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# Is Lawfare Worth Defining - Report of the Cleveland Experts Meeting - September 11, 2010

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**IS LAWFARE WORTH DEFINING?  
REPORT OF THE CLEVELAND EXPERTS MEETING  
SEPTEMBER 11, 2010\***

I. INTRODUCTION

On September 10–11, 2010, Case Western Reserve University School of Law hosted a symposium and experts meeting on the question of what is “lawfare” and how should the United States and its allies best respond to it? The event was funded by the Wolf Family Foundation, organized by the Frederick K. Cox International Law Center, and co-sponsored by the American Society of International Law, the International Association of Penal Law (American National Section), International Law Association (American Branch), the Inamori International Center for Ethics and Excellence, and the Public International Law and Policy Group.

The Cleveland Experts Meeting was chaired by Elizabeth Andersen, the Executive Director of the American Society of International. Of the two dozen other participants in the Experts Meeting, several were current or former Judge Advocate General (JAG) lawyers (Gregory Noone, Sandy Hodgkinson, Michael Lebowitz, Charles Dunlap, Michael Newton, David Crane, and David Frakt). Additional participants were former government or international organization officials who had experience as practitioners in international criminal law and the law of armed conflict (David Scheffer, Justice James Ogoola, Robert Petit, William Schabas, Michael Scharf, Paul Williams, Orde Kittrie, Jamie Williamson, and Melissa Waters). The remaining participants consisted of leading academic experts on the law of armed conflict (William Aceves, Tania Ansah, Laurie Blank, Shannon French, Scott Horton, Jens Meierhenrich, Leila Nadya Sadat, Robert Strassfeld, Susan Tiefenbrun, and Wouter Werner).<sup>1</sup> The experts participated in their individual/personal capacities and not as representatives of their respective countries, organizations, or institutions.

The hope was that the Experts Meeting could develop one or more useful definitions of “lawfare,” develop strategies to prevent the misuse of the term, and determine whether legal institutions were equipped to respond to “lawfare.”

In accordance with the understanding of the participants, this report follows the “Chatham House Rule”; therefore, the views of particular ex-

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\* This Report was drafted by Michael Scharf & Elizabeth Andersen, assisted by Cox Center Fellows Effy Folberg, Michael Jacobson, & Katlyn Kraus.

<sup>1</sup> A list of the experts and their affiliations follows as an Appendix to the Report.

perts remain unidentified in the text. In some places, the discussion has been re-ordered to enhance organizational clarity.

## II. HISTORY OF THE TERM “LAWFARE”

The term “lawfare” does not yet appear in the Oxford English Dictionary. Prior to 2001, the term was used sporadically in a variety of contexts. The term was popularized that year in a speech at Harvard University by Major General Charles Dunlap, who defined it as “a strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective.”<sup>2</sup> As originally envisioned by Dunlap, “lawfare” was a neutral term. It was designed as a sort of “bumper sticker” to help military personnel understand why the law needs to be incorporated into their thinking and planning.

In recent years, the term has been used by groups and commentators in an array of ways, many of which mean something quite different from Dunlap’s original conception. Today, “lawfare” is used most commonly as a label to criticize those who use international law and legal proceedings to make claims against the state, especially in areas related to national security. This definition has been popularized by a neo-conservative-sponsored group called “The Lawfare Project,”<sup>3</sup> whose website lists as examples of “lawfare” the case brought to the International Court of Justice on the legality of Israel’s security barrier, human rights cases sponsored by organizations sympathetic to the Palestinian cause, and litigation in support of terrorist detainees.<sup>4</sup> “Lawfare” has also been used to describe the nefarious exploita-

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<sup>2</sup> Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT’L. AFF. 146, 146 (2008).

<sup>3</sup> The Lawfare Project is a New York-based organization devoted to exposing alleged abuses of the international legal system. *About Us*, THE LAWFARE PROJECT (last visited Dec. 16, 2010), <http://www.thelawfareproject.org/about>. When references are made to the “hijacking” of the term, the Lawfare Project is usually the chief culprit. The Lawfare Project defines their goal as analyzing “*lawfare* as it used (via the Western legal system), nationally and internationally, to: (1) Thwart and punish free speech about issues of national security and public concern, (2) De-legitimize the sovereignty of democratic states, and (3) Frustrate and hinder the ability of democracies to defend themselves against terrorism.” *Id.*

The primary goals of the Lawfare Project are: (i) To raise awareness about the phenomenon (and specific instances) of lawfare assuring the subject matter receive the credibility and immediacy that it warrants, (ii) facilitate (legal and non-legal) responses to the perversion and misapplication of international & national human rights law, (iii) identify and mobilize human and institutional resources, and (iv) bring diverse and interested parties together in a common forum to discuss the threat.

*Id.*

<sup>4</sup> *What is Lawfare?*, THE LAWFARE PROJECT (last visited Dec. 16, 2010), <http://www.thelawfareproject.org>.

tion of international law for propaganda purposes by, for example, orchestrating civilian deaths.<sup>5</sup>

The assembled Experts recognized that, however defined, “lawfare” is a potentially powerful term that reflects the importance of law in the conflicts of the twenty-first century.

### III. HAS THE ACADEMY ALREADY LOST CONTROL OF THE CONCEPT OF LAWFARE?

Two fundamental debates regarding the definition of “lawfare” pervaded the expert discussion. The first was whether the term should be identified empirically—based on its usage up to the present—or normatively—based on an agreed-upon more appropriate definition. The second debate was whether academicians and legal experts should use the term at all, noting that using the term “lawfare” itself potentially undermined respect for the rule of law.

Some participants believed that “lawfare,” if defined narrowly, could be a useful term, but as described in more detail below there was little consensus on how best to define the term. Most participants agreed, however, that the reactive, “right-wing” concept of “lawfare” constituted a “hijacking” of the term and should be rejected. Not everyone thought that such a rejection was possible, though, and some of the experts expressed the view that now that others have widely propagated an alternative definition of the term, the academy has lost the initiative and would be fighting a futile cause in trying to recapture the concept as a neutral term.

While some of the experts wished to see “lawfare” retain its utility as a useful label for legal and military professionals, others believed that regardless of the term’s usefulness in its original military context, it had lost its usefulness when it began to be applied more broadly. Explaining why “lawfare” should not become a field of academic inquiry, one participant stated that the military implications of the term were “shocking in a civilian context.”

Some participants took the very existence of an empirical-normative debate to imply that the academy has already lost the initiative, and that “lawfare” has morphed into and will remain a term describing perceived wrongful uses of the law to achieve political or military ends. These experts opined that if a term encompassing the more “positive” uses of “lawfare” were needed, a separate term should be crafted. There was not, however, unanimity on this point, with some arguing that alternate definitions of “lawfare” have already made headway in the arena of public debate.

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<sup>5</sup> Mark Martins, *Reflections on “Lawfare” and Related Terms*, The Lawfare Project (Nov. 18, 2010), <http://www.lawfareblog.com/2010/11/reflections-on-%E2%80%9Clawfare-%E2%80%9D-and-related-terms/>.

They noted that while an Internet search in the spring of 2010 would likely have disclosed hundreds of references to the “Lawfare Project” definition, in recent months alternative definitions have been gaining in exposure.<sup>6</sup>

Some of the participants believed that regardless of what experts think about use of the term “lawfare” and its various definitions, the term is already so widespread that it cannot be “de-invented.” They opined that the term will likely remain in use, but it will not necessarily be limited to a single definition. They pointed out that “lawfare” is likely to join the ranks of the many terms in the dictionary that have alternative definitions.

One participant warned that any attempt to develop a generally agreed upon definition of “lawfare” would likely encounter problems similar to efforts to pin down an accepted definition of fundamental concepts in international humanitarian law (IHL), such as the term “genocide,”<sup>7</sup> noting that certain problematic concepts within definitions can easily “blow up in the face” of academics looking for a hard and fast definition. It was suggested that if the goal was to use “lawfare” to describe attempts by enemies to use the law of armed conflict to gain a strategic advantage over or constrain U.S. or allied military forces, the definition should be limited accordingly. Another participant echoed this sentiment, noting that “the term now has come to mean so much more than what it was originally supposed to,” thereby weakening its overall usefulness.

Concern that the term has been “hijacked” by neo-conservative interests spurred one participant to argue that any attempt to “reclaim and revalidate the proper exercise of the law” in the face of right-wing definitions of “lawfare” essentially plays into the hands of the “hijackers.” The expert added that debating whether existing legal tools such as tribunals and international criminal indictments fit into “lawfare” is not constructive. Such tools, it was argued, have existed for many years and whether they are used appropriately or not will ultimately depend on whether the legal institutions “follow the law and the evidence.”

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<sup>6</sup> See, e.g., Benjamin Wittes, Jack Goldsmith, & Robert Chesney, *LAWFARE: HARD NATIONAL SECURITY CHOICES*, <http://www.lawfareblog.com/>.

<sup>7</sup> The Genocide Convention defines genocide as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group,” including:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births with the group;
- (e) Forcibly transferring children of the group to another group.

The Convention on the Prevention and Punishment of the Crime of Genocide, art. II, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277. While the term “genocide” has a narrow legal definition under the Genocide Convention, it tends to be accorded a broader definition in political and diplomatic discourse.

Another participant, arguing on similar lines, stated that any attempt to define “lawfare” in such a way that academics could “box it in” to a military context would fail and would be contrary to the purpose of public international law. The value added by public international lawyers, it was argued, is the development of frameworks and parameters in which concepts such as “lawfare” can be subject to broad analysis and scrutiny.

Given the widespread disagreement on definition, some thought that “lawfare” may not be “a particularly useful term” and may serve simply as “an invented phenomenon” useful only to anti-international humanitarian law “hijackers” as a tool of intimidation. Others added that neo-conservative scholars had attempted to seize the concept of “lawfare” as part of a broader effort to make a case for unrestrained action by the U.S. president in the “global war on terror.”<sup>8</sup> Such scholars argue that international law is neither “real law” nor a “real constraint,” and that “lawfare” was essentially an illegitimate tactic used by foreign enemies to handicap the United States’ ability to fight terrorism. To refute that view, one of the participating experts had recently published a book based on interviews with former Department of State Legal Advisers, going back thirty years, which showed that international law has, in fact, traditionally been viewed by policymakers as “real” and as a legitimate constraint on actions that would contravene treaties and customary international law.<sup>9</sup>

#### IV. IMPORTANCE OF THE TARGET AUDIENCE

In contrast to concerns about the hijacking of “lawfare” by neo-conservatives, one participant feared that imposing a definition would result in the term being “hijacked” a second time—by the academy. Citing the importance of presenting a useful term to the relevant audience—“people making decisions and executing operations”—it was argued that “lawfare” could be likened to a weapon, with the normative value determined by use, not by definition. The suggested role of the academy, then, would be to develop the “intellectual infrastructure,” something the policymakers and operators may not have the time to do themselves.<sup>10</sup>

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<sup>8</sup> See JACK GOLDSMITH AND ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* (Oxford Univ. Press 2005).

<sup>9</sup> See MICHAEL P. SCHARF AND PAUL R. WILLIAMS, *SHAPING FOREIGN POLICY IN TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER* (Cambridge Univ. Press, 2010).

<sup>10</sup> See, e.g., 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>.

The utility of the “lawfare” concept may therefore depend on how it is addressed to relevant audiences and in what legal framework it is analyzed. Participants focused mainly on broad questions and referred to IHL and the Law of Armed Conflict (LOAC) interchangeably, with one definition suggested as the exploitation of IHL/LOAC “to achieve tactical and strategic goals.” By using exploitation, rather than misuse, as the defining act, this definition focused on actors who evade the main requirements of IHL, for example, by placing weapons in civilian areas and not wearing uniforms.

Not everyone felt that IHL and LOAC were freely interchangeable, noting that many in the military have no background or familiarity with the terminology used by lawyers with regard to IHL. In many cases, the target of the exploitation described above is not likely to be a public international lawyer, but rather a soldier or officer who has been exposed to a Clausewitzian approach that implies that the law of war is essentially irrelevant.<sup>11</sup> It was suggested that for any practical impact to be made on military practitioners, emphasis had to be placed on getting operators to understand the importance of the “legal preparation of battlespace.”

It was pointed out that the military and the academy are not the only entities with an interest in “lawfare,” and that it can serve U.S. interests as well as undermine them. Potential users of “lawfare” can include many different government agencies and support for U.S. strategic objectives. One participant noted that the Treasury Department has made proactive use of “lawfare” strategies in deterring large corporations and banks from doing business with Iran, as a way to suppress Iran’s nuclear capabilities.<sup>12</sup>

## V. DEFINING LAWFARE

### A. *Use and Misuse of the Law*

Conference participants divided into two general groups in debating the appropriate definition of “lawfare.” One group generally believed the definition of the term needs to include both the use and misuse of law to achieve operational objectives. Also discussed was whether “lawfare”

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<sup>11</sup> CARL VON CLAUSEWITZ, *ON WAR* 13 (Wildside Press LLC 2009) (“Violence arms itself with the inventions of Art and Science in order to contend against violence. Self-imposed restrictions, almost imperceptible and hardly worth mentioning, termed usages of International Law, accompany it without essentially impairing its power.”). At least one participant noted that this is not to say that U.S. officers or enlisted service members subscribe to the view that the law of war is irrelevant. *See, e.g.*, THE JUDGE ADVOCATE GENERAL CORPS, *THE MILITARY COMMANDER & THE LAW* (AFJAGS Press 2009), available at <http://milcom.jag.af.mil/> (providing general guidance in international law for commanders in the field as well as acting as a desktop book for instruction at various commander courses at Air University).

<sup>12</sup> *See, e.g.*, Paul Blustein, *Dutch Bank Fined for Iran, Libya Transactions*, THE WASH. POST, December 20, 2005, at D01.

should include uses of law and legal processes that “complement,” as opposed to serve as a “substitute” for, traditional military means to achieve an operational objective. Participating experts who preferred a definition of “lawfare” that includes both the positive and negative application of law described “lawfare” as including not only activities undertaken by enemies of the United States, but also by the United States to accomplish national security objectives.

By defining “lawfare” to encompass both the use and misuse of law, participants sought to accomplish two objectives. First, a definition that includes the proper use of law as a substitute for military means encourages using law instead of military force. One expert noted that “neither government attorneys nor academics seem to spend much time thinking about the proactive use of law, how we can use law as a tool for accomplishing our policy objectives.” The expert said that the question we should really be asking is, “what can be done by the executive branch and Congress to better use law as a proactive tool in promoting important national security objectives?” Additionally some participants fear that only focusing on the misuse of law could negatively impact the view of international law. This led one expert to suggest that the academy should not worry about defining “lawfare,” but rather should critique those who attempt to use the term in furtherance of their anti-international law agenda.

It was then suggested that a definition including the proper use of law would support a race to the courtroom instead of to the battlefield. For instance, one expert pointed out that private lawsuits against terrorist groups and states supporting terrorism “have been extremely effective” and are “exceptional examples of the use of lawfare in the war against terrorism.”<sup>13</sup> Further, a definition that acknowledges the proper use of law “need not simply force the United States into a defensive crouch.” As one participant opined,

if there are ways of accomplishing traditional military objective using U.S. law, the U.S. should not only fight back hard against others’ use of them but also vigorously look ourselves for a way to use the law. Truth be told, we have every reason to embrace lawfare, for it is vastly preferable to the bloody expense of indistinctive forms of warfare that ravaged the world in the twentieth century.

It was pointed out in this regard that economic sanctions on Iran have been a “particularly salient, deliberate, and in many ways a creative form of lawfare, using law as a substitute for traditional military means to

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<sup>13</sup> See Kirit Radia and Maddy Sauer, *Pan Am 103 Families Finally Compensated*, ABC NEWS (Oct. 31, 2008), <http://abcnews.go.com/Blotter/story?id=6158491&page=1> (describing the successful criminal prosecutions and civil damages obtained against defendants in the bombing of Pan Am 103, passenger airliner, in Lockerbie, Scotland).



achieve an operational objective.”<sup>14</sup> Some fourteen states have passed legislation to divest their state’s pension fund from foreign companies doing business with Iran,<sup>15</sup> and Treasury has convicted more than eighty banks, including most of the world’s top financial institutions, to cease some or all of their business with Iran.<sup>16</sup> Other participants—who favored a purely negative definition of “lawfare”—questioned whether such actions should be considered “lawfare.”

One expert warned that if the positive and negative applications of law are not both included in the definition of “lawfare,” some groups or individuals would use the term to instill fear of international law in the American public. This could lead to the “devaluation of the public’s image of international law.” The term “lawfare” would “become a code word for all things bad and mushy about international law.”

Another expert suggested that the word “misuse” should be removed from the definition “because misuse implies the objective or the motive of the person using it, saying that you can’t use law if you are a bad guy. And I don’t agree with that. I think bad guys can legitimately use law just like good guys can . . . . So I wouldn’t use the word misuse at all.”

#### *B. Misuse of Law for Military Objectives*

The other main group of participants believed the definition of “lawfare” could only encompass the misuse or manipulation of law to achieve an operational objective; in other words, the exploitation of LOAC for strategic and tactical purposes. Many participants who believed “lawfare” is only the misuse of law look to how the term is used in popular discourse today for a definition. Most felt popular discourse used “lawfare” as “an exploitation of the law” or “wrongful manipulation of the law and legal system to achieve strategic military or political ends.”<sup>17</sup> They felt that “even though the term may have been hijacked from its original meaning, the definition should not be what the academy would like it to be, but rather how the term is actually being used.” Others suggested that having a term meaning two competing and opposite things made no sense. “So if the positive use of law needs its own term then we should come up with a different

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<sup>14</sup> Iran Sanctions Act of 1996, 50 U.S.C. § 1701 (imposing sanctions against Iran, North Korea, and Syria as a result of those countries’ unusual and extraordinary threat).

<sup>15</sup> The Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. 111-195, July 1, 2010, 124 Stat 1312 (outlining a standards for states and local governments to divest from and prevent investment in companies with investment in Iran’s energy industry).

<sup>16</sup> See Sue Kirchhoff, *Fed Imposes Fine of \$100M on Swiss Bank*, USA TODAY (May. 10, 2004), [http://www.usatoday.com/money/industries/banking/2004-05-10-fed-ubs-fine\\_x.htm](http://www.usatoday.com/money/industries/banking/2004-05-10-fed-ubs-fine_x.htm).

<sup>17</sup> See Brooke Goldstein *Interviewed on Lawfare*, THE LAWFARE PROJECT (Mar. 9. 2010), <http://www.thelawfareproject.org/121/brooke-goldstein-interviewed-on-lawfare>.

one.” Moreover, the experts in this group stressed that the definition of “lawfare” must be kept in a narrow context, “otherwise, it gets out of control.”

Another suggested definition of “lawfare” focusing on negative connotations was the “manipulation or exploitation of the international legal system to supplement military and political objectives legally, politically, and through propaganda.” For instance, the Soviet Union had historically used “lawfare” to “control other states and to control the options of other states.” “Propaganda is an exceptionally strong” use of “lawfare,” and the Soviets “were masters of it,” the expert added. Another expert pointed out that in recent years the Russian Federation has continued to use “lawfare” by, for example, adding the definition of aggression into their criminal code, thus strategically preempting the [International Criminal Court (ICC)] by claiming Russia “can try aggression on [its] soil”<sup>18</sup> “This is not the legal application of international law, this is the preemption of international law,” the expert maintained.

## VI. CATEGORIZING EXAMPLES OF LAWFARE

### A. *Are Lawsuits and Legal Institutions a Form of Lawfare?*

The participating experts generally rejected the proposition that the legitimate application of the law of armed conflict or U.S. domestic laws should be considered “lawfare.” Although Bush Administration officials had used the term “lawfare” to derogatorily describe the legal work performed by human rights organizations and pro bono lawyers,<sup>19</sup> conference participants countered that the United States still needed to obey international law in order to accomplish military objectives. One expert noted that it was the crimes at Abu-Ghraib (not the attempts to litigate those crimes) that were responsible for U.S. deaths, re-energizing the insurgency, and cutting off intelligence sources. The expert further argued that memories of violations of the law of armed conflict do not usually fade over time; rather, the story of violations tends to stay in the minds of those with whom the United States needs to cooperate and/or subdue in order to achieve operational objectives.<sup>20</sup> Consequently, because respecting the law of armed conflict is necessary for U.S. operations to succeed, JAG lawyers must give

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<sup>18</sup> See Christi Scott Bartman, *Lawfare: Use of the Definition of Lawfare By the Soviet and Russian Governments*, (Aug. 2009), <http://etd.ohiolink.edu/send-pdf.cgi/Bartman%20Christi%20Scott.pdf?bgsu1241726718>.

<sup>19</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>. See Ashby Jones, *Cully Stimson Resigns*, WALL ST. J. LAW BLOG (Feb. 24, 2007, 4:08 PM), <http://blogs.wsj.com/law/2007/02/02/cully-stimson-resigns>.

<sup>20</sup> See Mark Bowden, *The Professor of War*, THE NEW YORKER, May, 2010, at 148.

legal advice to members of the armed forces so those persons know which actions they can and cannot take.

Second, the participating experts tended to reject the proposition that alleged asymmetric use of international law against the United States demonstrates that obeying international law is contrary to the United States' interests. One expert described the alleged asymmetric exploitation of law against the United States as "lawfare," which he defined as "the creation of a specter of misuse of international law in order to cause the United States to fear international law." Many of the participants believed the right-wing had politicized the definition of "lawfare," prompting one expert to suggest that "lawfare" be defined as "a term developed within the U.S. military and hijacked by right-wing ideologues in order to discredit the use of international law by people with whom they disagree."

Participants were also generally dismissive of the fears of trumped-up charges of war crimes against U.S. personnel. Instead, many of the participants felt that the United States should not shrink back because of the fear of lawsuits regarding U.S. military operations. It was noted that we should have confidence in our judicial institutions to weed out illegitimate claims or the misuse of law. The common view was that the United States should welcome the lawsuits because these lawsuits would decrease the violence of international conflict, and would allow the United States to pursue similar lawsuits against its enemies for their alleged violations of the law of armed conflict. Under this view, "if stronger international legal institutions cause militants to rush to court instead of rushing to war, then international law is successfully mitigating the violence and bloodshed of war."

Additionally, the experts noted that victims of the United States' enemies have had a string of successes in the courtroom and that such lawsuits are likely to increase in the future. It was suggested that victims of state-sponsored terrorism may start using tort law more ambitiously to hold state sponsors of terrorism liable for their conduct. For instance, an expert explained that there currently exists an INTERPOL arrest warrant for the sitting Iranian defense minister for the bombing of a Jewish Cultural Center in Argentina.<sup>21</sup> Although the INTERPOL warrant has not resulted in any further action, the expert suggested that victims from the attack might consider private litigation against the defense minister.

#### *B. The Legitimate Application of the Laws of Armed Conflict*

The experts agreed that the legitimate application of international law against participants in an armed conflict should not be labeled "lawfare." Yet they were unable to agree on a definition of "legitimate applica-

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<sup>21</sup> *Iran 'Minister' on Interpol List*, BBC NEWS, [http://news.bbc.co.uk/2/hi/middle\\_east/8215293.stm](http://news.bbc.co.uk/2/hi/middle_east/8215293.stm) (last updated Aug. 21, 2009).

tion.” Many of the experts viewed the interpretation of the law of armed conflict as not constituting “lawfare” unless the particular principle in question is a “contentious issue” or “an underdeveloped area of law.” The most discussed contentious issues at the conference were the requirement of proportionality and distinction,<sup>22</sup> prohibited weapons under the Geneva Conventions,<sup>23</sup> and the definition of an armed conflict.<sup>24</sup>

Experts analyzed the application of lawfare in distinction and proportionality cases through the example of a minaret attack. The minaret attack begins with a combatant firing from within the minaret of a mosque at U.S. armed forces. Normally, a Mosque is a protected object as to which attacks are prohibited, but such objects lose their protected status if the enemy uses them as a base of military operations. The U.S. forces are then faced with the decision of whether to return fire. If the United States does return fire, cameras operated by hostile forces will videotape the encounter. Now armed with video evidence of U.S. troops firing at a religious building, these hostiles will then use the video as propaganda that the United States commits war crimes or even bring the videotape before a court as evidence of U.S. war crimes. This, one expert opined, was a case of illegitimate application of international law, constituting “lawfare.” One of the other experts noted that under this increasingly frequent scenario, the definition of distinction and proportionality is effectively replaced with a standard that says “civilians died, therefore there were war crimes.” In such a situation, hostile parties can rely upon a result-orientated interpretation of the law in order to legitimize unlawful use of force or restrain a party of an armed conflict from exercising the lawful use of force.

In this context, the participating experts noted a struggle to determine whether acts undertaken with intent to influence opinion and garner support among a target audience were acts of “lawfare” or merely Informa-

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<sup>22</sup> Experts used violations of the law of distinction to refer to violations of Articles 18 and 37 of the First Additional Protocol of the Geneva Convention. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 18 & 37, June 8, 1977, 1125 U.N.T.S. 3.

<sup>23</sup> See Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949 (Protocol I), 6 U.S.T. 3114, 75 U.N.T.S. 31; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, June. 8, 1977 (Protocol II) art. 3, June 8, 1977, 1125 U.N.T.S. 609; 1949 Convention Relative to the Treatment of Prisoners of War, art.3, Aug. 12, 1949 (Protocol III), 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949 (Protocol IV), 6 U.S.T. 3516, 75 U.N.T.S. 287.

<sup>24</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, June. 8, 1977 (Protocol II), art. 1(1–2), June 8, 1977, 1125 U.N.T.S. 609 (contrasting armed conflict with sporadic acts of violence and rioting).

tion Operations, a term widely known in military circles.<sup>25</sup> With respect to the minaret scenario discussed above, some of the experts felt that this would be better labeled Information Operations than “lawfare.” They opined that it would become “lawfare” only if the party recording alleged violation of international humanitarian law took their claim before a judicial body or international institution.

The experts further noted that certain ill-defined concepts might invite “lawfare.” Examples cited were the definition of “armed conflict” under the Geneva Conventions and the definition of illegal weapons under Article 36 of Additional Protocol I to the Geneva Conventions. The status of various violent situations as armed conflicts, such as the less than twenty-four hour African Union invasion of the Comoros Islands and fighting between Mexico and the drug cartels, is unclear. Consequently, the actors in those situations may either argue that the situation should be deemed armed conflict, and thus covered by the laws of war, or that the situation fails to reach the threshold and the country’s law enforcement regulations therefore govern the use of force. Similarly, reviews of whether a particular weapon violates Article 36 can also be subjected to result-orientated interpretations of the law. One expert noted in this regard that the current push to classify white phosphorous as an illegal weapon<sup>26</sup> is misplaced because in most cases white phosphorous is lawfully used as a flare.

Experts feared that the consequence of result-orientated interpretations of international humanitarian law is, depending on the interpretation, to relax or expand prohibitions on unlawful conduct to either allow or prohibit any use of force during an armed conflict. Already, experts noted, military commanders at times believe that every action they take could be accused of being a war crime. Consequently, members of the armed forces are forced to change or not engage in certain operations in response to an overly expansive interpretation of international humanitarian law prohibitions. Although several experts focused on interpretations of international law to “unnecessarily restrict” the lawful use of force, others voiced concern that governments are using new types of combat operations to argue that international humanitarian law did not apply.

However, despite recognizing that result-orientated interpretations of the law affect combat operations and weaken the law as an institution, experts were unable to reach consensus that interpreting and applying grey

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<sup>25</sup> Information Operations broadly refers to the delivery and management of information affecting the battlefield while Information Warfare narrowly focuses on networks and computer security. JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-13, INFORMATION OPERATIONS, at I-1 (Oct. 9, 1998), available at [http://www.c4i.org/jp3\\_13.pdf](http://www.c4i.org/jp3_13.pdf).

<sup>26</sup> George Monbiot, *Comment: Behind the Phosphorous Clouds are War Crimes Within War Crimes*, THE GUARDIAN (Nov. 22, 2005), <http://www.guardian.co.uk/world/2005/nov/22/usa.iraq1>.

areas of the law of armed conflict should be deemed “lawfare.” For those experts that defined “lawfare” as “the exploitation of the law of armed conflict to achieve tactical and strategic goals,” the minaret scenario could be a form of lawfare. On the other hand, those who defined “lawfare” as “misuse of the law of armed conflict to achieve tactical and strategic goals,” were not so sure, because it is difficult to determine when someone is disingenuously interpreting a law or interpreting the law in good faith. Although many expressed concern over improper interpretations of the law, experts were equally concerned how useful a definition of lawfare that included disingenuous interpretations would be if the experts could not reach a consensus on how to distinguish an interpretation in good faith from an interpretation in bad faith.

#### VII. ARE INSTITUTIONS EQUIPPED TO COUNTER USES OF “LAWFARE?”

Participants believed domestic institutions, at least inside the United States and other stable democracies, are capable of handling “lawfare” in the form of trumped up charges of war crimes. In U.S. courts, several experts noted that judges are competent in evaluating the credibility of evidence and have a variety of mechanisms—including the political question doctrine, the act of state doctrine, Foreign Sovereign Immunity, and the state secrets doctrine—to dismiss frivolous lawsuits. On the other hand, some experts viewed U.S. courts as too willing to dismiss legitimate lawsuits against the United States as evidenced by the 9<sup>th</sup> Circuit’s recent invocation of the state secrets doctrine in the case of *Mohamed v. Jeppsens Dataplan*.<sup>27</sup>

Several of the experts were less confident of the ICC, the International Court of Justice, and U.N. Human Rights bodies’ capabilities in responding appropriately to “lawfare” because those institutions can suffer from politicization. The experts recognized that much of this is a problem of perceptions. Americans generally have a distrust of foreigners rendering judicial decisions against the United States. For instance, many in the United States oppose ICC ratification because doing so could involve foreigners deciding that the United States was unwilling to prosecute the crimes<sup>28</sup> and thus subjecting U.S. soldiers to a foreign-run trial with the possibility of being sent to a foreign prison. Additionally, a few experts noted the creation of ad-hoc tribunals for certain conflicts and not others causes international criminal justice to appear politicized. Many in Lebanon, for instance, view the Special Tribunal for Lebanon as a political rather than legal process because the number of victims in the situation before the Tribunal is sub-

<sup>27</sup> *Mohamed v. Jeppsens Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010).

<sup>28</sup> The Rome Statute of the International Criminal Court, art. 17(a), July 17, 1998, 2187 U.N.T.S. 90.

stantially lower than in other situations for which such tribunals have not been established.

One expert expressed concern that a finding that the law of armed conflict was violated could depend upon whether the prosecuting entity was a friendly ally, an enemy, or an international institution made up of a mix of judges from allied and unfriendly states. By way of example, the expert said he doubted whether French Resistance fighters against the Nazis tried in France after World War II would receive the same criticism that Palestinians and Afghanis have recently received over their alleged violations of the law of distinction.

Finally, several experts noted that non-state actors have fallen through the jurisdictions of most institutions. Non-state actors typically do not have their own judicial processes to prosecute members of their armed forces for violations of the laws of war. Additionally, domestic universal jurisdiction statutes often do not cover less severe war crimes such as discarding a uniform to blend into civilian populations. Moreover, international institutions such as the ICC lack jurisdiction over many non-state violations, such as combatants mingling in the civilian population, because they are not grave enough to trigger ICC jurisdiction. Consequently, many non-state actor violations of the law of armed conflict are not currently prosecuted.

#### VIII. CONCLUSION: HOW TO RESPOND TO LAWFARE

To the extent that this kind of lawfare involves the positive use of law and legal institutions to achieve strategic objectives without the use of military force, lawfare should be considered a positive development that complements the primary goals of IHL and LOAC—to minimize human suffering associated with armed conflict. This type of lawfare requires no response at all, and indeed should be encouraged. But the more common use of lawfare in modern parlance has a distinctly negative connotation, suggesting abuse, misuse, and exploitation of the law. The experts disagreed on the extent to which lawfare, in this negative sense of the term, is a real phenomenon, with many expressing considerable skepticism that it is a significant problem. But, to the extent that lawfare is a real or emerging trend, the experts expressed great confidence in the ability of existing domestic and international legal institutions to respond appropriately to frivolous or abusive claims or other attempts to misuse the law to achieve military and strategic objectives.

The simplest and best way for democratic countries to safeguard themselves from the effective use of lawfare is to plan and conduct military operations in full compliance with the laws of war. Giving military JAGs a robust and proactive advisory role in the planning and execution of military operations will help to ensure that the law of armed conflict is respected. Thorough documentation of combat operations, including, where practicable, videotaping, would also promote lawful behavior and assist in proving

or disproving allegations of misconduct. Prompt, aggressive and transparent investigation of all suspected or reported war crimes by any party to the conflict, coupled with vigorous efforts to hold transgressors accountable, will minimize the propaganda value of isolated law of war violations and help ensure that false accusations of war crimes do not gain traction. In short, those who respect and rigorously adhere to the law have little reason to fear that the law will be used as a weapon against them.

#### Appendix A List of Participating Experts

- *Professor William Aceves*, Associate Dean for Academic Affairs and Professor of Law, California Western School of Law
- *Professor David Crane*, Professor, Syracuse University College of Law and former founding Chief Prosecutor of the Special Court for Sierra Leone, 2002–2005
- *Major General Charles Dunlap, Jr.*, Major General, U.S. Air Force (Ret.); Deputy Judge Advocate General, U.S. Air Force, 2006-2010; Visiting Professor, Duke University School of Law and Associate Director, Center on Law, Ethics, and National Security
- *Professor David Frakt*, Associate Professor of Law at Barry University Dwayne O. Andreas School of Law; Lieutenant Colonel, U.S. Air Force Reserve Judge Advocate General's Corps; Previously served as a Defense Counsel with the Office of Military Commissions from April 2008 to August 2009
- *Professor Shannon French, PhD*, Director, Inamori International Center for Excellence and Ethics, Case Western Reserve University
- *Ms. Sandy Hodgkinson*, Special Assistant to the Deputy Secretary of Defense, former Deputy Assistant Secretary of Defense for Detainee Affairs, U.S. Department of Defense
- *Mr. Scott Horton*, Contributing Editor, *Harpers Magazine*, Lecturer, Columbia Law School
- *Professor Orde Kittrie*, Professor of Law at the Sandra Day O'Connor College of Law at Arizona State University; Visiting Scholar at the Johns Hopkins University School of Advanced Inter-



national Studies in Washington, D.C., and a member of the Council on Foreign Relations

- *Mr. Michael Lebowitz*, War Crimes Prosecutor in the Office of Military Commissions, Guantanamo Bay; Previously served as Chief Legal Assistance Attorney and Military Defense Counsel in the Virginia Army National Guard as part of the U.S. Army Judge Advocate General's Corps
- *Professor Jens Meierhenrich*, London School of Economics and Political Science
- *Professor Michael Newton*, Professor of the Practice of Law, Vanderbilt University Law School; Served in the Office of the Ambassador at Large for War Crimes Issue, U.S. Department of State; Taught at Judge Advocate General School and the Department of Law, U.S. Military Academy
- *Professor Gregory Noone*, Director of the National Security and Intelligence Program at Fairmont State University and an Assistant Professor of Political Science and Law; Captain in the Judge Advocate General's Corps, United States Naval Reserve and the Commanding Officer of the NR International and Operational Law unit
- *The Honorable Justice James Ogoola*, Former Principal Judge, Ugandan High Court
- *Mr. Robert Petit*, former International Prosecutor, Cambodia Tribunal; Counsel, War Crimes Section, Federal Department of Justice, Canada
- *Professor Leila Nadya Sadat*, Henry H. Oerschelp Professor of Law; Director, Whitney R. Harris World Law Institute, Washington University School of Law; Distinguished Alexis de Tocqueville Fulbright Chair, University of Cergy-Ponstoise
- *Professor William Schabas*, OC MRIA, Professor of Human Rights Law, National University of Ireland, Galway and Director, Irish Centre for Human Rights
- *Professor Michael Scharf*, John Deaver Drinko-Baker & Hosftetler Professor of Law, Director, Frederick K. Cox International Law

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Center, Case Western Reserve University School of Law; Served in Office of Legal Adviser, U.S. Department of State

- *Ambassador David Scheffer*, Northwestern University School of Law, former U.S. Ambassador at Large for War Crimes Issues
- *Professor Milena Sterio*, Professor of Law, Cleveland-Marshall School of Law, Cleveland State University
- *Professor Robert Strassfeld*, Director of the Institute for Global Security Law & Policy, Case Western Reserve University School of Law
- *Professor Susan Tiefenbrun*, Professor of Law, Director of Center for Global Legal Studies at Thomas Jefferson School of Law
- *Professor Melissa Waters*, Professor at Law Washington University School of Law
- *Professor Wouter Werner*, Professor in Public International Law at VU University in Amsterdam.; Main fields of interest are international legal theory, the interplay between international law and international politics, and the international legal regime on the use of force
- *Professor Paul Williams*, Rebecca I. Grazier Professor of Law and International Relations at American University; Co-founder and Executive Director of the Public International Law & Policy Group
- *Mr. Jamie Williamson*, Legal Advisor for the International Committee of the Red Cross Regional Delegation for the United States and Canada