84</sup> The NWS frames the emergence of asymmetric conflict as an external challenger for IHL’s established rules, producing architectural upheaval because “almost all modern armed conflicts are asymmetric.”<sup>85</sup> Correspondingly, asymmetrical conflict is portrayed as an usurping warfare, where “asymmetry compels [insurgent actors] to resort to unconventional and unlawful means and methods of warfare as the only way to redress the military and economic imbalance they face.”<sup>86</sup> Furthermore, structural collision is the overriding characterization since the interests of insurgent actors are theorized as incompatible with how military necessity is presumed under the law of

---

82. Antonio Cassese, *Current Challenges to International Humanitarian Law* in THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT 4–19 (Andrew Clapham et al. eds., 2014).

83. M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. OF CRIM. LAW AND CRIMINOLOGY 711–810 (2008).

84. See George R. Lucas Jr., “New Rules for New Wars” *International Law and Just Wart Doctrine for Irregular War*, 43 CASE W. RES. J. OF INT’L L. 677, 702 (2011); see also Miriam Bradley, *International Humanitarian Law, Non-State Armed Groups and the International Committee of the Red Cross in Colombia*, 4 J. OF INT’L HUMANITARIAN LEGAL STUD. 108, 131 (2013).

85. CASSESE, *supra* note 82, at 8.

86. BASSIOUNI, *supra* note 83, at 714–15.

armed conflict. The outlook advanced, therefore, is one of historic predicament, fueled by a dominant view that “lacunae” in IHL leave insurgent actors outside the institutional framework, and thus incentivize others to undermine the established laws of war. As illustrated by the United Nations Secretary-General, this has cultivated institutional lament over the perceived gap between the existing institutional order and the prevalence of asymmetric conflicts: “[i]mproved compliance with international humanitarian law and human rights law will always remain a distant prospect in the absence of, and absent acceptance of the need for, systematic and consistent engagement with non-state armed groups.”<sup>87</sup>

The lawfare scholarship, by contrast, has developed an alternate narrative that emphasizes how asymmetric conflicts represent an internal, and not external, challenge for IHL’s institutional framework. Accordingly, instead of doctrinal lacunae and architectural crisis, the focus is on legally-savvy actors, e.g., insurgents, and how they are instrumentalizing—or even gaming—the established laws of war.<sup>88</sup> This flows from a systemic confluence of asymmetric conflict with legalization, which has generated novel military practices that use and abuse the IHL framework. Yet, lawfare scholarship is fragmented on the ramifications of law’s infusion into asymmetric conflicts, being divided largely between two conceptual approaches that emphasize what scholars have called reflexive<sup>89</sup> versus structural<sup>90</sup> lawfare. As a result, a more extensive and wide-ranging scholarship has developed relative to the NWS, driven by an exceptional interchange between military and civilian scholars on how to interpret law’s entry into asymmetric warfare and, correspondingly, sustain IHL’s institutional coherence vis-à-vis the specter of internal misuse.<sup>91</sup>

We need to grasp how lawfare emerged as a term, and specifically the way a conceptual cleavage structures what has become a popular lawfare

87. U.N. Secretary-General, *Rep. of Secretary-General on the protection of civilians in armed conflict*, ¶ 11 U.N. Doc. S/2010/579 (Nov. 11, 2010).

88. See CASSESE, *supra* note 82, at 1, 7, 10.

89. Wouter G. Werner, *The Curious Career of Lawfare*, 43 CASE W. RES. J. INT’L L. 61, 68 (2010).

90. Dale Stephens, *The Age of Lawfare*, 87 INT’L L. STUD. 327, 330 (2011).

91. See, e.g., Andres B. Munoz Mosquera & Sacha Dov Bachmann, *Lawfare in Hybrid Wars: The 21st Century Warfare*, 7 J. INT’L HUMANITARIAN LEGAL STUD. 63 (2016); Michael T. Palmer & J. Michael Johnson, *Undersea Lawfare: Can the U.S. Navy Fall Victim to This Asymmetric Warfare Threat?*, 69 NAVAL WAR C. REV. 135 (2016); Michael A. Newton, *Illustrating Illegitimate Lawfare*, 43 CASE W. RES. J. INT’L L. 255 (2010); William A. Schabas, *Gaza, Goldstone and Lawfare*, 43 CASE W. RES. J. INT’L L. 307 (2010).

sub-literature. Pivotaly, the term lawfare did not originate from scholarship, rather it entered academic vocabulary via the United States Air Force and, specifically, via the office of the Judge Advocate General (JAG).<sup>92</sup> The term was popularized at the turn of the millennium by Major General Charles J. Dunlap in a series of speeches and writings, where, in Dunlap's words, he advanced: "a 'bumper sticker' term easily understood by a variety of audiences to describe how law was altering warfare."<sup>93</sup> This "bumper sticker" strategy proved wildly successful because it came to dominate both societal and scholarly discourses. To illustrate the semantic impact, for instance, consider the is instructive: a search today of lawfare generates over 900,000 returns in Google,<sup>94</sup> over sixty academic articles or chapters in *Thompson Reuters Web of Science*,<sup>95</sup> a *Wikipedia* definition,<sup>96</sup> a highly prolific *Lawfare* blog,<sup>97</sup> but, remarkably, no entry in the *Oxford English Dictionary*.<sup>98</sup> As Sadat and Geng explain, lawfare is distinguished by a remarkable paradox, where its rhetorical omnipresence is equaled by a commensurate lack of etymological meaning:

Analyzing the terms reveals that 'law' is defined as 'a rule of conduct imposed by authority' while 'fare' is an Old English, now archaic, word meaning a voyage or expedition. Thus, 'herring-fare' would be an obsolete way of referring to a 'voyage to catch herrings.' In the same vein, 'warfare means going to war . . . the action of carrying on, or engaging in, war.' Using this method, 'lawfare' would indicate a voyage into law. However, the term is probably more accurately described as a play on the word 'warfare.'<sup>99</sup>

This bit of etymological history becomes relevant for more than your next game of Scrabble.<sup>100</sup> Specifically, sizable conceptual stretching was involved when lawfare jumped from "bumper sticker" to a term of art within international law scholarship. It merits asking whether international lawyers were attentive to the consequences of that jump, where, effectively, a play on words became a conceptual framework for an influential scholarship

---

92. Freya Irani, 'Lawfare', *US military discourse, and the colonial constitution of law and war*, 3 EUR. J. INT'L SECURITY 113, 113 (2017).

93. Dunlap, *Lawfare Today: A Perspective*, *supra* note 38, at 146.

94. GOOGLE, <http://www.google.com> (search "lawfare" to retrieve "About 1,460,000 results") (last visited Feb. 26, 2020).

95. WEB OF SCIENCE, [www.webofknowledge.com](http://www.webofknowledge.com) (search "lawfare" to retrieve 61 results) (last visited June 12, 2019).

96. *Lawfare*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Lawfare> (last visited Feb. 26, 2020).

97. LAWFARE BLOG – HARD NATIONAL SECURITY CHOICE, <https://www.lawfareblog.com> [<https://perma.cc/7DCU-FNAW>] (last visited Feb. 18, 2020).

98. Leila Nadya Sadat & Jing Geng, *On Legal Subterfuge and the So-Called Lawfare Debate*, 43 CASE W. RES. J. INT'L L. 153, 156 (2010).

99. *Id.*

100. William A. Schabas, *Gaza, Goldstone, and Lawfare*, 43 CASE W. RES. J. INT'L L. 307, 308 (2010).



of IHL. This becomes significant when one understands what Giovanni Sartori, another political scientist, identified as the tendency toward “conceptual straining” across the social sciences.<sup>101</sup> As Sartori explains, reliance on highly abstract terms, like lawfare, risk over-extension in relation to empirical developments because, “the net result of conceptual straining is that our gains in extensional coverage tend to be matched by losses in connotative precision. It appears that we can cover more—in travelling terms—only by saying less, and by saying less in a far less precise manner.”<sup>102</sup>

Why is “conceptual straining” relevant vis-a-vis lawfare in scholarly analyses? The implication is more apparent when one looks closer at the two dominant strands of reflexive and structural lawfare. This loops us back to the founding posture of indignation from which lawfare emerged as a concept and stimulated an eventual reflexive scholarship. The term sprung, literally, into popularity via indignation, which Major-General Dunlap openly acknowledged as the rationale behind his initial promotion of lawfare as a “bumper sticker.”<sup>103</sup> This was illustrated in Dunlap’s landmark paper presented at *Harvard’s Carr Center for Human Rights* in 2001, where lawfare was first described as a term expressing military indignation as well as a policy in pursuit of some legal scholarship:

Lawfare describes a method of warfare where law is used as a means of realizing a military objective. Though at first blush one might assume lawfare would result in less suffering in war (and sometimes does), in practice it too often produces behaviors that jeopardize the protection of the truly innocent. There are many dimensions to lawfare, but the one ever more frequently embraced by U.S. opponents is a cynical manipulation of the rule of law and the humanitarian values it represents. Rather than seeking battlefield victories, per se, challengers try to destroy the will to fight by undermining public support that is indispensable when democracies like the U.S. conduct military interventions. A principle way of bringing about that end is to make it appear that the U.S. is waging war in violation of the letter or spirit of LOAC.<sup>104</sup>

---

101. Giovanni Sartori, *Concept Misformation in Comparative Politics*, 64 THE AM. POL. SCI. REV. 1033, 1034 (1970).

102. *Id.* at 1035.

103. Dunlap, *Lawfare Today: A Perspective*, *supra* note 38, at 146.

104. Charles J. Dunlap Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts*, Paper Presented to the Humanitarian Challenges in Military Intervention Conference 4, 11 (Nov. 29, 2001) [hereinafter Dunlap, *Law and Military Interventions*].

#### IV. CONCEPTUAL STRAINING AND THE LIMITS OF LAWFARE

The scholarly traction Dunlap gained following that proverbial launch at Harvard was near immediate and well-documented, giving rise to an initial generation of lawfare work that emphasized its instrumentality and bad faith.<sup>105</sup> Notably, at the vanguard was a hyper-instrumental and pejorative type of theorizing, which, as Dunlap echoes above, mirrored the political logic of attrition as elaborated by Mack to political scientists three decades earlier.<sup>106</sup>

But within IHL, reflexive lawfare made no reference to Mack's theorizing on asymmetric conflict; instead, its theory of naked instrumentalism was developed by a separate cohort of legal academics and advocates<sup>107</sup> led by Harvard scholar and one-time Bush administration advisor, Jack Goldsmith: "various nations, NGO's, academics, international organizations, and others in the international community have been busily weaving a web of international and judicial institutions that today threatens [United States government] interests."<sup>108</sup>

Yet, the academic life of lawfare has been richer than this opening and influential generation of reflexive scholarship. This explains why Dunlap's later work migrated to a different conceptualization of structural lawfare. The scholarly purpose behind that shift is less of a focus on alleged misuses of law, and instead a focus on making "sense of the changing security environment in which militaries—primarily Western—had to operate."<sup>109</sup> Dunlap's migration reflects a turn in research to less ideological theorizing, as exemplified by David Kennedy's work on lawfare that examined both positive and negative implications flowing from IHL's "routinization" in contemporary warfare.<sup>110</sup> There was general recognition that warring state and non-state actors all use law to serve strategic purposes, which suggested the need for "managing law and war together."<sup>111</sup> As Dunlap expressed in

---

105. See, e.g., Eric Talbot Jensen, *Combatant Status: It is Time for Intermediate Levels of Recognition for Partial Compliance*, 46 VA. J. OF INT'L L. 209, 210 (2005) (discussing Dunlap's paper).

106. Dunlap, *Law and Military Interventions*, *supra* note 104, at 11.

107. See Alan Dershowitz & Elizabeth Samson, *The Chilling Effect of 'Lawfare' Litigation*, THE GUARDIAN (Feb. 9 2010), <https://www.theguardian.com/commentisfree/libertycentral/2010/feb/09/libel-reform-radical-islamic-groups> [<https://perma.cc/736N-UTPF>]; U.S. DEP'T OF DEF., NAT'L DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 5 (2005); Matthew S. Cohen & Chuck D. Freilich, *War By Other Means: the Delegitimation Campaign Against Israel*, 24 ISRAEL AFF. 1, 10–14 (2018).

108. JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 60 (2009).

109. Werner, *supra* note 89, at 66.

110. See DAVID KENNEDY, OF WAR AND LAW 41 (2006).

111. See *id.* at 125.

retrospect, lawfare had evolved from a vocabulary of normative disapproval to a managerial and critical discourse on the implications of war’s legalization:

Although I’ve tinkered with the definition over the years, I now define “lawfare” as the strategy of using—and misusing—law as a substitute for traditional military means to achieve an operational objective. As such, I view law in this context much the same as a weapon. It is a means that can be used for good and bad purposes . . . . Today’s international commerce requires an extensive legal architecture to function, and this fact operates to raise the “legal consciousness”, so to speak, of the entire world community. As we have seen before, such trends in global affairs tend to spill over into warfare.<sup>112</sup>

However, several questions arise. Did Dunlap overstate lawfare’s actual renovation? To what extent had a narrative makeover mitigated the legacy of indignation, and retooled lawfare’s analysis on the “extensive legal architecture” behind contemporary war? These questions push Sartori’s earlier quote back into focus on the problem of abstraction and conceptual strain in the social sciences, with lawfare being a case in point. The one-time bumper sticker had travelled far within legal and especially IHL scholarship and flowed from semantics of “saying less in a far less precise manner.”<sup>113</sup> The notable gain of lawfare convened a fragmented scholarship, involving both hyper-instrumental and critical clusters of literature. Yet, this left a sizable portion of IHL’s scholarship on asymmetric conflict that is analytically vulnerable because institutional analysis was boxed within a play on words.<sup>114</sup> With scholars hooked on the semantics of lawfare, nearly every development regarding law and asymmetric conflict could be reduced into some variant of lawfare. This overuse and strain effectively stunted vocabulary and analytical insights into evolving institutional dynamics between law and asymmetric conflict. As Dunlap illustrated in his preceding quote, lawfare was expressed as law being a “weapon” but later tied to a wider legal “architecture”<sup>115</sup> without theorizing the relationship and simultaneity between those diverse meanings.

Consequently, novel terms like legal performances and vicarious litigation represent important means of conceptual leverage useful for confronting lawfare’s semantic success via a mirror of conceptual poverty. This requires piecing together what both Mack and Dunlap have revealed (to different disciplinary audiences) on the mutations grafted by asymmetric conflict

---

112. Dunlap, *Lawfare Today: A Perspective*, *supra* note 38, at 146.

113. See Sartori, *supra* note 101, at 1035.

114. Sadat & Geng, *supra* note 99, at 156.

115. Dunlap, *Lawfare Today: A Perspective*, *supra* note 38, at 146–47.

onto the established laws of wars. In this light, both NWS and lawfare literature missed a key observation due to their dominant postures of lament and indignation. Asymmetric conflicts have produced institutional mutations to the existing framework of IHL, which are neither exclusively external or internal to the IHL system of rules.<sup>116</sup> The strategic emphasis on political attrition over battlefield victory radically expanded possibilities of unconventional combat victories, which have made legal appearances—as opposed to military outcomes—a major dimension in often globalized theatres of armed hostilities.

The problem is that the theorizing of lawfare lacks conceptual depth to translate the extent of institutional change. Foremost, there are fundamental gaps vis-à-vis the kinds of power lawfare articulates and theorizes, and specifically, what value-added the concept provides to understand the dynamics of institutional power in asymmetric conflicts. The significance of that gap becomes clearer with Barnett and Duvall’s explanation of compulsory versus institutional power:

. . . [I]nstitutional power is an actors’ control of others in indirect ways. Specifically, the conceptual focus here is on the formal and informal institutions that mediate between A and B, as A, working through the rules and procedures that define those institutions guides, steers, and constrains the actions (and nonactions) and conditions of existence of others.

Thus compulsory and institutional power differ in the following ways . . . . [C]ompulsory power typically rests on the resources that are deployed by A to exercise power directly over B, A cannot necessarily be said to “possess” the institution that constrains and shapes B . . . . [R]are is the institution that is completely dominated by one actor.<sup>117</sup>

This definition highlights the void incurred by lawfare’s attempt to strain around the concept of institutional power. We can even see that straining at work when lawfare is, to use Dunlap’s term, *tinkered* into “managing” law’s interventions in asymmetric conflicts,<sup>118</sup> or investigating IHL’s “routinization” in contemporary warfare. A deeper look at institutional power points to how lawfare’s semantics have distracted from theorizing law’s use relative to different forms of power in asymmetric conflicts and warfare. The question that follows, conceptually, is how to move past lawfare’s notional grip?

There is a signpost, this Article argues, standing already within Dunlap’s revised definition of lawfare: “the strategy of using—or misusing—law as a

---

116. See Section 3: Lament and Indignation: New Wars, Lawfare and IHL’s narrative struggle with Asymmetric Conflict, *supra* at 15.

117. Michael Barnett & Raymond Duvall, *Power in International Politics*, 59 INT’L ORG. 39, 51 (2005).

118. Dunlap, *Lawfare Today: A Perspective*, *supra* note 38, at 146.

substitute for traditional military means to achieve an operational objective.”<sup>119</sup> Few have examined Dunlap’s definition to evaluate how he theorizes power, and still fewer have placed his definition relative to Barnett and Duvall’s distinction between compulsory and institutional power. In doing so, what sticks out is the way Dunlap’s definition relies, explicitly, on a compulsory rather than an institutional theory of power.<sup>120</sup> This is curious. First, law and IHL have an inherent institutional quality. Second, lawfare originated from indignation over the (alleged) institutional misuse of law to further extra-legal objectives.<sup>121</sup> Third, Dunlap’s definition operates presumably in a relational context, where warring adversaries use or misuse law interactively against each other to achieve a military objective.<sup>122</sup> Thus, translated into the language of Barnett and Duvall above, each adversary attempts to leverage institutional power, via the rules and procedures of IHL, in order to influence “the actions (and nonactions)” of their opponents.<sup>123</sup>

#### V. CONCLUSION: VICARIOUS LITIGATION AS A NOVEL INSTITUTIONALIZATION AND BATTLESPACE

This is where legal performances and vicarious litigation re-enter the picture as better conceptual means for accessing that contest over law’s institutional power in warfare. Warring parties each seek to mobilize, in different ways, the institutional rules of IHL. However, to call that simply “lawfare” and end the analysis there would let too much of the institutional struggle escape from view. In particular, we lose sight of the major institutional, or quasi-institutional, contest at play: state and non-actors enact legal performances to construct compelling appearances of legality, or illegality, within the theatre of hostilities. The big challenge, as Barnett and Duvall underline, is that no state or non-state actor physically, or normatively, possesses an international institution, like IHL, as its own. Rather, there is only a “rare” possibility of dominating the institution,<sup>124</sup> by knowing how to direct an institutional apparatus versus an adversary with like intentions and skills.

---

119. Dunlap, *Does Lawfare Need an Apologia?*, *supra* note 33, at 122.

120. Barnett & Duvall, *supra* note 117, at 51–52.

121. See Dunlap, *Law and Military Interventions*, *supra* note 104, at 4.

122. Dunlap, *Does Lawfare Need an Apologia?*, *supra* note 33, at 122.

123. Barnett & Duvall, *supra* note 117, at 51.

124. *Id.*

Accordingly, the crowning metaphor behind lawfare's scholarship, i.e. law as a physical "weapon", becomes misleading, because it ignores how IHL operates as an institutional, rather than simply compulsory, means of power in asymmetric conflicts. This helps explain the notable rise of legal performances because warring actors seek to mobilize the institutional authority of IHL by broadcasting vicarious legal claims and counterclaims. Each adversary seeks to discursively and legally master IHL as an institutional and indirect means of waging (narrative) combat. And the nature of that struggle intensifies as more actors see legal performances as a useful means of institutional power, political attrition and, crucially, indirect control.

The end result for today's theatre of hostilities is that vicarious litigation has become an integral battlespace and a novel institutional mutation of IHL's framework, that works influentially between kinetic and narrative combat. Yet, there is a darker implication to this distinctive outgrowth of legalization. Vicarious litigation can readily escalate into a vortex of militarized legalism with no actual court for resolution, which, while proliferating references to legality, paradoxically disables the institutional coherence, authority and power of IHL in real-time combat. The legalization of war along such an institutional trajectory translates into a different kind of normative conquest, which deviates from what international lawyers likely presumed with law's active integration into present-day warfare: legal performances and vicarious litigation as institutional extensions of combat by other means.