



Sgt. Kyle Hale of 1st Battalion, 6th Infantry Regiment, 2nd Brigade Combat Team, 1st Armored Division, contains an unruly crowd 10 June 2008 to protect a man who was nearly trampled outside the Al Rasheed Bank in the Jamila market in the Shiite enclave of Sadr City, Baghdad, Iraq. (Photo by Petros Giannakouris, Associated Press)

Lawfare 101

A Primer

Maj. Gen. Charles Dunlap Jr., U.S. Air Force, Retired

For many commanders and other military leaders, the role of law in twenty-first century conflicts is a source of frustration. Some think it is “handcuffing” them in a way that is inhibiting combat success.¹ For others, law is another “tool that is used

by the enemies of the West.”² For at least one key ally, Great Britain, law seems to be injecting counterproductive hesitancy into operational environments.³ All of these interpretations have elements of truth, but at the same time they are not quite accurate in providing

an understanding of what might be called the role of *lawfare* in today's military conflicts.

Law has become central to twenty-first century conflicts. Today's wars are waged in what Joel Trachtman calls a "law-rich environment, with an abundance of legal rules and legal fora."⁴ This is the result of many factors outside of the military context, including the impact of internationalized economics. Still, as the Global Policy Forum points out, globalization "is changing the contours of law and creating new global legal institutions and norms."⁵

As with many other aspects of modern life, trends in the economic sphere impact warfighting, and this includes how law interacts with armed conflict. Many senior leaders have come to recognize this reality. Retired Marine Corps Gen. James L. Jones, a former NATO commander and U.S. national security advisor, observed several years ago that the nature of war had changed. "It's become very legalistic and very complex," he said, adding that now "you have to have a lawyer or a dozen."⁶

Technology has also revolutionized the impact of law on war, as its many manifestations add to war's complexity. Sorting out the implications of technology for warfighting requires an advanced appreciation for the norms that do—or should—govern it. Retired Army Gen. Stanley McChrystal recently observed that "technology has only made law more relevant to the battlefield."⁷ He believes that "no true understanding of the exercise of U.S. military power can be attained without a solid appreciation of how the law shapes military missions and their outcomes."⁸

The purpose of this article is to provide an overview of the concept of what has come to be known as lawfare. This essay also aims to provide some practical context for nonlawyer leaders to think about lawfare, as well as some considerations for how to prepare to operate against an enemy seeking to capitalize on this phenomenon of contemporary conflicts.⁹

What is Lawfare?

The term lawfare has existed for some time, but its modern usage first appeared in a paper this author wrote for Harvard's Kennedy School in 2001.¹⁰ Lawfare represents an effort to provide military and other nonlawyer audiences an easily understood "bumper sticker" phrasing for how belligerents, and particularly those unable to challenge America's

high-tech military capabilities, are attempting to use law as a form of "asymmetric" warfare.¹¹

Over time, the definition has evolved, but today it is best understood as the use of law as a means of accomplishing what might otherwise require the application of traditional military force. It is something of an example of what Chinese strategist Sun Tzu might say is the "supreme excellence" of war, which aims to subdue "the enemy's resistance without fighting."¹² Most often, however, it will only be one part of a larger strategy that could likely involve kinetic (lethal) and other traditional military capabilities.

More importantly, lawfare is ideologically neutral. Indeed, it is helpful to think of it as a weapon that can be used for good or evil, depending upon who is wielding it and for what reasons. As Trachtman says, "Lawfare can substitute for warfare where it provides a means to compel specified behavior with fewer costs than kinetic warfare, or even in cases where kinetic warfare would be ineffective."¹³ That is a truth that is equally applicable to America's enemies as it is to the United States itself.

How Has the United States Used Lawfare?

There are many examples of how law can be used to peacefully substitute for other military methodologies. For example, during the early part of Operation Enduring Freedom, commercial satellite imagery of areas in Afghanistan became available on the open market. Although there may have been a number of ways to stop such extremely valuable data from falling into hostile hands, a legal "weapon"—a contract—was used to buy up the imagery. Doing so prevented

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They are using the law in order to turn respect for the law in the United States and other democratic countries into a vulnerability.



“the pictures from falling into the hands of terrorist organizations like al-Qaeda.”¹⁴

Law plays a very significant role in counterinsurgency operations. Although the term lawfare is not used, Field Manual 3-24, *Insurgencies and Countering Insurgencies*, is replete with how law is a key element of the comprehensive approach that success in such conflicts requires.¹⁵ In particular, it makes the point that “establishing the rule of law is a key goal and end state in counterinsurgency.”¹⁶ As Gen. David H. Petraeus has pointed out, it is unlikely that a counterinsurgency effort will succeed absent a form of lawfare that brings about the rule of law in the target state instead of relying solely on killing or capturing the insurgent force.¹⁷

There are further legal means that can impact military capabilities rather directly. For example, sanctions crippled the Iraqi air force to the point where fewer than one-third of its aircraft were flyable when the coalition invaded in 2003.¹⁸ The operational impact is obvious: Iraqi jets were grounded just as effectively as if they were shot down. Sanctions are also seen as having slowed Russia’s military buildup. Kyle Mizokami reported in 2016 that international sanctions (along with falling oil prices) were adversely affecting the economy, which, in turn, frustrated Russia’s efforts to rebuild its military.¹⁹

There has been an array of approaches for using law to undermine adversaries, approaches that can be put under the aegis of lawfare. For example, Juan Zarate, a former Treasury Department official, describes a range of legal initiatives his agency used to disrupt and deny terrorists, in particular the financial resources they needed.²⁰ In addition, even private litigation is working to deny access to the banking and social media platforms terrorists increasingly rely upon.²¹

How Does the Adversary Use Lawfare?

Many hostile nonstate actors use lawfare as a mainstay of their strategy for confronting high-tech

militaries. To be clear, they are using the law in order to turn respect for the law in the United States and other democratic countries into a vulnerability. For example, they might seek to exploit real or imagined reports of civilian casualties in the hopes that fear of causing more of the same will result in a constrained use of certain military technologies (e.g., airpower) by rule-of-law countries like the United States.

The after effects of the bombing of the Al Firdos bunker during the 1991 Gulf War presaged much of what we see today. Although believed to be a military command-and-control center, it was actually being used as a shelter for the families of high-level Iraqi officials. When pictures of dead and injured civilians were broadcast worldwide, they “accomplished what the Iraqi air defenses could not: downtown Baghdad was to be attacked sparingly, if at all.”²²

Ironically, nothing violative of the law of war had occurred, but perceptions of the same had the operational effect of a sophisticated air defense system.²³ Many adversaries have “gone to school” on this event as an example of a low-tech means to counter high-tech systems. Obviously, perceptions do matter. Michael Riesman and Chris T. Antoniou insist,

In modern popular democracies, even a limited armed conflict requires a substantial base of public support. That support can erode or even reverse itself rapidly, no matter how worthy the political objective, if people *believe* that the war is being conducted in an unfair, inhumane, or iniquitous way. [italics added]²⁴

Accordingly, after witnessing what the Al Firdos bombing raid accomplished, some adversaries seek to exploit such incidents when they occur, but others seek to orchestrate them in order to get the benefit of the restraint that might follow. For example, the Islamic State “uses civilians as human shields to claim that the U.S.-led coalition is targeting innocent people during the strikes.”²⁵



In fact, most U.S. adversaries actually see our political culture's respect for the law as a "center of gravity" to be exploited. William Eckhardt observes,

Knowing that our society so respects the rule of law that it demands compliance with it, our enemies carefully attack our military plans as illegal and immoral and our execution of those plans as contrary to the law of war. Our vulnerability here is what philosopher of war Carl von Clausewitz would term our "center of gravity."²⁶

Incidents of illegality markedly advance an enemy's lawfare strategy. The Abu Ghraib prisoner abuse scandal that occurred during the Iraq War is a classic illustration.²⁷ It is significant that Lt. Gen. Ricardo Sanchez, then commander of Combined Joint Task Force 7 (commander of coalition ground forces in Iraq), used traditional military language in assessing the impact of the explosion of criminality at Abu Ghraib by terming it "clearly a defeat" because its *effect* was indistinguishable from that imposed by traditional military setbacks.²⁸ Elsewhere, as reported by Joseph Berger in the *New York Times*, Petraeus, then head of U.S. Central Command,

Syrian Army officers and their families who support President Bashar al-Assad are locked in "human shield" cages by a rebel group called "Army of Islam" 31 October 2015 in the Damascus suburb of Douma, Syria. The group claimed the human shields would protect Douma's civilians from airstrikes led by Russian and Syrian air forces. (Photo by Balkis Press/Sipa USA via Associated Press)

had explained during an interview how violations of the law impact what happens on the battlefield:

"Whenever we have, perhaps, taken expedient measures, they have turned around and bitten us in the backside," [Petraeus] said. Whenever Americans have used methods that violated the Geneva Conventions or the standards of the International Committee of the Red Cross, he said: "We end up paying the price for it ultimately. Abu Ghraib and other situations like that are nonbiodegradable. They don't go away. The enemy continues to beat you with them like a stick."²⁹

The situation is even more aggravated in an era of proliferated sports cameras, cell phones, and similar

devices able to record and transmit images worldwide in real or near-real time. A forty-second video of marines urinating on the bodies of dead Taliban that went “viral” was, according to Afghan leaders, a “recruitment tool for the Taliban.”³⁰ This is exactly the kind of avoidable illegality that lawfare-oriented adversaries readily exploit.

The point is that today each troop in the field is, indeed, a “strategic corporal.” Gen. Charles C. Krulak, former commandant of the Marine Corps, said in 1999 that “the individual marine will be the most conspicuous symbol of American foreign policy and will potentially influence not only the immediate tactical situation, but the operational and strategic levels as well.”³¹ Today, the exposure of lawfulness or unlawfulness of individuals, superempowered by technology, is able to have an operational or strategic impact.

Chinese and Russian Lawfare

It is a mistake to think that lawfare is something only utilized by technology-vulnerable nonstate actors. Countries with formidable military capabilities do employ lawfare, but differently. China, for example, has an extremely sophisticated “legal warfare” doctrine, which designates such strategies as one of their “three warfares.”³² According to Dean Cheng, the “People’s Liberation Army are approaching lawfare from a different perspective: as an offensive weapon capable of hamstringing opponents and seizing the political initiative.”³³

Quoting Chinese sources, Cheng says, “Legal warfare, at its most basic, involves ‘arguing that one’s own side is obeying the law, criticizing the other side for violating the law, and making arguments for one’s own side in cases where there are also violations of the law.’”³⁴ Current events suggest that China seems to be executing its lawfare strategy. Indeed, some observers see this strategy as the main thrust of their expansion into the South China Sea.³⁵

Additionally, today, Russia is often viewed as a pre-eminent practitioner of what has been called “hybrid war,” of which lawfare is an element. In Army parlance, the term “hybrid threat” captures “the seemingly increased complexity of operations, the multiplicity of actors involved, and the blurring between traditional elements of conflict.”³⁶ It combines “traditional forces governed by law, military tradition, and custom with unregulated forces that act with no restrictions on violence or target selection.”³⁷

Chairman of the Joint Chiefs of Staff Gen. Joseph F. Dunford Jr. says he tries to stay away from “hybrid” terminology. Rather, he considers it “a competition with an adversary that has a military dimension, but the adversary knows exactly what the threshold is for us to take decisive military action.” Consequently, he says “they operate below that level,” and are able to “continue to advance their interests and we lose competitive advantage.”³⁸

Legal experts say that Russia’s form of hybrid warfare explicitly seeks to blur legal lines in order to exploit the uncertainty that results.³⁹ They posit that the “inherent complexity, ambiguity, and the attributable character of hybrid warfare create not only new security but also legal challenges,” especially for these “who adhere to international law within good faith and the commonly agreed frameworks established under and governed by the principles of the rule of law.”⁴⁰ Plainly, this is a form of lawfare and something long a part of Russia’s arsenal.⁴¹

Responding at the Tactical Level: The Commander’s Responsibilities

Quite obviously, many of the challenges and opportunities presented by lawfare in its many manifestations arise mostly at the strategic and operational levels of conflict. This does not, however, mean that other aspects of lawfare are of no importance to those at the tactical level. This is relevant with respect to denying the enemy the opportunity to employ lawfare techniques to exploit or orchestrate acts that create the fact or perception of lawlessness that will undermine or even prevent mission success.

Most commanders and tactical-level leaders understand that they have a wide variety of responsibilities in the legal arena, particularly with respect to discipline. The Army’s 2015 *Commander’s Legal Handbook* counsels that in many instances,

The purpose of your actions should be to preserve the legal situation until you can consult with your servicing Judge Advocate. However, like most aspects of your command responsibilities, you can fail if you just wait for things to come to you. You need to be proactive in preventing problems before they occur.⁴²

In terms of operations, being proactive with respect to the challenge of lawfare includes what I call “legal preparation of the battlespace.”

Legal Preparation of the Battlespace

Commanders are familiar with the concept of intelligence preparation of the battlefield but need to add *legal* preparation of the battlespace to their “to-do” list.⁴³ This means systematically analyzing the legal dimensions of a particular mission and its context, and determining their potential effect on operations. It then becomes incumbent on commanders—at every level—to take whatever actions they can to enhance positive effects of the law on the operation, and to eliminate or mitigate potential adverse impacts.

Key to this effort would be utilization of the supporting judge advocate generals (JAGs). Like other services, the Army JAG Corps has established an explicit practice area to “provide legal advice to commanders and their staffers on domestic, foreign, and international laws that influence military operations.”⁴⁴

Recently, Maj. Dan Maurer, an Army JAG, advised his fellow uniformed lawyers about the need to understand their advisory role vis-à-vis the commander and other decision makers. Although not addressing lawfare specifically, his advice nevertheless has application: “Decision-makers need to be fully confident and fully aware of not only *what* you think, but *why* you think it, and *how* their particular decisions will affect *others* beyond the slim consequences of the immediate battle drill.”⁴⁵

Most commanders would likely agree with Maurer, but how can they ensure that their legal advisor is capable of giving them that sort of insight? Part of the answer is easy, in that commanders will likely be supported by a JAG with strong legal skills. Getting an appointment as a JAG officer is extremely competitive these days, and law students and lawyers who aspire for a commission must be among the very best.⁴⁶ However, legal acumen is only part of the process.

The finest lawyer cannot be effective if he or she does not fully understand the client’s business and needs. In the military setting, this means a deep understanding of the mission, capabilities, and mindset of the supported unit. Much of this falls upon the JAG to develop, but commanders can facilitate the process by reaching out to their supporting legal officer. This means ensuring that the JAG visits the unit frequently and acquires a familiarity with its soldiers,

equipment, and methods of operation. This must be accomplished in garrison because it is extremely difficult to do on the fly or once deployed.

Success, Maurer tells us, is “measured by *the relationship itself* between the advisor and principal decision maker.”⁴⁷ He offers these questions for introspection by both the legal advisor and the decision maker:

Is [the relationship] characterized by trust?

Is it deep? Is it candid? Does it forgive errors and accept nuance and a bit of chaos? Is it built to allow for the *time* to be *all* of these things, or is it nothing more than a twice-monthly status report?⁴⁸

None of this, of course, obviates the responsibility of the supporting legal advisor and others in his or her functional chain of supervision to engage in a wide-ranging professional, and often highly technical, legal analysis, and to prepare a supporting legal plan that spans all levels of war as is necessary to effectively wage lawfare and, conversely, defend against it.⁴⁹

Educate the Troops about Lawfare

Beyond securing the right legal advisor, it is important to have the troops understand the “why” about lawfare. The most obvious part of this process for tactical-level units is ensuring the troops understand that battlespace discipline is more than a matter of personal character and accountability; it directly relates, as discussed earlier, to operational success.

Consequently, commanders and other leaders need to explain the importance of denying adversaries incidents of real or perceived misconduct that can be exploited. This part of the legal preparation of the battlefield must begin long before the unit arrives in the battlespace. As the U.S. Supreme Court explained in *Chappell v. Wallace*,

The inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex, with no time for debate or reflection.⁵⁰

Yet at the same time, twenty-first century commanders need to appreciate that today’s troops are not automatons (and we should not want them to be). According to the 2016 Deloitte Millennial Survey, personal values have the greatest influence on millennials’

decision making.⁵¹ This means they need to have a keen understanding of how a task fits with their personal values or ethics.⁵² Richard Schragger points out that “law allows our troops to engage in forceful, violent acts with relatively little hesitation or moral qualms.”⁵³ Law can, he says, create a “well-defined legal space within which individual soldiers can act without resorting to their own personal moral codes.”⁵⁴

Absent a firm grounding in the importance of law and its moral underpinnings, personal moral codes can take a dark turn under the enormous stress of combat. The late historian Stephen Ambrose observed that it is a “universal aspect of war” that when you put young troops “in a foreign country with weapons in their hands, sometimes terrible things happen that you wish had never happened.”⁵⁵ More recently, William Langewiesche has reported on just how combat can catastrophically distort the judgment of otherwise good soldiers.⁵⁶ This and other case studies need to be carefully examined by leaders, JAGs, and troops alike.

Clearly, to deny adversaries an effective lawfare strategy, troops must be trained on the law of war and its incorporation into the rules of engagement. Leaders, however, need to be wary of self-imposed restraints, because they can work to benefit adversaries. For example, the announcement by NATO first and later by the United States of the rules of engagement that require a “near certainty” of zero civilian casualties creates the perception of illegality when such casualties inevitably occur, even though international law does not require zero civilian casualties but merely that they need not be excessive in relation to the concrete and directed military advantage anticipated.⁵⁷

Such publicly announced restraints invite adversaries to do exactly what the law does not want them to do: embed themselves among civilians in order to protect themselves from an air attack more effectively than any air defense might be able to do. Indeed, there is a real risk that overly restrictive rules of engagement may, paradoxically, endanger civilians because the failure to conduct a strike may save some civilians in the near term, but over time, the enemy who escapes an attack may go on to wreak more havoc on innocents, which would not have been the case if the attack had gone forward and the enemy had been neutralized.⁵⁸

All of this suggests that the complexities of modern battlefields, and in particular the implications of

lawfare and counter-lawfare techniques, make solutions very fact-dependent. A sophisticated understanding of the legal “terrain” is essential and will require a real intellectual investment by military leaders and their forces if they are to be prepared to succeed.

The legal machinations of Russians waging hybrid war are not necessarily the same as China’s legal warfare in the South China Sea or the Islamic State’s ruthless exploitation of human shields to ward off high-tech weaponry. Each approach is a related but differing application of lawfare. Only by a discriminate and detailed analysis of these various lawfare strategies will U.S. forces be able to anticipate and blunt an adversary’s use of lawfare.

Concluding Observations

There is yet much work to do. In his book on lawfare, Orde Kittrie makes the astute observation that “despite the term having been coined by a U.S. government official, the U.S. government has only sporadically engaged with the concept of lawfare.”⁵⁹ He goes on to lament that the United States has “no lawfare strategy or doctrine, and no office or inter-agency mechanism that systematically develops or coordinates U.S. offensive lawfare or U.S. defenses against lawfare.”⁶⁰

Although enumerating all of the techniques to counter adversary lawfare strategies is beyond the scope of this article, I hope that, together with other experts,

a start is underway. Fortunately, some useful work has been done with respect to specific challenges. For example, Stefan Halper’s 2013 paper—prepared for the Department of Defense’s Office of Net Assessments—provides useful ideas not only for the specific situation it addresses (China’s actions in the South China Sea) but also with real application to other lawfare situations.⁶¹ Trachtman has also done some valuable work that will help develop thinking about lawfare.⁶²

Furthermore, in a recent article in NATO’s *Three Swords Magazine*, U.S. Army Lt. Col. John Moore notes that while the alliance has no formal definition or doctrine, the concept has been discussed in papers and at conferences.⁶³ Given the rise especially of Russia’s employment of hybrid war with its lawfare element, he believes it is urgent that NATO coalesce its already extant thinking about lawfare and express it in a formal doctrine in order to facilitate the alliance’s ability to defend itself against lawfare techniques, as well as to use the concept proactively.⁶⁴

In the meantime, commanders and leaders at all levels need to include law and lawfare into their planning process and operational conduct, even in the absence of formal doctrine. The fact is that lawfare is not a passing phenomenon; it is intrinsic to current conflicts and will continue to be so for the foreseeable future. The best leaders will ensure that they and their troops will be prepared to meet this challenge. ■

Notes

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