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Legal asymmetries in asymmetric war

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Abstract. Standard conceptions of the relationship between international law and war in International Relations (IR) mostly oscillate between the sceptical view that law is mostly irrelevant in times of conflict, and the optimistic view that law is a meaningful moral standard that effectively constrains violence. Modern asymmetric conflicts between liberal democratic states and non-state actors such as the Taliban, *al-Qaeda*, or *Hamas* challenge these conceptions, however, as they are at once increasingly legal and extremely violent. Drawing inspiration from IR and International Law (IL) scholarship from multiple theoretical paradigms, this article examines the legal asymmetries before, during, and after asymmetric conflict. Noting that law is at once a useful tool and a strong normative force, it argues that a good understanding of legal asymmetries can supplement existing theories of asymmetric war, continue the dissolution of false dichotomies and open up interesting avenues of research in IR, and help both scholars and policymakers understand how international law influences modern asymmetric conflict against non-state actors.

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In the study and practice of international relations, war has often been considered a law-free zone. From Cicero's maxim *inter arma enim silent leges*[1] to claims from International Relations (IR)[2] realists that international rules 'matter only at the margins',[3] there has been a strong, enduring scepticism of the law's ability to constrain wartime violence. A competing tradition of scholars and activists has been far more optimistic about the power of law to mitigate the evils of armed conflict.[4] With some key exceptions,[5] most scholarship within IR has tended to gravitate strongly towards one of these two views. Yet neither adequately accounts for the increasingly

* The views expressed in this article are those of the author alone and do not represent the views of the Government of Canada or the Department of National Defence. Many thanks to Mike and Nadia Hall, Rosalind Irving, Tom McKeown, and Palma Paciocco for their comments on various versions of this article. A special thanks to Rebecca Hall for her insightful comments, patient editing, and support during the research and writing process.

[1] Roughly translated as 'In times of war, the law is silent.'

[2] In this article, I will use the acronyms of IR and IL to describe the disciplines of International Relations and International Law, and the lowercase of international relations and international law to describe the actual phenomena and practice.

[3] John Mearsheimer, 'The False Promise of International Institutions', *International Security*, 19:3 (1994/5), pp. 5–49, 7; see more generally Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (New York: Knopf, 1960).

[4] See, for example, Christian Reus-Smit (ed.), *The Politics of International Law* (Cambridge: Cambridge University Press, 2004); and Adam Bower, Norm Development without the Great Powers: Assessing the Antipersonnel Mine Ban Treaty and the Rome Statute of the International Criminal Court (University of British Columbia, 2012).

[5] See, for example, Karl Deutsch and Stanley Hoffman, *The Relevance of International Law: Essays in Honour of Leo Gross* (Garden City, NY: Schenkman Publishing Inc, 1971).

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legalistic nature of modern asymmetric warfare between liberal democratic states, on the one hand, and non-state actors such as *al-Qaeda* and its affiliates, the Taliban, Iraqi insurgents, *Hezbollah* and *Hamas*, on the other. In such conflicts, the incorporation of legal considerations into military strategy, and the acrimony of accompanying legal debates, suggest that '(w)ar has become a modern legal institution'.[6] This incongruity between the most common IR perceptions of the law and the reality of twenty-first-century combat raises an important question: what is the true nature of the relationship between international law and modern asymmetric war between states and non state-actors?

This article seeks to answer this question and contribute to a better understanding of the peculiar merger of law and violence that characterises asymmetric conflicts[7] such as the US global campaign against terrorism, NATO's war in Afghanistan, the Second Gulf War, and Israel's wars in Lebanon (2006) and Gaza (2008–9). I open with a brief discussion of some influential theories of asymmetric war and law in IR, noting that despite their many virtues, these theories largely overlook the important role of international law in conflict and therefore are useful but incomplete explanations of modern asymmetric war. Although other IR scholarship does more explicitly examine the role of law in war, it too is of limited use for explaining the question at hand due to its general tendency to focus on interstate rather than asymmetric conflicts, specific legal issues in isolation, state treaty compliance rather than broader legal dynamics, or law as mostly a morally progressive force (that is, one that constrains violence). Notably, no IR scholarship to date clearly elucidates the various legal asymmetries that both constrain and enable the use of force and interact with other asymmetries to shape outcomes in conflicts between states and non-state actors. In an effort to address this gap in the literature, I briefly examine recent works in International Law (IL), which thoughtfully explore the interaction between law and violence in such asymmetric conflicts. Such work complements IR scholarship by exploring the myriad ways that law matters in modern asymmetric war and stressing that law is simultaneously both a useful tool for the powerful and a strong normative constraint. Drawing inspiration from IR and IL scholarship from multiple theoretical paradigms, I then examine the role of law before, during, and after asymmetric conflict. Rather than presenting a specific case study or focusing on one particular aspect of the law, this section takes a broader view to show the various particularly legal asymmetries that profoundly influence asymmetric warfare. Finally, I examine the scholarly and practical implications of this article, noting that a good understanding of legal asymmetries can supplement existing theories of asymmetric war, continue the dissolution of false dichotomies, and open up interesting avenues

[6] David Kennedy, *Of War and Law* (Princeton and Oxford: Princeton University Press, 2006), p. 10.

[7] While much of the scholarship that informs it deals with conflict between states of all regime types, this article's focus is strictly on conflicts between liberal democracies and non-state actors for three main reasons: first, the legal asymmetries I seek to explain are more acute given that international law is created only by states; second, liberal democracies are more likely than other states to wage war legally and be more susceptible to accusations of law-breaking; third, this article specifically seeks to contribute to ongoing policy debates regarding how liberal democracies should fight against non-state actors, and is therefore geared toward these countries and their citizens. Accordingly, in all sections but the first (IR views of international law and asymmetric war) I use the term asymmetric war to apply to wars between liberal democracies and non-state actors. That being said, some of this article's findings may also apply both to asymmetric interstate conflicts and to asymmetric conflicts between autocracies and non-state actors.

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of research in IR, and help both scholars and policymakers understand how international law influences modern asymmetric conflict against non-state actors.

IR views of international law and asymmetric war

Generally, approaches in IR seek to understand and explain asymmetric war by focusing on three key asymmetries: power, resolve, and strategies.[8] I will briefly discuss each of these asymmetries in turn to determine how they help to explain modern war and where they could be supplemented usefully by a legal approach. While the last two necessarily flow from the first, power is, of course, not wholly determinative of war outcomes. What matters more is how effectively resources are translated into war-fighting capability.[9] Indeed, the additional focus on asymmetries in resolve and strategies is necessary precisely because of the queer fact that the strongest party often loses asymmetric wars.[10]

Obviously, a focus on power is the necessary first step to any understanding of asymmetric war given that power asymmetry is largely what makes an asymmetric war. Without it, the war resembles traditional war among peers or near-peers. I need not dwell on the importance that the discipline of IR places on material capabilities and state power relative to other states.[11] It is a given, therefore, that states which seek to maximise power *vis-à-vis* other states will *usually* have superior capabilities to those of non-state actors. This discrepancy in military capabilities brings to mind the well-known image of asymmetric war: a rag-tag bunch of insurgents launching surprise attacks against their better armed state foes before disappearing amongst the civilian population. However, at least since Vietnam and Algeria, there has been an understanding that a huge advantage in material power does not necessarily translate into victory in war. To explain this surprising disconnect between material inputs and war outcomes, scholars have usefully noted that power asymmetries can cause asymmetries in other areas which relate to power in interesting and unexpected ways.

Key amongst these is the question of resolve, or will. In a classic work on why big nations lose small wars, Andrew Mack notes that, far from guaranteeing victory, material power may hinder it because it leads to marked differences in the resolve of the respective combatants. The reasons are simple and compelling: the stronger party can afford to be only half committed because it does not face an existential threat;[12] great strength brings greater expectations for rapid victory which, when not met, lead to frustration amongst the population of the stronger power; populations tend to be less tolerant of their troops' moral infractions in wars with limited aims against weaker opponents;[13] and such internal divisions erode the political capability of the

[8] See Andrew Mack, 'Why Big Nations Lose Small Wars: The Politics of Asymmetric Conflict', *World Politics*, 27:2 (1975), pp. 175–200; Ivan Arreguin-Toft, 'How the Weak Win Wars: A Theory of Asymmetric Conflict', *International Security*, 26:1 (2001), pp. 93–128.

[9] Stephen Biddle, *Military Power: Explaining Victory and Defeat in Modern Battle* (Princeton: Princeton University Press, 2004).

[10] See fn. 8 above.

[11] Kenneth Waltz, *Theory of International Politics* (Reading, MA: Addison-Wesley, 1979).

[12] Patricia L. Sullivan, 'War Aims and War Outcomes: Why Powerful States Lose Limited Wars', *Journal of Conflict Resolution*, 51:3 (2007), pp. 496–524.

[13] See also Thomas G. Mahnken, 'The American Way of War in the Twenty-First Century', in Efraim Inbar (ed.), *Democracies and Small Wars* (Abingdon, Oxfordshire: Taylor and Francis Ltd, 2003), pp. 71–82.

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stronger power to continue fighting. The weaker party usually faces none of these problems; thus asymmetries in power that favour the strong can result in asymmetries of resolve that favour the weak.

By adding the concept of resolve, or will, to that of capability, Mack enriches IR's analytical framework to help unravel the most head-scratching of puzzles: states often lose when their enemy has not, and *cannot*, defeat them militarily. This had already been well accepted in the policy world by such realist luminaries as Henry Kissinger who pointed out that 'the guerrilla wins if he does not lose'.[14] However, given that much of IR scholarship focuses mostly on material capabilities as the determinative aspect of state power, this is no small point. More interestingly, by splitting asymmetric war into two aspects – the military war in theatre and the political war at home – Mack's approach draws attention to a fact that remains extremely important in explaining the dynamics and outcomes of asymmetric war; namely, superiority in the military sphere, and the expectations or frustrations it engenders at home, can lead to domestic divisions that can sap political resolve and aid the enemy.[15] These divisions become a strategic enabler for the weaker party, which accordingly strives to 'amplify the contradictions in the enemy's camp'.[16] These are essential points that encourage us to broaden our view of the waging of war to include the concurrent debates about war. Indeed, the split between theatre of war and home front suggests 'in certain types of conflict, conventional military superiority is not merely useless, but may actually be *counter-productive*'.[17] This is a startling claim for a realist outlook that emphasises power – and particularly military power – above all else.

However, strong countries do not always lack resolve, especially when the war effort is tied to their sense of identity.[18] Further, while nothing saps national morale like a seemingly endless war, quick routs can be immensely popular. Therefore, the length of the war is a key factor in determining asymmetric war outcomes. In order to successfully exploit its stronger enemy's political vulnerability, the weaker party must play for time and avoid defeat at all costs. To do this, the strategy it adopts *vis-à-vis* its stronger foe becomes essential. In an illuminating paper on how the weak win wars, Ivan Arreguin-Toft makes just this point in describing how a weak actor's strategy can make a strong actor's power irrelevant and provide the time needed for the dynamics mentioned above to unfold.[19] For Arreguin-Toft, 'strategic interaction', particularly asymmetries in strategy, is the key factor in understanding asymmetric war. He usefully divides strong and weak actor strategies into a neat typology.[20] The strong actor (attacker) has two strategies: 'direct attack', where they attack their adversary's armed capacity; and 'barbarism', where they attack their adversary's will or capacity through systematic violations of the laws of war such as the use of prohibited weapons, attacks against non-combatants, the establishment of concentration camps, or reprisals. The weak actor (defender) also has two strategies:

[14] Henry Kissinger, 'The Vietnam Negotiations', *Foreign Affairs*, 47:2 (1969), pp. 211–34, 214.
[15] See also Avi Kober, 'Western Democracies in Low Intensity Conflict: Some Postmodern Aspects', in *Democracies and Small Wars*, pp. 2–18.
[16] Mack, 'Why Big Nations Lose Small Wars', p. 185.
[17] Ibid., p. 179; Jason Lyall and Isaiah Wilson III, 'Rage against the Machines: Explaining Outcomes in Counterinsurgency Wars', *International Organization*, 63:1 (2009), pp. 67–106.
[18] Arreguin-Toft, 'How the Weak Win Wars'.
[19] Ibid.
[20] Ibid., p. 101.

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'direct defense', which target the opponent's military; and 'guerrilla warfare', which aims to destroy the will of the attacker. The 'direct strategies' (direct attack and direct defense) are self-explanatory. With regard to the 'indirect strategies', guerrilla warfare can best be explained through Mao's famous dictum: 'When guerrillas engage a stronger enemy, they withdraw when he advances; harass him when he stops; strike him when he is weary; pursue him when he withdraws.'[21] And if guerrilla warfare requires that guerrillas move amongst the population like a fish in the sea, barbarism often requires mass killing and the draining of the sea.[22]

Noting that 'every strategy has an ideal counter strategy', Arreguin-Toft claims that 'strong actors are more likely to win same-approach interactions and lose opposite-approach interactions'.[23] For a typical asymmetric conflict, this implies that a guerrilla strategy will be tremendously effective in playing for time against a restrained (that is, non-barbarous) traditional foe and allowing internal divisions and political vulnerabilities to take root. This will be especially effective against a state that underestimates the cost of fulfilling its war aims.[24] In other words, asymmetries in strategy, as well as asymmetries in capabilities, can lead to asymmetries in resolve. Arreguin-Toft's theory, then, recognises the importance of different types of asymmetries and neatly links them in a convincing and useful manner. Similarly, Jason Lyall and Isaiah Wilson III note that the increased mechanisation of modern militaries (that is, power asymmetry) actually negatively affects a state's war chances because it diminishes its ability to collect information and exercise force with discrimination.[25]

As helpful as these theories are, they also highlight the fact that one type of asymmetry, although hinted at, is glaringly absent: asymmetries in the law. Indeed, without careful consideration of the law, the theories above seem out of step with the current military reality where military lawyers play a key operational role, legally controversial decisions are made at the highest levels, and both criticism and support of war efforts are offered in distinctly legal terms. Excluding the law from theories of asymmetric war therefore begs certain questions, most notably: Why do overwhelming power disparities not translate into victory more often? What gets in the way? Why are citizens so critical of the moral infractions of their own soldiers, especially when committed against ruthless, foreign foes? Why are moral arguments so effective in creating divisions and weakening resolve on the home front? If 'barbarism' (that is, breaking the laws of war) is an effective strategy against guerrilla warfare, why do states not employ it systematically to avoid defeat? Why and how do non-state actors use the law to limit the power of their state foes? How do states use the law in response?

While these theories of asymmetric conflict somewhat underemphasise the role of law in conflict, other IR scholarship has explored the potential impact of the laws of war on state behaviour as well as state compliance with international treaties more generally.[26] Such work has focused on the efficacy of specific legal rules during

[21] Ibid., p. 104.
[22] Benjamin Valentino, Paul Huth, and Dylan Balch-Lindsay, 'Draining the Sea: Mass Killing and Guerrilla Warfare', *International Organization*, 58:2 (2004), pp. 375–407.
[23] Arreguin-Toft , 'How the Weak Win Wars', pp. 104, 110.
[24] Sullivan, 'War Aims and War Outcomes'.
[25] Lyall and Wilson III, 'Rage Against the Machines'.
[26] See Jana Von Stein, 'International Law: Understanding Compliance and Enforcement', in Robert Denemark (ed.), *International Studies Compendium* (Oxford: Wiley-Blackwell, 2009); Beth A. Simmons, 'Treaty Compliance and Violation', *Annual Review of Political Science*, 13:1 (2010), pp. 272–96.

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wartime such as those regarding the protection of civilians,[27] mass killing,[28] torture,[29] or the treatment of prisoners.[30] Other important IR scholarship has explored how states strategically break or change the law to further their interests [31] and use the law to exert influence over other states.[32] Further scholarship treats law mostly as a moral phenomenon, focusing on how law constrains state action even in times of war.[33] In such a view, law is an extremely powerful and mostly progressive moral discourse,[34] largely because of the popular image that international law is 'distinguishable from, and superior to, politics',[35] as well as being compulsory, neutral, and objective.[36] In short, IR scholars have done an exemplary job of exploring the non-legal aspects of asymmetric war, and exploring how law interacts with, bolsters, and restrains the use of state power in various ways, especially in interstate conflicts. To date, however, there have been no broad overviews of how law structures the dynamic of asymmetric warfare and influences war outcomes in IR. This article seeks to help fill this gap.

IL views of international law in asymmetric war

In exploring the legal aspect of modern war, it is necessary to take an interdisciplinary approach since, notwithstanding the quality of the IR work above, IL scholarship has gone further in understanding the relationship between law and asymmetric war against non-state actors. At its best, such work marries a rich understanding of the importance of law with an unblinking acceptance of the reality of power. Not surprisingly, military lawers, who operate at the nexus of law and war have written influential work in this vein.[37] For example, retired JAG General Charles Dunlap Jr has

[27] Benjamin Valentino, Paul Huth, and Sarah Croco, 'Covenants without the Sword: International Law and the Protection of Civilians in Times of War', *World Politics*, 58:3 (2006), pp. 339–77; Colin H. Kahl, 'In the Crossfire or the Crosshairs? Norms, Civilian Casualties, and U.S. Conduct in Iraq', *International Security*, 32:1 (2007), pp. 7–46.

[28] Valentino, Huth, and Balch-Lindsay, 'Draining the Sea'.

[29] Ryder McKeown, 'Norm Regress: US Revisionism and the Slow Death of the Torture Norm', *International Relations*, 23:1 (2009), pp. 5–25.

[30] James D. Morrow, 'When do States Follow the Laws of War?', *American Journal of Political Science*, 101:1 (2007), pp. 559–72; Geoffrey P. R. Wallace, 'Welcome Guests, or Inescapable Victims?: The Causes of Prisoner Abuse in War', *Journal of Conflict Resolution*, 56:2 (2012), pp. 955–81.

[31] Theo Farrell, 'World Culture and Military Power', *Security Studies*, 14:3 (2005), pp. 448–88; Ian Hurd, 'Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World', Ethics and International Affairs, 25:3 (2011), pp. 293–313.

[32] Shirley V. Scott, 'Is there Room for International Law in *Realpolitik*?: Accounting for the US "Attitude" Towards International Law', *Review of International Studies*, 30:1 (2004), pp. 71–88.

[33] Richard Price, 'The Chemical Weapons Taboo', *International Organization*, 49:1 (1995), pp. 73–103.

[34] Nicole Deitelhoff, 'The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case', *International Organization*, 63:1 (2009), pp. 33–65.

[35] Shirley V. Scott, 'Identifying the Source and Nature of a State's Political Obligation Towards International Law', *Journal of International Law and International Relations*, 1:1–2 (2005), pp. 49–60.

[36] Shirley V. Scott and Olivia Ambler, 'Does Legality Really Matter? Accounting for the Decline in US Foreign Policy Legitimacy Following the 2003 Invasion of Iraq', *European Journal of International Relations*, 13:1 (2007), pp. 67–87.

[37] Charles J. Dunlap Jr, 'Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts', *Carr Centre for Human Rights, Working Paper* (John F. Kennedy School Of Gov't, Harvard University, 2001), available at: {http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf} accessed 4 April 2012; Charles J. Dunlap Jr, 'Lawfare Today: A Perspective', *Yale Journal of International Affairs*, 3:1 (2008), pp. 146–53; Charles J. Dunlap Jr, 'Does Lawfare Need an Apologia?', *Case Western Reserve Journal of International Law*, 43:1–2 (2011), pp. 21–143; Charles J. Dunlap Jr, 'Lawfare Today … and Tomorrow', *Case Western Reserve Journal of International Law*, 43:1–2 (2011), pp. 315–25; Kenneth Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict', *The American Journal of International Law*, 98:1 (2004), pp. 1–34. Both authors are retired military lawyers, from the US Air Force and the Canadian Forces respectively.

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coined the term 'lawfare' to describe the use of law as a weapon of war,[38] a definition that has expanded to mean the 'strategy of using – or misusing – law as a substitute for traditional military means to achieve an operational objective'.[39] While lawfare has often been used to describe the threat posed to Israel and the US from the unscrupulous abuse of the law by terrorists and their sympathisers, it can just as effectively be used to describe the instrumental use of the law in war by any actor, including states.[40]

The ongoing discussion of lawfare runs parallel to other fascinating work in IL scholarship that explores the crumbling boundary between law and asymmetric war. For example, David Kennedy explores how law simultaneously serves the interest of both violence and morality: 'in today's asymmetric wars … law can be weaponized quite differently by our own technologically sophisticated forces and by the dispersed groups of terrorists and insurgents against whom they have found themselves in combat. At the same time, the legalization of warfare offers new opportunities for those who seek to restrict the use of violence and military force. Millions of people marched against the Iraq war buoyed by the claim that the war was an illegal violation of the UN charter.'[41] Law is both a tool to be wielded and a medium for political and moral protest.

Dunlap Jr and Kennedy share a common willingness to explore the complex ways by which international law shapes asymmetric conflict, interacts on modern battlefields, and defines the heated debates that surround the use of force against non-state actors. Such accounts not only offer a broader array of insights but also appear to align more closely with the current military reality where lawyers play a key operational role, legally controversial decisions are made at the highest levels, and both criticism and support of war efforts are offered in distinctly legal terms. What such work suggests is that law not only governs conflict, but also that legal asymmetries are an integral component of the broader asymmetries that determine the nature, duration, and outcome of war between state and non-state actors. The key to this body of work is the idea that the law is at once a tool for manipulation and a powerful set of normative rules. An often unstated but essential background assumption is that law would not be an effective tool if it were not accepted as a set of rules with particular legitimacy and normative force. Building on the above IR and IL literature on asymmetric conflict, I turn now to exploring the roles of international law in asymmetric war, focusing on the legal asymmetries before, during, and after conflict.

Legal asymmetries before and during conflict

The ability to create the law

Although there is a powerful perception that international law is detached, impartial, and objective, certain important asymmetries are actually built into the process and content of the law itself. First and foremost, while non-state actors are only legal subjects, states are both creators and subjects of international law, a fact that has

[38] Dunlap Jr, 'Law and Military Interventions'.
[39] Dunlap Jr , 'Lawfare Today: A Perspective'.
[40] Dunlap Jr , 'Lawfare Today and Tomorrow', p. 315.
[41] Kennedy, *Of War and Law*, p. 10.

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profound implications for how the laws of armed conflict (LOAC) are structured. States create and define international law both through treaties and custom (that is, state actions with the accompanying belief that they stem from a sense of legal obligation).[42] In comparison, non-state actors, who cannot abstain from signing a treaty or claim to be persistent objectors to emerging customary law, are subject to laws they did not make. Because states have the power to determine who is outside the law and which rules apply in given situations,[43] it is not surprising that the laws of war *usually*[44] favour states against non-state actors.

Asymmetric rights and obligations

In traditional war between states, there is a legal symmetry given that both sides have the right to fight; it is *how* they fight that is the object of legal censure.[45] At its core, this protects the legal right of state soldiers to kill in the pursuit of state objectives, and legitimises and monopolises state violence.[46] As well as the right to avoid prosecution for killing, the status of 'soldier' entitles one to certain protections as a Prisoner of War (POW), although it also exposes one to the threat of being killed at any time during war by virtue of one's status alone.[47] This symmetry of rights does not naturally apply to asymmetric conflicts where only states decide which actors have the right to fight and non-state actors are often, but not always,[48] declared to be outside the realm of legal privilege.[49] Perhaps the most famous example of this is the Bush Administration simultaneously claiming the right to target *al-Qaeda* fighters as *combatants* in a *War* on Terror even while claiming that the Geneva Conventions did not apply to *al-Qaeda* given their status as *unlawful* combatants. While the Administration was roundly pilloried for these arguments, this was not necessarily a clear case of breaking international law; rather the Administration exploited a

[42] Kenneth W. Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance', *International Organization*, 54:3 (2000), pp. 421–56; Theodor Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law', *The American Journal of International Law*, 90:2 (1996), pp. 238–49.

[43] Anthony J. Colangelo, 'Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law', *Harvard International Law Journal*, 4:1 (2007), pp. 121–201.

[44] This is not to say that the law always benefits states. For example, during the politically-charged negotiations on Additional Protocol I to the Geneva Conventions, a group of states successfully extended the Protocol to include 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes', a move opposed by the US. Thanks to an anonymous reviewer for this point.

[45] David Krezmer, 'Rethinking the Application of IHL in Non-International Armed Conflicts', *Israel Law Review*, 42:8 (2009), pp. 8–45, 12.

[46] Thomas W. Smith, 'The New Law of War: Legitimizing High-tech and Infrastructural Violence', *International Studies Quarterly*, 46:3 (2002), pp. 355–74.

[47] Sean Watts, 'Reciprocity and the Law of War', *Harvard International Law Journal*, 50:2 (2009), pp. 365–434; Francoise J. Hampson, 'Direct Participation in Hostilities and Interoperability of the Law of Armed Conflict and Human Rights Law', in Raul A. ('Pete') Pedrozo and Daria P. Wollschlaeger (eds), *International Law and the Changing Character of War* (Newport, RI: Naval War College, 2011), pp. 197–212, 198.

[48] For example, Article 1(1) of Additional Protocol II notes that the Geneva Conventions apply to conflicts between states and 'organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'.

[49] Milena Sterio, 'The Gaza Strip: Israel, Its Foreign Policy, and the Goldstone Report', *Case Western Reserve Journal of International Law*, 43:1–2 (2011), pp. 229–54, 242.

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seam in a body of laws that was never created for conflict with non-state actors so as to capitalise on an important legal asymmetry in its war against transnational terrorism.[50]

As well has having rights withheld, non-state actors can be exposed to the full force of legal sanction due to their non-state status. While the LOAC between states ostensibly respects a separation between *jus ad bellum* and *jus in bello* (that is, a soldier cannot be punished for the unjustness of his cause but only for the unlawfulness of his actions), this firm distinction may not hold in the case of conflict with non-state actors.[51] For example, following a 2002 firefight in Afghanistan, a foreign non-state combatant was charged with murder for throwing a grenade that killed an American soldier.[52] In comparison, the US did not charge any Iraqi government soldiers with murder for killing Americans during combat. This discrepancy shows that even following the LOAC does not necessarily make non-state violence legal.

As well as symmetrical rights, traditional war is also characterised by symmetrical obligations. This traditional symmetry does not exist in wars against non-state actors.[53] For example, while all states have obligations under International Human Rights Law (IHRL) – even during times of armed conflict – non-state actors traditionally do not, given that human rights were conceived strictly as obligations owed to humans by states.[54] While obligations under the LOAC are at least theoretically symmetrical, even for non-state actors,[55] at least five factors interfere with this symmetry in practice.

First, in situations of immense power asymmetry, especially when non-state actors can credibly claim to be fighting 'occupiers' or 'imperialists', the international public seems receptive to arguments that the weaker party cannot afford to play by the same rules.[56] In the words of Michael Schmitt, 'as in any ''unfair fight'', there is a propensity to root for the underdog'.[57] While certainly not condoning terrorist actions, even champions of international law such as the International Committee of the Red Cross (ICRC) can contribute to this dynamic. For instance, in its 2009 Interpretive Guidance on the Notion of Direct Participation in Hostilities, the ICRC recommended that non-state combatants must be serving a 'continuous combat function' in order to be lawfully targeted; that is, they must not be targeted simply by virtue of their status as a member of an armed group.[58] The fact that this would give non-

[50] John B. Bellinger III and Vital M. Padmanabhan, 'Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law', *The American Journal of International Law*, 105:2 (2011), pp. 201–43, esp. 202–4

[51] Jasmine Moussa, 'Can Jus ad Bellum Override Jus in Bello? Reaffirming the Separation of the Two Bodies of Law', *International Review of the Red Cross*, 90:872 (2008), pp. 963–90, esp. 987–9.

[52] Michelle Shephard, 'Khadr Charged with Murder', *Toronto Star* (24 April 2007), available at: {http://www.thestar.com/news/2007/04/24/khadr_charged_with_murder.html} accessed 10 February 2014.

[53] See Von Stein, 'International Law'; Morrow, 'When do States Follow the Laws of War?'

[54] Marco Sassoli and Laura M. Olson, 'The Relationship Between International Humanitarian and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts', *International Review of the Red Cross*, 90:871 (2008).

[55] Robbie Sabel, 'The Legality of Reciprocity in the War against Terrorism', *Case Western Reserve Journal of International Law*, 43:1–2 (2011), pp. 473–82.

[56] Laurie R. Blank, 'Facts but Missing the Law: The Goldstone report, Gaza and Lawfare', *Case Western Reserve Journal of International Law*, 43:1–2 (2011), pp. 279–305, 304.

[57] Michael N. Schmitt, 'The Vanishing Law of War: Reflections on Law and War in the 21st Century', *Harvard International Review*, 31:1 (2009), pp. 64–8, available at: {http://hir.harvard.edu/frontiers-of-conflict/the-vanishing-law-of-war} accessed 4 August 2012.

[58] ICRC, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities Under Humanitarian Law' (2009), available at: {http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf} accessed 8 February 2014.

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state actors more formal protection under the law than state soldiers, where even military cooks are targetable simply by virtue of their military status, was one reason why some legal experts who participated in the review process ultimately withdrew their support for the ICRC guidance.[59]

Second, liberal democracies demand from themselves a greater level of compliance with international law.[60] The citizens, politicians, and institutions in liberal democracies all reinforce the view that they should be held to a higher standard than the barbarians who flout international law, a view captured eloquently by President Obama's statement that '(e)ven as we confront a vicious adversary that abides by no rules, I believe the United States must remain a standard bearer in the conduct of war'.[61] Such respect for the LOAC is also prevalent in the organizational culture of the Armed Forces in liberal democracies. The 2006 US Army and Marine *Counterinsurgency Field Manual*, for example, specifically warns against the danger of losing moral legitimacy by conducting torture.[62] The US military also consistently sought to avoid civilian casualties in Iraq even when it put US troops at risk – a result of the humanitarian side of US military culture[63] and the values of the military JAG corps.[64] Non-state actors *usually* either do not have such audiences holding them to account or, if they do, they are often being held to very different standards.[65] Here we see how different views of the law contribute to different levels of resolve to do 'whatever it takes' against one's enemies. Democracies have greater built-in legal checks to restrain themselves in all but the most extreme circumstances; the 'audience costs' of violation are significantly greater for democratic states, and we can expect them to be more reticent to break the laws of war.[66] Thus, considerations regarding the importance of normative standards intrude upon the strategic calculus of states, preventing them from simply casting the law aside. States can become trapped by rules of their own making.

Third, asymmetry in material capabilities poses new challenges for the state as it raises the possibility of very strict compliance with certain laws. Thus while the advent of 'smart' targeting technology was trumpeted by Western militaries as an effective way to meet the LOAC's discrimination and proportionality requirements,[67]

[59] Michael N. Schmitt, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis', *Harvard National Security Journal*, 1 (2010), pp. 1–44.

[60] Dale C. Walton, 'Victory Through Villainization: Atrocity, Global Opinion, and Insurgent Strategic Advantage', *Civil Wars*, 14:1 (2012), pp. 123–40; Seumas Miller, 'Review Essay: An Eye for an Eye: Counterterrorism, Reciprocity and Human Rights', *Harvard International Review*, 31:1 (2009), pp. 84–6; Kevin Jon Heller, 'On a Differential Law of War: A Response', *Harvard International Law Journal*, 52:1 (2011), pp. 237–49.

[61] Barack Obama, 'Remarks by the President at the Acceptance of the Nobel Peace Prize', Oslo (10 December 2009); see also Von Stein, 'International Law'.

[62] US Army Field Manual 3–24, 'Counterinsurgency', *Marine Corp Warfighting Publication*, 3–33.5 (Washington DC: Department of the Army and United States Marine Corps, 2006), pp. 7–9.

[63] Kahl, 'In the Crossfire or the Crosshairs?'

[64] Laura A. Dickinson, 'Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance', *The American Journal of International Law*, 104:1 (2011), pp. 1–28.

[65] While this has certainly been the case in conflicts against Islamist extremist groups such as *al-Qaeda* and the Taliban, non-state actors do not always disregard international law. Jessica Stanton notes that in civil wars both the regime type of a rebel group's opponent and the extent of their war aims contribute to (non-)compliance with the LOAC. Rebels are more likely to target civilians when faced with a democratic opponent and when they have either separatist or unclear war aims. See *Strategies of Violence and Restraint in Civil War* (Proquest Umi Dissertation Publishing 2011).

[66] James Morrow, 'The Laws of War, Common Conjectures, and Legal Systems in International Politics', *The Journal of Legal Studies*, 31:1 (2002), pp. 41–60.

[67] Jack M. Beard, 'Law and War in the Virtual Era', *The American Journal of International Law*, 103:3 (2009), pp. 409–45.

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this has created an expectation that they be used in all cases.[68] Even the American process of weapons development and procurement is subject to review by JAG officers to ensure its legality under the LOAC.[69] For modern militaries, the problem with this trend is that all civilian casualties from the use of technically legal, 'dumb' munitions, even when they are the collateral damage from a legal strike aimed at a military objective, are likely to be met with moral and even legal condemnation.[70] The inverse is that non-state actors may not even have the capacity to comply with some aspects of the law;[71] people have questioned, for example, whether non-state actors can be expected to distinguish themselves from civilians when they often cannot even afford uniforms.[72] A more worrying implication of this line of reasoning is that homemade rockets launched into civilian areas, and the clear violation of the LOAC principle of distinction which such attacks entail, can perhaps be excused because, without the technology for smart munitions, they are the only viable method of resistance. For some onlookers, then, *can* implies *ought* and it is logical to discuss the development of a 'differential law of war' based on the legal principle of common but differentiated responsibilities.[73] In such a social context, all civilian deaths are legally suspect if they result from the application of *state* force. This has led to the odd situation, certainly from a realist perspective, where some states have taken steps not just to comply with international legal obligations, but to exceed them.[74] For example, following civilian casualties in Afghanistan, NATO stated that 'if there is the likelihood of even one civilian casualty, NATO will not strike',[75] thus tying itself to a standard far stricter than its LOAC obligations. Following this announcement, the Taliban further enmeshed themselves in civilian areas, complicating NATO's operations. Thus asymmetries in material power help create the asymmetries in law that actually limit the use of that power.

Fourth, states have a vested interest in maintaining the legitimacy of the system of international law, and thus may comply with the LOAC to signal their commitment to the broader international system of state-based order.[76] Fifth, state and non-state actors are pushed towards or away from compliance in war by their own strategic interests, as will be discussed in the following section. Compared with non-state actors, then, democracies are pushed toward compliance by a range of 'broader enforcement mechanisms' such as international and domestic opinion, organisational culture, and their own increasing capabilities.[77]

[68] Raul A. ('Pete') Pedrozo and Daria P. Wollschlaeger, 'Introduction', in Pedrozo and Wollschlaeger (eds), *International Law and the Changing Character of War* (Newport, RI: Naval War College, 2011), pp. 1–17, 9.

[69] Kahl, 'In the Crossfire or the Crosshairs?', p. 41.

[70] John F. Murphy, 'Mission Impossible? International Law and the Changing Character of War', in Pedrozo and Wollschlaeger (eds), *International Law and the Changing Character of War* (Newport, RI: Naval War College, 2011), p. 13–40, p. 35.

[71] Sandesh Sivakumaran, 'Re-envisioning the Law of Armed Conflict', *The European Journal of International Law*, 22:1 (2011), pp. 219–64, 253.

[72] Gabriella Blum, 'On a Differential Law of War', *Harvard International Law Journal*, 52:1 (2011), pp. 164–217

[73] Blum, 'On a Differential Law of War', p. 166.

[74] Kittrie, 'The International Law of War and America's War on Terrorism', p. 400.

[75] Quoted in Kittrie, 'Lawfare and US National Security', p. 400.

[76] Joel H. Westra, 'Cumulative Legitimation, Prudential Restraint, and the Maintenance of International Order: A Re-Examination of the UN Charter System', *International Studies Quarterly*, 54:2 (2010), pp. 513–33.

[77] Eyal Benvenisti, 'The Legal Battle to Define the Law on Transnational Asymmetric Warfare', *Duke Journal of Comparative and International Law*, 20:3 (2010), pp. 339–60, 345.

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Together, such factors challenge traditional notions of legal symmetry, contributing to the view held by an increasing number of judges, scholars, and organisations that the principle of reciprocity should be (or has been) eliminated from international law (that is, an enemy's lack of compliance with international law can no longer justify one's own).[78] This is a worrying development for states facing non-state actors in war given that the LOAC traditionally gives them the right to use reprisals to ensure their enemy's reciprocal compliance with the law. Indeed, for this reason, states such as the UK have long insisted on maintaining the right to commit reprisals 'for the sole purpose of compelling the adverse party to cease committing violations'.[79] Such a statement lays bare the tension faced by liberal democratic states when confronted with adversaries who disregard the law: to continue to follow the law seems to put a state at a disadvantage; to follow the adversary in disregarding the law seems to put a state at odds with its own values. Regardless of how liberal democracies ultimately address this tension – and they have thus far opted mostly for unilateral compliance – the very notion that a state is expected to show restraint even as its opponent breaks the LOAC contributes to the asymmetrical legal obligations present in modern conflict. Along with the other factors above, this suggests that in asymmetric war there are *de jure* symmetrical obligations that favour the state and *de facto* asymmetrical obligations that favour non-state actors.

The ability to choose the legal framework

While states have the power to create the law that structures wartime interactions, not all laws are created equal. There are many different bodies of law and legal frameworks with varying requirements that reflect their different origins and purposes.[80] For example, the LOAC was established in the nineteenth century to bring a modicum of humanity to the brutality of war between states. Rather than seeking absolute prohibitions, the LOAC is largely utilitarian in outlook. In balancing humanitarianism with military necessity, it affirms the state's right to kill during war, and does not aim to excise violence from war so much as to limit and channel it.[81]

In contrast, IHRL emerged and flourished following the infamous human rights abuses of World War II, with the explicit aim of protecting the individual from state oppression. Its norms have one core principle: to protect the right to life and the dignity of the human being.[82] Unlike the LOAC, IHRL privileges deontological rather than consequentialist reasoning. Killing is permitted only in the most exceptional circumstances, and obligations are meant to be absolute and non-derogatory. As a result, concepts like *jus cogens* prohibit certain actions no matter what the enemy's infractions.[83]

[78] See Watts, 'Reciprocity', and Blum, 'On a Differential Law of War'.
[79] Quoted in Watts, 'Reciprocity', p. 428.
[80] Compare Christian Tomuschat, 'Human Rights and International Humanitarian Law', *The European Journal of International Law*, 21:1 (2010), pp. 15–23, with Krezmer, 'Rethinking the Application of IHL'.
[81] Watts, 'Reciprocity', p. 423.
[82] See the United Nations, 'The Universal Declaration of Human Rights' (1948).
[83] Geoffrey Corn and Eric Talbot Jensen, 'Transnational Armed Conflict: A "Principled" Approach to the Regulation of Counter-Terror Combat Operations', *Israel Law Review*, 42:1 (2009), pp. 46–79.

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International Criminal Law (ICL) is also a relatively recent phenomenon. It takes its cues from domestic legal systems and has adopted the language, processes, and expectations of domestic criminal law with a focus on concepts like due process, the collection of evidence, *habeas corpus* rights, the right to legal counsel, etc. Importantly, ICL applies specifically to individual persons rather than states. In ICL, a balance is struck between the individual rights of the accused and the prerogative of the international community to punish culpable individuals – within certain humane boundaries of course.

Rather than being a unified moral and legal code opposed to death and destruction, then, international law comprises numerous different frameworks with different assumptions, strengths, and weaknesses regarding the use and control of violence.[84] While all three of these bodies of law apply partially, none fit perfectly with the reality of modern asymmetric war. Instead, they form a sort of 'regime complex' in the area of asymmetric war, representing multiple overlapping regimes replete with legal inconsistencies.[85] This has led to the legal gray zone of recent years where even the body of law, or 'domain', that should be applied to a conflict is itself the subject of political and legal contestation and linked to very loaded questions: Is this an occupation? Was this an act of war or a crime? Should we consider terrorists as criminals, soldiers, or something in between? Should our response be investigation, incarceration, assassination, or rehabilitation? Reasonable people disagree and much is open to debate, but such vexing questions show that the very choice of legal framework is itself a vital issue, largely because each framework has a radically different view of the sanctity of human life.

Given such significant discrepancies, it is small wonder that states choose their legal framework(s) strategically and develop and deploy legal concepts that maximize their *marge de manoeuvre*.[86] For example, Israel has argued that an armed conflict short of war applies against Palestinians militants, allowing it to simultaneously use aspects of the LOAC and the ICL model in the occupied territories.[87] Such legal gray zones can permit a wide range of state action, leading critics to claim that states 'forum shop' in order to have their cake and eat it too.[88] But non-state actors fighting against states, as well as those who want to restrict state violence for other reasons, are also aware of these differences in legal frameworks and seek the application of more restrictive bodies of law to asymmetric conflicts, usually based upon criminal law or human rights.[89] Here we see an interesting combination of agent-centered and structural approaches. The various legal frameworks created by states are more than just 'the rules of the game' that structure strategic interaction; rather, arguments and decisions regarding which rules apply can be important moves in their own right.

[84] Sivakumaran, 'Re-envisioning the Law of Armed Conflict', p. 238.
[85] Kal Raustiala and David G. Victor, 'The Regime Complex for Plant Resources', *International Organization*, 58:2 (2004), pp. 277–309.
[86] Hilly Moodrick and Even Khen, 'The Question of Legal Regimes in Gaza and the West Bank', *Israel Studies*, 16:2 (2011), pp. 55–80.
[87] Lisa Hajjar, 'International Humanitarian Law and "Wars on Terror": A Comparative Analysis of Israeli and American Doctrines and Policies', *Journal of Palestine Studies*, 36:1 (2006), pp. 21–42.
[88] Kennedy, *Of War and Law*.
[89] Krezmer, 'Rethinking the Application of IHL', p. 37.

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The legality of certain strategies, tactics, and weapons

Within the conflict itself, states are also pushed toward compliance with international law, and non-state actors away from it, by their own strategic interests. Indeed, it is difficult to dispute that lawful fighting is much easier for the powerful than for the weak.[90] Aerial bombardment is legal. Human shielding is not. This asymmetry affects the strategic choices states and non-state actors face regarding whether to comply with key aspects of LOAC such as distinction and proportionality, as both sides seek to maximise their respective strengths and expose their opponent's weaknesses.[91] States tend to favour a 'legal' fight, where their material capabilities will be privileged. Non-state actors usually do not have the same interest in complying with a law that is so obviously skewed to a state's advantage.[92] While the possibility of ending up in the ICC docks for infringements of international law may provide some incentive for non-state actors to comply with international law, in situations where the very act of their fighting is already declared illegal it is doubtful that this serves as much of an added deterrent. In any case, non-state actors such as the Taliban and Iraqi insurgents have thus far frequently departed from accepted norms in order to gain 'their own asymmetrical edge, one capable of neutralizing the technological asymmetrical advantage enjoyed by their enemies'.[93] Rockets are launched indiscriminately at civilian areas, suicide bombers disguise themselves as women, snipers hide in parapets, and arms caches are hidden in hospitals, places of worship and cultural sites. The examples of such behaviour in places such as Iraq, Afghanistan, and Gaza are numerous.[94] In the battle of Fallujah alone, for example, it is estimated that sixty mosques were used as bases by insurgents for military operations.[95]

The asymmetries in obligation discussed above usually preclude a state breaking the law in response to non-state violations of the LOAC. The international community expects better from democratic states. Because democracies and their populations recognise the maintenance of certain legal standards as preferable for both moral and instrumental reasons and because the image of the law holds such normative sway, they generally restrain their forces.[96] To give one high profile example, Seymour Hersh reported that on the first night of the war in Afghanistan, the US called off a Predator strike on Taliban leader Mullah Omar due to JAG's concerns over excessive collateral damage.[97] This reticence to descend into barbarism can be manipulated by non-state actors, eliciting cries that they are exploiting civilised standards for uncivilised ends. Indeed, in 2006, Israel claimed that *Hezbollah*'s tactics of fighting

[90] Blum, 'On a Differential Law of War', p. 171.
[91] Kennedy, *Of War and Law*.
[92] Blum, 'On a Differential Law of War', p. 172; Benvenisti, 'The Legal Battle', p, 342.
[93] Wolff Eintschel Von Heinegg, 'Asymmetric Warfare: How to Respond', in Pedrozo and Wollschlaeger (eds), *International Law and the Changing Character of War* (Newport, RI: Naval War College, 2011), pp. 463–80.
[94] See, for example, Human Rights Watch, 'A Face and a Name: Civilian Victims of Insurgent Groups in Iraq' (2005), available at: {http://www.hrw.org/reports/2005/10/02/face-and-name} accessed 18 December 2012.
[95] Robin Geib, 'Asymmetric Conflict Structures', *International Review of the Red Cross* 88:864 (2006), pp. 757–77, 765.
[96] Mahnken, 'The American Way of War'.
[97] Seymour Hersh, 'King's Ransom: How Vulnerable are the Saudi Royals?', *The New Yorker* (16 October 2001), available at: {http://www.wanttoknow.info/011022newyorker.saudi.qaeda.htm} accessed 13 February 2014.

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amongst the population and human shielding were directly responsible for the number of civilian casualties in Lebanon.[98] All things being equal, then, it is more rational for states to choose legal strategies and tactics and more rational for non-state actors to choose illegal ones. This lack of common interest does not bode well for reciprocal compliance.[99]

Legal asymmetries in legal and political debates

The legal frameworks chosen and the dynamics on the ground have implications for the domestic and international political and legal debates that swirl around asymmetric war. Non-state actors bait state militaries into breaking the law, or at least appearing to do so, and then criticise them with the full force of the media. While such tactics are not unique to modern asymmetric conflict, non-state actors use this form of entrapment to exploit democratic divisions by fostering moral outrage over purported legal violations and thus winning sympathy – lawfare at its most frustrating. Illustratively, an *al-Qaeda* training manual recovered by British police included specific instructions to file false claims of torture in order to complicate legal proceedings, exploit Western respect for the rule of law, and appear to be the victims in the media.[100] Here law becomes an integral part of the realist strategic calculus for non-state actors who play on asymmetric expectations and (mis)use legal terminology to manipulate international and domestic institutions and create negative public opinion, not just to delegitimise the enemy but to constrain their actions over time. Asymmetries in law are used to nurture and exploit advantageous asymmetries in strategy.

In these efforts, illiberal non-state actors occasionally find unexpected allies in certain NGOs and civil society groups which face an awkward possibility: by condemning state actions in legal terms or by seeking to apply more restrictive standards of IHRL or ICL to the conduct of state officials during war, well-meaning, liberal-minded civil society groups can find themselves aiding the war effort of the illiberal enemies of Western states.[101] Both seek to constrain the power of the state – one for cynical and strategic purposes, the other for ethical reasons, which aspire to achieve a higher standard of behaviour for all. Noble intentions notwithstanding, NGOs can find themselves defending the interests of their own government's enemies and some of the most illiberal violators of human rights. Indeed, excessive legal criticism of a state's legal record can limit state action abroad as states take certain strategies off the table in order to fight more legally.

As mentioned, the push for the humanisation of war has been so effective that states now sometimes adopt standards which are more exacting than legal ones. In this regard, the US has recently suggested that it would base targeting decisions for Drone strikes in the international campaign against terrorism on some mixture of

[98] Geib, 'Asymmetric Conflict Structures', p. 766.
[99] Morrow, 'When do States Follow the Laws of War?'
[100] 'The Al Qaeda Manual', p. 16, available at: {http://www.justice.gov/ag/manualpart1_4.pdf} accessed 9 February 2014.
[101] Yoran Dinstein, 'Concluding Remarks: The Law of Armed Conflict and Attempts to Abuse or Subvert It', in Pedrozo and Wollschlaeger (eds), *International Law and the Changing Character of War* (Newport, RI: Naval War College, 2011), pp. 484–94.

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combatant status (that is, belonging to a terrorist group) *and* direct threat,[102] a commitment that the UN Special Rapporteur for Human Rights has praised as offering 'a higher level of protection than is required by international humanitarian law'.[103] Similarly, as part of General Petraeus's counterinsurgency strategy, the US made the policy decision in Iraq to go beyond legal requirements and limit civilian casualties even if it put US forces at risk. On one hand, such moral progress is to be commended. On the other hand, to the extent that more aggressive strategies would be effective – in itself an open question[104] – adopting such a high standard could prolong the conflict and expose a state to criticism for not ending the war more quickly. This is not to say that liberal democracies are not much stronger in the long run for these divisions,[105] only that legal criticism and scrutiny bring short-term costs in terms of national resolve and in taking certain strategies off the table.

Despite this disadvantage, states are not helpless in this other 'air war'. Owing to their status as chief international lawmakers, states can manipulate or reinterpret the rules in ways that suit their new situation[106] and use state institutions and access to media to defend their policy and paint their enemies as pernicious, unscrupulous law-breakers.[107] States even use videos to prove their actions lawful and those of their enemies unlawful. During 2008–9's 'Operation Cast Lead', the Israeli Defence Forces (IDF) produced compelling videos of Israel's 'roof knocking' technique, where a warning missile is fired at the corner of a roof where 'human shields' have congregated in order to compel them to leave a building serving as an arms depot. Secondary explosions following the building's destruction confirmed the presence of illicit arms.[108] This is but one example of the many channels states use to spread and defend their legal positions on contested incidents and secure their interests.

Legal asymmetries after conflict

(De)legitimisation, punishment, and reshaping the rules

Wartime legal debates spill into postwar rhetorical and legal battles over legitimacy as each side strives to frame the conflict in advantageous terms and prepare the

[102] President Barack Obama, 'The Future of our Fight against Terrorism', *Remarks at National Defense University*, Washington (2013), available at: {http://www.theguardian.com/world/2013/may/23/obama-drones-guantanamo-speech-text} accessed 14 February 2014.

[103] UN Human Rights Council, 'Armed Drones and the Right to Life', *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions* (2013), p. 15.

[104] Compare Jason Lyall, 'Does Indiscriminate Violence Incite Insurgent Attacks?: Evidence from Chechnya', *Journal of Conflict Resolution*, 53:3 (February 2009), pp. 331–61, with Matthew A. Kocher, Stathis N. Kalyvas, and Thomas B. Pepinsky, 'Aerial Bombing and Counterinsurgency in the Vietnam War', *American Journal of Political Science*, 55:2 (April 2011), pp. 201–19.

[105] See Dunlap Jr, 'Lawfare Today', p. 140: 'As a practical matter, litigation is a potent engine for truth-finding as it ruthlessly eliminates the irrelevant and systematically drives towards reasoned and principled conclusions. In the national security realm, litigation can help us to creatively focus, sharpen, and strengthen our response to a range of threats. It has genuine potential to make us better and, therefore, more dangerous to our enemies.

[106] See, for example, McKeown, 'Norm Regress'.

[107] Wouter G. Werner, 'The Curious Career of Lawfare', *Case Western Reserve Journal of International Law*, 43:1–2 (2011), pp. 61–72, 65.

[108] Amos Harel and Yoav Stern, 'IDF Targets Senior Hamas Figures', *Haaretz* (2009), available at: {http://www.haaretz.com/print-edition/news/idf-targets-senior-hamas-figures-1.267312} accessed 14 July 2012.

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terrain for possible future conflict.[109] The chosen language for claims and counter-claims, accusations and justifications in the modern world is almost exclusively legal.[110] Non-state actors and their allies often use international institutions such as the UN Human Rights Council to organise special investigative commissions and expose state 'abuses' in order to delegitimise the state war effort.[111] Here, the legal framework one employs becomes extremely important. For example, in the *Goldstone Report* that criticised Israeli and *Hamas* actions during the Gaza conflict, 'a number of the allegations of offenses said to have been committed by the IDF are based exclusively on presumed violations of *human rights law* – not the law of armed conflict'.[112] Naturally, states go to great lengths to defend themselves against such accusations, sometimes conducting credible investigations into their own activities as the IDF did following Goldstone.[113] It should be noted that few consider non-state actors to be capable of, or interested in, the same rigorous process and it is neither asked nor expected of them.[114] This suggests that there is also an important asymmetry of accountability between states and non-state actors.[115]

Of course, states are not always on the defensive after conflict. As mentioned, states also use legal means, whether international or domestic civil or military trials, to try, convict, and punish non-state foes having the temerity to challenge state authority.[116] For their part, non-state actors and their allies strategically file libel, harassment, or hate speech lawsuits to pester or silence their rivals and critics,[117] and pressure third party states to arrest state officials allegedly guilty of war crimes. The secretary general of *Hezbollah* himself has supported this tactic, stating: 'We have to sue the Israeli leaders anywhere possible in the world. Suing Israel for its crimes will render Israeli leaders beleaguered and perplexed.'[118] To give a specific example from a slightly different context, in 2009 a plaintiff working on behalf of Palestinians successfully got a warrant issued by a British court for the arrest of former Israeli Foreign Minister Tzipi Livni.[119] The fact that the UK government ultimately changed the law governing arrests for war crimes reinforces the claim that national prosecutions based on universal jurisdiction are largely subject to political considerations.[120]

[109] Oakland Ross, 'War Crimes Charges Fly in Gaza; Israelis, Palestinians both Cite Violations of International Law', *Toronto Star* (6 February 2009).

[110] Jutta Brunnee and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010).

[111] Kittrie, 'The International Law of War', p. 398.

[112] David Graham, 'The Law of Armed Conflict in Asymmetric Urban Armed Conflict', in Pedrozo and Wollschlaeger (eds), *International Law and the Changing Character of War* (Newport, RI: Naval War College, 2011), pp. 302–13.

[113] Anshel Pfeffer, 'Barak: Gaza Probe Shows IDF Among World's Most Moral Armies', *Haaretz* (22 April 2009), available at: {http://www.haaretz.com/news/barak-gaza-probe-shows-idf-among-world-s-most-moral-armies-1.274600} accessed 18 June 2012.

[114] Michael P. Scharf and Elizabeth Andersen, 'Is Lawfare Worth Defining?' Report of the Cleveland Experts Meeting, September 11, 2010, *Case Western Reserve Journal of International Law*, 43:1–2 (2011), pp. 11–27, 24.

[115] Thanks to an anonymous reviewer for this phrase.

[116] Colangelo, 'Constitutional Limits on Extraterritorial Jurisdiction', p. 146.

[117] Susan Tiefenbrun, 'Semiotic Definition of "Lawfare"', *Case Western Reserve Journal of International Law*, 43:1–2 (2011), pp. 29–60, 53.

[118] Quoted in Kittrie, 'Lawfare and US National Security', p. 397.

[119] BBC News, 'Israel Fury at UK Attempt to Arrest Tzipi Livni' (15 December 2009), available at: {http://news.bbc.co.uk/2/hi/middle_east/8413234.stm} accessed 9 December 2012.

[120] Maximo Langer, 'The Diplomacy of Universal Jurisdiction: The Regulatory Role of the Political Branches in the Transnational Prosecution of International Crimes', *American Journal of International Law*, 100:4 (2011), pp. 868–90.

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Perhaps most difficult for states, domestic courts can constrain state action through their decisions.[121] While courts tend to respect the national security prerogatives of the Executive, they have played a crucial role in extending legal constraints into the legal twilight zones of modern war. For example, in the Hamden Decision, the US Supreme Court simultaneously rejected the US claim that *al-Qaeda* had no Geneva protections – arguing that all prisoners must receive at least a minimum standard of protection – while accepting the US argument that the LOAC applied to the War on Terror.[122] All this suggests that, far from simply being a route to cooperation or a civilising force, international and domestic legal institutions become extensions of the field of battle. The use of legal action and rhetoric represents the continuation of war by other means.

A waning of the conflict presents all interested parties with an opportunity to pause and review the rules to assess whether they sufficiently address modern realities. Has the right balance been struck between military necessity and human dignity? What holes in the framework need to be plugged, and how? Are there unexpected, perverse consequences to purported legal and moral progress? In such times, debates over what the rules are merge into debates over what the rules should be and interested parties act strategically to further their own interests. Given its stellar reputation with governments and NGOs, the ICRC is particularly well suited to lead and mediate such efforts. It has recently led in-depth examinations into the LOAC's sufficiency to regulate modern conflicts, generating important recommendations regarding the application of the LOAC against non-state actors.[123] With certain key exceptions, such as the rules surrounding detention, the ICRC concluded that the existing rules have the necessary flexibility to apply to conflicts with non-state actors; what is needed is greater compliance with existing law rather than new rules.[124] Given their vexing experiences of fighting non-state actors who systematically break the LOAC as an integral part of their strategy, some states are bound to protest that the ICRC is not taking sufficient account of state security interests, especially when one recalls ICRC prescriptions giving non-state actors more formal protection than state soldiers.[125] While states ultimately hold the trump card regarding the creation or affirmation of international law, the contributions of the ICRC are difficult to ignore. Whatever the end result, these important debates will determine the nature of the legal asymmetries shaping future wars.

Implications for the study of law and asymmetric war in IR

To recap, the preceding discussion of the role of international law in asymmetric war suggests that law has become closely integrated with state and non-state violence

[121] Ashley S. Deeks, 'Litigating How We Fight', in Pedrozo and Wollschlaeger (eds), *International Law and the Changing Character of War* (Newport, RI: Naval War College, 2011), pp. 427–61; Rosa Ehrenreich Brooks, 'War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror', *University of Pennsylvania Law Review*, 153:2 (2004), pp. 676–760, 702.

[122] Jonathan Mahler, *The Challenge: Hamdan V. Rumsfeld and the Fight Over Presidential Power* (New York: Farrar, Straus and Giroux, 2008).

[123] ICRC, 'Strengthening Legal Protection for Victims of Armed Conflict: Address by Dr. Jakob Kellenberger' (21 September 2010), available at: {http:www.icrc.org/eng/resources/documents/statement/ihl-development-2109} accessed 9 February 2014; ICRC, 'Interpretive Guidance'.

[124] ICRC, 'Strengthening Legal Protection for Victims of Armed Conflict'.

[125] Schmitt, 'The Interpretive Guidance'.

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even as it has become the medium through which moral claims and justifications of power are generally made. Actors address international law according to utilitarian logic, based on the consequences of following, bolstering, discarding, or stretching it. The law is interwoven into debates over strategy, morals, and identity, and it affects the course of war on the ground. Law is used as a tool of the war effort, but it could not be so 'used and abused' if it did not have strong normative force. In short, legal asymmetries interact with other asymmetries to structure asymmetric wars between states and non-state actors in myriad complex ways.

This has significant implications for the study of IR. First, given that law is an integral part of asymmetric war it should prove useful to further consider how legal asymmetries interact with other asymmetries to benefit state and non-state combatants. As the above discussion shows, asymmetric capabilities lead to asymmetric rights and obligations. Asymmetric rights and obligations lead to asymmetric strategies. Asymmetric strategies lead to asymmetries of resolve. The links between legal and other asymmetries present a fascinating area for future research and legal asymmetries could be fruitfully incorporated into other theories of asymmetric war. While this article deals primarily with the perspective of a democratic state fighting a non-state adversary, complementary lines of inquiry could explore how non-state actors themselves view and engage with international law during asymmetric war – a perspective that is relatively absent from current literature[126] – as well as examine how legal asymmetries shape conflict between states.

Second, whereas IR has tended to clump all types of international law together, often considering it irrelevant, a greater appreciation of the different legal frameworks and how they are chosen, used, and abused by state and non-state actors would contribute both to IR work on asymmetric conflict and to the study of forum shopping and regime complexes.[127] This article suggests that the success of a state's forum-shopping efforts, not to mention views regarding the sufficiency of the frameworks themselves, will vary according to audience.[128] Human rights advocates, whose primary concern is human life and dignity, seem to privilege IHRL and ICL, and view the application of the LOAC to conflicts with non-state actors as providing a blank cheque for states. If the LOAC must be applied, states should be held to higher standards and state actions must still be informed by IHRL and ICL. In contrast, government officials and military lawyers, who are more attuned to the demands of military necessity, seem more likely to view a *flexible* application of the LOAC as the best of a bad bunch in terms of frameworks for wars against non-state actors. Courts have tended to fall somewhere in between the two camps. These differences present interesting possibilities for research on the relationship of different actors to different bodies of law and/or how these dynamics relate to asymmetric conflict.

Third, both legal asymmetries between states and non-states, and the differences in bodies of law, have implications for the IR compliance literature, which has focused mostly on international treaty compliance by states. Such a focus seems too narrow in asymmetric war against non-state actors, where customary law plays a

[126] For an exception, see Stanton, *Strategies of Violence and Restraint*.

[127] Raustiala and Victor, 'The Regime Complex'; Marc L. Busch, 'Overlapping Institutions, Forum Shopping and Dispute Settlement in International Trade', *International Organization*, 67:4 (Fall 2007), pp. 735–61.

[128] Thanks to an anonymous reviewer for this suggestion.

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significant role, it is uncertain which body of law applies, and the two parties do not have equal incentives to comply. Indeed, states could be forgiven if they answer accusations of law-breaking by asking: 'Which law?' or 'What about them?' This article also raises the related possibility of *over*-compliance, wherein states sometimes adopt standards that go beyond their legal obligations. Exploring these issues further would help ascertain the true levels of, and reasons for, compliance with international law and expand a useful body of scholarship to new and pressing areas.

Fourth, and more broadly, to conceive of international law as simultaneously restricting and enabling wartime violence requires IR scholars to follow IL scholars in taking an outlook that crosses divides both within and between different disciplines to better understand the vexing problems at the intersection of law and war. This article therefore echoes previous calls for a more eclectic approach to IR[129] – one that is particularly useful for exploring asymmetric war, where the messy reality does not completely match the expectations of any single paradigm, yet partially matches the expectations of them all. While the last two decades have seen a welcome increase in scholarship comparing IR and IL's respective bodies of theory,[130] there have been fewer attempts in IR to apply the insights of both disciplines to the study of war. Indeed, IR scholars have been less open to incorporating IL scholarship than *vice versa* in most subject areas,[131] thus diminishing IR's effectiveness and resulting in the peculiar situation where IL scholars seem to capture more of the reality of modern asymmetric war than do IR scholars. This article suggests that focusing on international law does not mean abandoning realist assumptions about the importance of power; even studies of conflict can benefit from an interdisciplinary approach that takes the law, and IL, seriously. Ultimately, this offers a way to cast aside theoretical squabbles in favour of a cooperative discussion focused upon understanding complex realities – a key step in making theory relevant to the real-world practice of international relations.

Implications for the practice of international relations

Understanding how legal symmetries channel, constrain, and facilitate the use of force in asymmetric war also has practical implications. While providing some guidance to humanitarians who wish to constrain state violence in pursuit of a better world, it reveals the dangers of legal advocacy when certain actors feel no compunction about using the law's power as a tool for nefarious ends. Human rights can make for strange bedfellows, and excessive badgering of responsible militaries might do more harm than good in the long run if it enables victory for non-state actors such as *al-Qaeda* and the Taliban. State revision or application of the law should not always be met with moral opprobrium. These actions can represent thoughtful and necessary efforts to adjust the rules to new strategic and moral realities and address

[129] See, for example, Peter J. Katzenstein and Nobuo Okawara, 'Japan, Asia-Pacific Security, and the Case for Analytical Eclecticism', *International Security*, 26:3 (2001/2), pp. 153–85; Andrew Moravscik, 'Theory Synthesis in International Relations: Real Not Metaphysical', *International Studies Review*, 5:1 (2003), pp. 131–6.

[130] See, for example, Anne-Marie Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda', *The American Journal of International Law*, 87:2 (1993), pp. 205–39.

[131] Robert Beck, 'International Law and International Relations Scholarship', in David Armstrong (ed.), *The Routledge Handbook of International Law* (New York, NY: Routledge, 2009), p. 25.

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the fact that states disadvantage themselves by applying old rules, meant to be reciprocally applied between states, to new conflicts where reciprocity does not exist. Further, seeking to have IHRL displace the LOAC in conflicts against groups such as *al-Qaeda* may make legal conflict next to impossible for states.[132] Raising the bar too high could perversely reinforce the law's reputation as something that is strictly utopian (that is, not relevant for war). International law risks losing its normative force if, in its idealism, it forgets to take into account the moral limits of the *real* world.[133] Therefore, humanitarians too must face the responsibility of considering the potential consequences of their actions – no easy task for those steeped in a deontological, absolutist moral culture.[134]

This article also offers lessons for civilian and military policymakers, and argues that the law should be understood and respected not only by those who wish to end wars, but also by those who seek to win them. If the law is considered merely to be a static, objective, and detached set of rules – something only to obey or to ignore – policymakers risk being blindsided by their enemies' exploitation of widely-shared, idealistic perceptions of how the world ought to be. A better recognition of how law is used by one's foes allows for the preparation of a better defence – a counter-lawfare. Yet there are also risks in considering the law to be infinitely malleable and subjective – something only to manipulate and deploy. Indeed, recognising that the use of law has its limits, and its power, in the aura of legitimacy surrounding the idea of law encourages humility and temperance. The law is not so easily controlled and has unforeseen effects. When the law is too quickly dismissed or the gap between deeds and words grows too great, it can delegitimise state action, or even the law itself.[135]

Perhaps most importantly, an understanding of the legal asymmetries in asymmetric war should make clear for operational commanders and strategic decision-makers the importance and consequences of legal decisions at various points in the command chain. Given the widely-held expectation that democratic states will comply with international law and maintain a functioning system of international rules, and given how effectively non-state actors and their supporters exploit state breaches (or perceived breaches) of international law to magnify divisions within democratic societies and erode support for the war effort, commanders have a tremendous responsibility to limit any actions that could be perceived as illegal. As General Petraues recognised in Iraq, this can require democratic forces to occasionally tie their own hands and sacrifice short-term exigency for longer-term legitimacy – to accept tactical setbacks for strategic gains.

Given that this can mean putting military personnel in even greater danger – in effect, accepting greater personal risk to mitigate national legal risk – national political, policy and military leaders must ensure that citizens understand and support the choices their government makes regarding military actions and international law. This becomes both a moral issue and a strategic imperative given the corrosive effect that deep domestic divisions over the law can have on a nation's will to fight. To the

[132] Dinstein, 'Concluding Remarks'.
[133] Richard Price (ed.), *Moral Limit and Possibility in World Politics* (Cambridge: Cambridge University Press, 2008).
[134] Michael N. Barnett and Thomas George Weiss, *Humanitarianism in Question: Power, Politics, Ethics* (Cornell University Press, 2008).
[135] Scott and Ambler, 'Does Legality Really Matter?'

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greatest extent possible, national leaders must debate these issues openly in order to build a broad democratic consensus and ensure that their citizens have confidence in how the wars being fought in their name are conducted. This requires partisans on all sides to recognise the complexity and importance of the interrelationship between international law and asymmetric war. It is not enough to pretend that existing law is irrelevant against non-state actors or to suggest that it can be easily applied to radically new situations. The practical message of this article therefore follows directly from its theoretical implications: there are dangers inherent in considering law either to be irrelevant to the use of force or strictly opposed to it. The solution suggested in this article is to adopt a framework which incorporates both the law of power and the power of law. By cultivating such a legal understanding and respect in all levels of their government and citizenry, democratic states can begin to turn a perceived weakness into a source of enduring strength.

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