

## THE CURIOUS CAREER OF LAWFARE

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*This article discusses some different uses of the term ‘lawfare’ since the 1970’s. The main aim of the article is to explore how particular ways of framing the concept of “lawfare” affect questions of legal, moral, and political accountability. In particular, the article contrasts the way in which the term ‘lawfare’ has been used in critical theory with the instrumentalization of the term in neoconservative thinking. While critical theory has used the term to rethink questions of accountability and to spur a process of self-critique, neoconservative thinking has mainly used the term to discredit an opponent’s reliance on law and legal procedure. This has turned the use of the term ‘lawfare’ itself into a strategic move—a move that could eventually undermine the integrity of law.*

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### I. INTRODUCTION

When I accepted the invitation to contribute to this conference, I only had a general idea what lawfare was about. At the time I thought that “lawfare” mainly stood for the way in which states, the military, and influential non-profit organizations used international law to legitimise and critique the use of military force—that lawfare signified, in David Kennedy’s words, the art of “managing law and war together.”<sup>1</sup> I was soon to discover that this is not how most people use the term nowadays, in particular in circles that are critical of the way in which international law sets limits to

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<sup>1</sup> DAVID KENNEDY, OF WAR AND LAW 125 (2006).

the exercise of power by sovereign states.<sup>2</sup> In current debates, “lawfare” is often used as a label to criticise those who use international law and legal proceedings to make claims against the state, especially in areas related to national security.<sup>3</sup> In these contexts, “lawfare” is almost invariably defined in negative terms, such as “abuse of the law and legal systems for strategic political or military ends.”<sup>4</sup> In one of the more radical descriptions, lawfare is portrayed as a challenge to the strength of democratic nations, a “strategy of the weak, using international fora, judicial processes and terrorism.”<sup>5</sup>

Of course, it is impossible to judge which of the strongly diverging definitions of lawfare is correct. The meanings of terms such as “lawfare” are not set in stone, but rather, evolve through their use in different social practices.<sup>6</sup> However, this does not mean that it is impossible to take a critical stand towards the different meanings that are attached to the concept of lawfare. The way in which social reality is defined has direct bearing on questions of responsibility—different conceptual lenses highlight and suppress different ways of organising legal, moral, and political responsibility.<sup>7</sup> In that sense, definitional issues are neither pointless nor arbitrary. This is why I choose to study and compare some different meanings attached to the concept of lawfare—not to discover its one true meaning, but to explore the different contexts in which the concept has been used and to set out how a particular way of framing “lawfare” affects questions of legal, moral, and political accountability.

In order to explore these issues, I will analyze four different uses of the concept of lawfare since the mid-1970s. The first section discusses how the term was used in new-age circles some thirty-five years ago and its radical transformation in the hands of Chinese military strategists. The second section examines the introduction of the concept in the early twenty-first century as part of a broader attempt to rethink the role of law in contemporary warfare. There, I will focus on the writings of David Kennedy, who used the concept of lawfare to stimulate critical reflection on questions of

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<sup>2</sup> See THE LAWFARE PROJECT, <http://www.thelawfareproject.org/> (last visited Nov. 6, 2010) (defining lawfare as “the use of the law as a weapon of war, or more specifically, the abuse of the law and legal systems for strategic political or military ends.”).

<sup>3</sup> See *id.*

<sup>4</sup> See *id.*

<sup>5</sup> U.S. DEP’T OF DEF., NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 5 (2005), available at <http://www.defense.gov/news/Mar2005/d20050318nds1.pdf> [hereinafter 2005 NAT’L DEF. STRATEGY].

<sup>6</sup> LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 20e (G.E.M. Anscombe, trans., 1953) (“For a large class of cases—though not for all—in which we employ the word ‘meaning’ it can be defined thus: the meaning of a word is its use in the language.”).

<sup>7</sup> I thank Erna Rijdsdijk for her never-ending efforts to point out how the social construction of reality affects issues of responsibility.

personal responsibility of those who are involved in the waging of war. The third section studies yet another way in which lawfare is used: as a label to fight those who invoke law and legal procedures against the state. In this context, the concept of lawfare is no longer used to induce self-critique and to rethink personal responsibility. Instead, the concept *itself* is turned into a political instrument that can be used to undermine the activities of legal and political opponents.

## II. A COMPARATIVE ANALYSIS OF THE DIFFERENT USES OF LAWFARE

### A. *From Yin and Yang to Unrestricted Warfare*

One of the first texts in which the term “lawfare” appeared was a book chapter by John Carlson and Neville Yeomans.<sup>8</sup> In many respects, the chapter reflects the spirit of the 1970s. It advocates a legal culture based on “harmony, peace and love,” serving “humanitar[ism], flexibility and intuition” while balancing yin and yang in society.<sup>9</sup> The authors lament the development of secular law in “the West” in the past 200 years—in less than eighteen pages—arguing that Western legal orders have become accusatorial, utilitarian, and rooted in self-interest.<sup>10</sup> In this context, they introduce the concept of “lawfare.” Although the concept is not defined anywhere, it is not difficult to see what the authors mean when they use the term “lawfare” in their attack on what they believe to be the essence of modern Western law: “The search for truth is replaced by the classification of issues and the refinement of combat. Lawfare replaces warfare and the duel is with words rather than swords.”<sup>11</sup> According to Carlson and Yeoman, the modern West should learn from traditional and Eastern cultures where lawsuits are regarded as disruptive of societal order and where disputes are settled in a more communal spirit.<sup>12</sup> Initially, the term “lawfare” thus served as a label to denounce individualistic and accusatorial aspects of law in Western societies.

Given Carlson and Yeoman’s plea for a turn to the East, it is ironic that the next mentions of lawfare can be found in a book called *Unrestricted Warfare*, written by two officers of the Chinese People’s Liberation Army,

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<sup>8</sup> John Carlson & Neville Yeomans, *Whither Goeth the Law—Humanity or Barbarity*, in *THE WAY OUT—RADICAL ALTERNATIVES IN AUSTRALIA* 155, 155 (Margaret Smith & David Crossley eds., 1975), available at <http://www.laceweb.org.au/whi.htm>. In this article, I will refer to the text published on Laceweb. For other earlier uses of the term see also the contribution to this issue by Leila Sadat.

<sup>9</sup> Carlson & Yeomans, *supra* note 8.

<sup>10</sup> *Id.* at 2.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

Qiao Liang and Wang Xiangsui.<sup>13</sup> Instead of striving for harmony, the authors witness a trend towards unrestricted warfare and strongly advise China to come to terms with this new reality.<sup>14</sup> Although *Unrestricted Warfare* is often mentioned as one of the earliest sources of the concept of lawfare, it should be noted that lawfare only plays marginal role in the book.<sup>15</sup> It appears together with other alternative forms of warfare, including psychological warfare, smuggling warfare, media warfare, technological warfare, and economic aid warfare.<sup>16</sup> Moreover, the only—and rather sketchy—definition of “lawfare” that can be found in the book emphasises the strategic importance of being a trendsetter in international standards.<sup>17</sup> According to the authors, “lawfare” is about “seizing the earliest opportunity to set up regulations.”<sup>18</sup> At the same time, Qiao has emphasised that powerful states such as the United States depend on existing normative frameworks for the exercise of its power. While the United States may break international rules, such as the prohibition on the use of force, Qiao argued, “[the U.S.] has to observe its own rules or the whole world will not trust it.”<sup>19</sup>

The concept of lawfare thus only appears at the margins of *Unrestricted Warfare*. However, the way in which lawfare is linked to the central argument of the book makes it important for the purposes of this article as well. The book’s main argument is that the nature of war and warfare has undergone significant changes.<sup>20</sup> This may sound like a cliché since numerous books, articles, and reports already made the point that war has transformed fundamentally in roughly the past fifty years.<sup>21</sup> While the book indeed repeats many of the commonplaces regarding the new face of war, it

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<sup>13</sup> See QIAO LIANG & WANG XIANGSUI, UNRESTRICTED WARFARE (Beijing: PLA Literature and Arts Publishing House, Feb. 1999), available at [http://redreform.com/unrestricted\\_warfare.htm](http://redreform.com/unrestricted_warfare.htm).

<sup>14</sup> *Id.*

<sup>15</sup> See LIANG & XIANGSUI, *supra* note 13. Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21<sup>st</sup> Century Conflicts* (Carr Center for Human Rights, John F. Kennedy Sch. of Gov’t, Harvard U., Working Paper, 2001), available at <http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf> (discussing Dunlap’s assertion that Liang and Xiangsu’s book does not fully address or define lawfare).

<sup>16</sup> *Id.* at 42–43.

<sup>17</sup> *Id.* at xxii.

<sup>18</sup> *Id.* at 43.

<sup>19</sup> Interview with Qiao Liang in the *Zhongguo Qingnian Bao*, as referred to in the introduction of the translation of “Unrestricted Warfare,” *supra* note 9.

<sup>20</sup> LIANG & XIANG SUI, *supra* note 13, at xviii–xxii.

<sup>21</sup> See MARTIN VAN CREVELD, THE TRANSFORMATION OF WAR, THE MOST RADICAL REINTERPRETATION OF ARMED CONFLICT SINCE CLAUSEWITZ (1991); HERFRIED MÜNKLER, THE NEW WARS (Polity Press 2005) (2002); MARY KALDOR, OLD AND NEW WARS, ORGANIZED VIOLENCE IN A GLOBAL ERA (Polity Press 2006) (1998).

also gives them specific meaning and force. For instance, the book's argument is not so much that "war" as a separate social state is changing.<sup>22</sup> The argument is that war has become inseparable from other societal institutions, from society, economy, and politics in peacetime.<sup>23</sup> Therefore, the title *Unrestricted Warfare* does not really capture what is at stake in the book's central argument. The argument is not only that the conduct of hostilities has become unrestricted, it is that war itself has broken free from its traditional confines, that war has permeated all other sectors of society.<sup>24</sup> The authors' definition of war is illustrative in this respect. Consciously deviating from Clausewitz' definition of war in terms of armed force used to submit the enemy to one's own will, they define the "new principles of war" as: "using all means, including armed force or non-armed force, military and non-military, and lethal and non-lethal to compel the enemy to accept one's interests. This represents change. A change in war and in the mode of war occasioned by this."<sup>25</sup>

Not surprisingly, the authors subsequently argue that traditional distinctions between war and peace, combatant and non-combatant, just and unjust cause, and armed force and other non-violent instruments have become obsolete.<sup>26</sup> Under such an expansive concept of war, almost all those who hold different interests can be turned into enemies and all methods are potential weapons in war. War, Qiao and Wang contend, "is increasingly becoming a matter for politicians, scientists, and even bankers . . . If those such as Morris, bin Laden and Soros can be considered as soldiers in the wars of tomorrow, then who isn't a soldier?"<sup>27</sup>

The second use of lawfare discussed here therefore appears in a context that sketches a disturbing picture of the war and warfare in the twenty-first century. The use of law is regarded as one of the many strategies that can be used in a world-wide struggle where the dividing line between war and non-war is almost impossible to make. The use of law as a military tool, together with methods such as media warfare, drug warfare, fabrication warfare, cultural warfare, etcetera, illustrates that the relationship between war and politics is turned upside down. According to Qiao and Wang, war is no longer the continuation of politics with the inclusion of other means; it is politics that has become the continuation—or even just one of the manifestations—of war.<sup>28</sup>

<sup>22</sup> LIANG & XIANG SUI, *supra* note 13, at xx–xxii.

<sup>23</sup> *Id.* at x–xiii.

<sup>24</sup> *Id.* at xi–xxiii.

<sup>25</sup> *Id.* at xxi–xxii.

<sup>26</sup> *Id.* at 241–47.

<sup>27</sup> LIANG & XIANG SUI, *supra* note 13, at 190–91 (“[W]arfare is in the process of transcending the domains of soldiers, military units, and military affairs”).

<sup>28</sup> *Id.*

### B. *Legalised War*

From the late 1990s on, the term “lawfare” was introduced in a different context as well. In Charles Dunlap’s writings, the concept of lawfare was used to make sense of the changing security environment in which militaries—primarily Western—had to operate.<sup>29</sup> While Qiao and Wang argued that war was breaking free from traditional limits, Dunlap witnessed unprecedented legal restraints on the conduct of hostilities.<sup>30</sup> In order to illustrate this point, Dunlap quotes the perspective of the former NATO supreme allied commander Europe, General Jones, who said:

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>31</sup>

The omnipresence of law in contemporary military affairs created new opportunities to fight enemies. Legal arrangements not only put limits on warfare, but also provide venues to legitimise the use of military force, to de-legitimise the enemy, and to supplement the use of force with less destructive—and less costly—means.<sup>32</sup> It is therefore not surprising that the legalization of war went hand in hand with the strategic use of law as a way to fight the enemy. In this context, Dunlap defined “lawfare” as “the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective.”<sup>33</sup>

It should be noted that for Dunlap the term “lawfare” is not meant in a normative sense, as a way to express disapproval of the use of law as a strategic tool.<sup>34</sup> For him, the use of legal proceedings or the mobilization of

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<sup>29</sup> Dunlap, *supra* note 15.

<sup>30</sup> LIANG & XIANG SUI, *supra* note 13, at 5 (noting that the traditional definition of war can no longer be used to explain war today); Dunlap, *supra* note 15, at 4 (explaining the heavy presence of lawyers in warzones because of post-conflict investigations and the U.S.’ commitment to upholding human rights).

<sup>31</sup> Lyric Wallwork Winik, *A Marine’s Toughest Mission*, PARADE, Jan. 19, 2003, [http://www.parade.com/articles/editions/2003/edition\\_01-19-2003/General\\_Jones](http://www.parade.com/articles/editions/2003/edition_01-19-2003/General_Jones) (quoting General James L. Jones, a former NATO commander, explaining how the legalistic nature of today’s warfare has complicated the fight).

<sup>32</sup> For a discussion see Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT’L AFF. 146, 146–154 (2008).

<sup>33</sup> Charles J. Dunlap, Jr., *Lawfare: A Decisive Element of 21<sup>st</sup>—Century Conflicts?*, 54 JOINT FORCE QUARTERLY 34 (2009), at 2, available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA515192&Location=U2&doc=GetTRDoc.pdf>

<sup>34</sup> *Id.*

public concern about military operations is a perfectly legitimate activity.<sup>35</sup> Still, the strategic use of law does raise questions about the role and legitimacy of law in contemporary armed conflicts. What is left of the integrity of law and the responsibility of lawyers if legal provisions are turned into strategic tools to fight an enemy? Such questions figure prominently in David Kennedy's study on the "routinization of humanitarian law into the military profession."<sup>36</sup> For Kennedy, the notion of lawfare is useful in diagnosing how the evolution of the law of armed conflict law has affected the responsibilities of humanitarians and the military.<sup>37</sup> According to Kennedy, the law of armed conflict has grown into a common vocabulary to assess the legitimacy of war—or acts of war.<sup>38</sup> Humanitarians are no longer outsiders who speak law to power, but have become "professionals of war," working in close relationship with bureaucrats, politicians, and the military to develop legal standards for civilized warfare.<sup>39</sup> However, since these standards are often underdetermined and flexible, these efforts yield a paradoxical result. The law of armed conflict provides a common vernacular to assess military operations, but at the same time leaves room for different and conflicting interpretations.<sup>40</sup> The legalization of war, in other words, has made it easier to make opposing claims in a vocabulary that is understood globally. The combination of universality and flexibility has fostered the use of the legal arguments as military tools and turned the law of armed conflict into a "strategic vernacular" that combines normativity with instrumental rationality.<sup>41</sup> In this context, Kennedy introduces the concept of lawfare as the art of "managing law and war together."<sup>42</sup>

Thus, Kennedy uses the notion of lawfare to address some fundamental concerns regarding the role of law in military affairs. The first concern is that a widely shared strategic attitude toward humanitarian law may eventually undermine the normative force of law.<sup>43</sup> Specifically, if all parties concerned believe that legal arguments are produced merely to gain military or political advantage, the integrity of law is at stake. Debates on the legality or illegality of behaviour then turn into a "dialogue of the deaf,

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<sup>35</sup> Dunlap, *supra* note 15, at 148 ("[C]oncern from the public, NGO's, academics, legislatures, and the courts about the behaviour of militaries is more than simply a public relations problem; it is a legitimate and serious activity that is totally consistent with adherence to the rule of law, democratic values and—for that matter—lawfare.").

<sup>36</sup> KENNEDY, *supra* note 1, at 41.

<sup>37</sup> *Id.* at 37.

<sup>38</sup> *Id.* at 39.

<sup>39</sup> *Id.* at 28–33.

<sup>40</sup> *Id.* at 25.

<sup>41</sup> *Id.* at 116.

<sup>42</sup> *Id.* at 125.

<sup>43</sup> *Id.* at 135.

. . . as we use the discourse more, we believe it less—at least when spoken by others.”<sup>44</sup> The second concern is that personal responsibility for decisions regarding the lethal use of force is replaced by legal calculus and legal judgment.<sup>45</sup> One of the effects of the legalization of war may then be the erosion of a sense of personal responsibility, the transformation of free decisions into judgments that result from “the abstract operation of professional principles.”<sup>46</sup>

Kennedy thus voices two seemingly contradictory concerns about lawfare. On the one hand, there is the concern that the credibility and independence of legal arguments is undermined by their strategic use. On the other hand, the concern is that legal arguments are taken too seriously and used as the endpoint of normative deliberations. Both points, however, address the same basic idea: that humanitarians and militaries should acknowledge their freedom to take responsible decisions on the use of lethal force, including the decision to use law as a strategic tool.

### C. *Reflexive Lawfare*

The legalization of politics and war gave rise to yet another use of the term “lawfare.” “In the past quarter century,” Goldsmith wrote in a 2002 memo for the Bush administration, “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 USG interests.”<sup>47</sup> Goldsmith expressed a deeply felt concern in the U.S. administration that the legalization of world politics, for example, via the expansion of universal jurisdiction and the proliferation of international tribunals, would hamper effective measures in the fight against terrorism.<sup>48</sup> Victim groups and human rights advocates soon learned how to utilize the newly opened up venues for legal action.<sup>49</sup> Even where attempts to hold former officials legally accountable do not result in actual cases before a court, they generally create media activity and spur public debate about the legitimacy of specific governmental operations.<sup>50</sup> Under the Bush Administration, the fear for legal action even reached a point where recourse to international fora and international law by opponents was de-

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 144

<sup>46</sup> *Id.*

<sup>47</sup> JACK GOLDSMITH, *THE TERROR PRESIDENCY, LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 60 (W.W. Norton & Company 2009).

<sup>48</sup> *Id.* at 59.

<sup>49</sup> *Id.* at 58–61.

<sup>50</sup> *Id.* at 62–63.

nounced as a strategy of the weak, just like the use of instruments such as terrorism.<sup>51</sup>

In order to fight the use of law by critics of the government, the term “lawfare” was taken up again. The way in which lawfare was then often used, however, implied a significant change in its meaning and purpose.<sup>52</sup> Lawfare was still used to describe the increasing judicialization of war and politics.<sup>53</sup> At the same time, lawfare was used as an instrument to discredit critics of the government.<sup>54</sup> The concept of lawfare was thereby transformed from an analytical tool to capture the changing relation between law and war into a weapon actually involved in political and military struggles. Invoking the term “lawfare” had become a strategic move itself—an alternative form of warfare that, for lack of a better term, may be called “reflexive lawfare.” “Reflexive lawfare” can be defined as “the use of the term ‘lawfare’ to discredit an opponent’s reliance on law and legal procedure.”<sup>55</sup> If it would not be too much of a sophism, one may define “reflexive lawfare” also as “the use of the term ‘lawfare’ as an instrument of lawfare.”<sup>56</sup>

The transformation of lawfare is visible in at least three interrelated aspects. First, those who use “lawfare” as a stigma for their opponents apply it almost exclusively to actions of critics or enemies of a particular government—in practice mostly the United States and Israel.<sup>57</sup> This strongly deviates from the way in which scholars such as Dunlap or Kennedy have used the concept. Kennedy, for example, used “lawfare” to analyse how all those who are involved in modern wars use law as a strategic tool.<sup>58</sup> In similar fashion, Dunlap sets out how the military and humanitarians, states and non-state actors, as well as national officials and international organizations

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<sup>51</sup> *Id.* at 64.

<sup>52</sup> David Luban, *Lawfare and Legal Ethics in Guantanamo*, 60 STAN. L. REV. 1981, 2020 (2007–2008).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 2021 (denouncing the efforts of lawyers defending those accused of terrorist acts); Scott Horton, *State of Exception: Bush’s War on the Rule of Law*, HARPER’S, July 2007, at 74, 74 <http://www.harpers.org/archive/2007/07/0081595>.

<sup>55</sup> *See* Horton, *supra* note 54.

<sup>56</sup> *See id.*

<sup>57</sup> *See* Anne Herzberg, *Lawfare Against Israel*, Wall Street Journal Europe, Nov. 5, 2008, available at <http://online.wsj.com/article/SB122583394143998285.html> (An opinion article on frivolous exploitation of lawsuits in furtherance of a “lawfare” strategy against Israel); *See also* Alan Dershowitz & Elizabeth Samson, *The Chilling Effect of ‘Lawfare’ Litigation*, THE GUARDIAN, Feb. 9, 2010, available at <http://www.guardian.co.uk/commentisfree/libertycentral/2010/feb/09/libel-forum-radical-islamic-groups> (citing a recent ACLU’s recent law suit in the United States).

<sup>58</sup> DAVID KENNEDY, OF WAR AND LAW 125 (2006).

engage in lawfare.<sup>59</sup> Those who use lawfare as a stigma, however, tend to be silent about the strategic use of law by governments and the military, focusing instead on the possible negative effects of the invocation of law and legal procedure by opponents of a particular government.<sup>60</sup>

Secondly, the strategic use of law is presented predominantly in a negative light, as an unfair and dangerous way to frustrate legitimate governments.<sup>61</sup> This is a far cry from the way in which Dunlap and Kennedy used the concept. For Dunlap, the strategic use of law is not negative by definition, as it may be part of a legitimate activity that promotes democratic values and the rule of law.<sup>62</sup> Kennedy too, while voicing concerns about the effects of lawfare, did not denounce the use of law as a strategic tool *per se*.<sup>63</sup> On the contrary, he warned against attempts to project the invocation of law by one's opponents as purely cynical, strategic moves, as this would eventually undermine the integrity of law.<sup>64</sup>

Thirdly, the use of "lawfare" is largely decoupled from critical self-reflection. For Kennedy, acknowledging the importance of lawfare also confronted him with the possible downsides of his own previous efforts to civilize war.<sup>65</sup> His ultimate aim was to propel a process of critical self-reflection about the personal responsibility of humanitarians and military.<sup>66</sup> For those who use lawfare as a stigma, however, the primary aim is not to take a fresh and critical look at their own position and responsibility.<sup>67</sup> This is not to say that they turn a blind-eye to issues of responsibility. They will

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<sup>59</sup> See Dunlap, *supra* note 33, at 36 (describing al-Qaeda's use of lawfare and recent media reports on the Taliban).

<sup>60</sup> See generally, Anne Herzberg, *NGO Lawfare, Exploitation of Courts in the Israeli-Arab Conflict*, NGO MONITOR MONOGRAPH SERIES, September 2008, available at <http://www.ngo-monitor.org/data/images/File/lawfare-monograph.pdf>.

<sup>61</sup> See THE LAWFARE PROJECT, *supra* note 2; see also 2005 NAT'L DEF. STRATEGY, *supra* note 5.

<sup>62</sup> Charles J. Dunlap, Jr., Visiting Professor, Duke University School of Law and Associate Director, Center on Law, Ethics, and National Security, Presented at Case Western University School of Law Frederick K. Cox International Law Center War Crimes Research Symposium, Does Lawfare Need an Apologia? (Sept. 10, 2010), available at <http://www.au.af.mil/au/aunews/archive/2010/0520/0520Articles/Dunlap0520.pdf>.

<sup>63</sup> KENNEDY, *supra* note 1, at 41 ("But if law can increase friction by persuading relevant audiences of a campaign's illegitimacy, it can also grease the wheels of combat. Law is a strategic partner for military commanders when it increases the perception of outsiders that what the military is doing is legitimate. And of course, it is a strategic partner for the war's opponents when it increases the perception that what the military is doing is not legitimate.")

<sup>64</sup> *Id.* at 41 ("Law is a strategic partner for military commanders when it increases the perception of outsiders that what the military is doing is legitimate.")

<sup>65</sup> *Id.* at 8 (demonstrating the author's attempt to reconcile the laws of war, such as when a military is entitled to kill civilians, with human rights concerns).

<sup>66</sup> *Id.* ("May the human freedom of responsible decision be the vocation of our politics.")

<sup>67</sup> See, e.g., Herzberg, *supra* note 60 (using "lawfare" with a negative connotation).

feel, for example, that protecting a particular nation against terrorist threats is the ultimate responsibility, which may require far-reaching and unpopular measures.<sup>68</sup> Using lawfare as a stigma, however, has little to do with developing a critical stance towards one's own role and responsibility. On the contrary, the label "lawfare" is primarily used to communicate that *others* are acting irresponsibly because they use law to frustrate governments fighting for a good cause.<sup>69</sup>

This is not to say that the use of law and legal proceedings can never be criticized. There are many good reasons to follow attempts to legalize world politics and to point at possible risks and dark sides of using law as an instrument to settle political disputes.<sup>70</sup> However, using lawfare as a label to discredit opponents of a specific government contributes little to a better understanding of the pros and cons of using law and legal procedure in a particular context. Instead, it blinds us for the omnipresence of law in contemporary wars and for the ways all parties concerned use legal arguments strategically. Moreover, it seduces us to take a comfortable, but limited view on responsibility: it does not invite us to think critically about our own role and responsibility, but only helps us to discredit those who we believed were wrong in the first place.

### III. CONCLUSION

This essay has examined the curious career of lawfare: how the concept was borne in new age circles, reappeared more than two decades later in reflections on unrestricted warfare, how it travelled from the U.S. army to critical legal studies, and how it ended up in the hands of those who use it primarily to discredit opponents of particular governments.

The aim of this exercise has not been to discover the one true meaning of "lawfare." After all, meaning is not pre-given but produced and reproduced in specific social contexts. This is not to say that we should be indifferent to the ways in which concepts are used. In terms of what is highlighted and what it suppressed, it matters a great deal how a concept is used and defined. In this context, I have voiced concern about the move towards reflexive lawfare—the use of the term "lawfare" as an instrument to de-legitimise opponents. This way of using lawfare gives a one-sided perspective on the role of law in contemporary conflicts. It largely neglects the many ways in which governments and the military use law strategically and presents the recourse to law and legal procedure as something negative.

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<sup>68</sup> See, e.g., Goldsmith, *supra* note 47, at 129.

<sup>69</sup> See, e.g., *id.*

<sup>70</sup> See Sarah Nouwen & Wouter Werner, *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan*, 21(4) EUR. J. OF INT'L L. (forthcoming 2011).

Therefore, it risks undermining the integrity of law and closing off debates about accountability for the use of lethal force.

This is not to say that we should abandon the concept of lawfare altogether. "Lawfare" is a powerful term that captures the omnipresence of law in the wars of the late 20th and early 21st century. It signals that arguments about the irrelevance of law in issues of high politics have lost touch with the realities of contemporary warfare. Moreover, it indicates that law is not just a restraining force, but rather a symbolic order that helps to socially construct, legitimise, and assess the use of lethal force. Lawfare does not need to be turned into an instrument for political and military struggles. It can also form the starting point for research into the complex ways in which law and war are related nowadays, and the questions of responsibility that result from this.