DOES LAWFARE NEED AN APOLOGIA?

Charles J. Dunlap, Jr.[*]

Few concepts in public international law are more controversial than lawfare. This essay contends that lawfare is best appreciated in the context of its original meaning as an ideologically neutral description of how law might be used in armed conflict. It emphasizes that although law may be manipulated by some belligerents for nefarious purposes, it can still serve to limit human suffering in war. In discussing the current state of the concept of lawfare, the essay reviews several contentious areas, and recognizes the concerns of critics. The paper concludes that lawfare is still a useful term, and is optimized when it is employed consistent with its original purpose of communicating to non-specialists how law can serve as a positive good in modern war as a nonviolent substitute for traditional arms.

I. INTRODUCTION

Whatever one might think of the concept of lawfare, there is no denying the truly remarkable velocity with which it has achieved notoriety among aficionados of international law. Less than a decade ago, "lawfare" was very much an obscure term, and its limited use was almost entirely un-

[*] Major General, U.S. Air Force (Ret.). J.D., Villanova University School of Law, 1975; B.A., St. Joseph's University, 1972. 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. Board of Advisors, Center for a New American Security.

related to the interpretation that today makes it a central feature of 21st century conflicts.[1]

Initially, the modernized definition of "lawfare" was simply "the use of law as a weapon of war."[2] The latest permutation of this writer's interpretation is a bit more elaborate, holding that "lawfare" is a "strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective."[3] Admittedly, this construct of lawfare is not, as will be discussed below, universally accepted.

To be clear, "lawfare" was never meant to describe every possible relation between law and warfare. It focuses principally on circumstances where law can create the same or similar *effects* as those ordinarily sought from conventional warmaking approaches.[4] In military terms, lawfare represents a form *of effects-based operations*.[5] Generally speaking, effects-based operations reflect an approach to warfare that is not preoccupied with particular methodologies, but rather on actions "designed to achieve specific effects that contribute directly to desired military and political outcomes."[6] Law often can do that just as successfully as more violent means. Furthermore, the term was always intended to be ideologically *neutral*, that is, harking back to the original characterization of lawfare as simply another kind of weapon, one that is produced, metaphorically speaking, by beating law books into swords.[7] Although the analogy is imperfect, the point is that a weapon can be used for good or bad purposes, depending upon the mindset of those who wield it. Much the same can be said about the law.

---

[1] The author believes the first use of the term in the modern context was in 2001. *See generally* Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st 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.

[2] *Id.* at 5.

[3] Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT'L. AFF. 146, 146 (2008).

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

[5] *See* EDWARD C. MANN III, COLONEL, USAF, RETIRED, GARY ENDERSBY, LIEUTENANT COLONEL, USAF, RETIRED & THOMAS R. SEARLE, *Thinking Effects: Effects-Based Methodology for Joint Operations*, 15 AIR UNIVERSITY PRESS 1 (2002), *available at* http://www.au.af.mil/au/awc/awcgate/cadre/mann.pdf.

[6] *See, e.g.*, Scott Horton, *Lawfare Redux*, HARPER'S, Mar. 12, 2010, *available at* http://www.harpers.org/archive/2010/03/hbc-90006694 (noting that the integrity of Pakistani law continued even after one-time dictator Pervez Musharraf attempted to suspend the country's constitution and put its Supreme Court under house arrest); Charles J. Dunlap, Jr. and Linell A. Letendre, *Military Lawyering and Professional Independence in the War on Terror: A Response to David Luban*, 61 STAN. L. REV. 417, 425–426 (2008) (addressing the benefits of defending Guantanamo Bay detainees).

[7] *See* Dunlap, *supra* note 4.

To some critics, lawfare's expectation that "bad" people will sometimes be able to use—or abuse—the law to further nefarious purposes is offensive, as it is to them tantamount to saying that there is something inherently "bad" about the law. This is hardly true. Just because the law is available, for example, to the most evil of criminals who may avail themselves of its protections from time to time does not mean that the law acquires the attributes of the criminal. Nor does it mean, incidentally, that those lawyers who assist such persons in securing their legal rights necessarily share their malevolent intent.[8]

It merely means that law—at least ideally—has established norms that, on balance, best serve society as a whole even when it has the effect of protecting people many find odious and even dangerous. There is also no question that society may pay a harsh price in certain instances for its adherence to law. Overall, however, it is indisputable that the public enjoys enormous benefits from the social order law creates—notwithstanding that occasionally evildoers determined to disrupt that social order are among those who profit from the rights and liberties the law produces and protects.

II. LAWFARE AS AN AMERICAN WEAPON

Despite the lawfare's frequent negative characterization as a tool of terrorists, it is vital to remember that it is not restricted to one side of a conflict.[9] As I have often tried to show, actions that could be characterized as "lawfare" have been carried out by the United States, and properly so. For example, prior to operations in Afghanistan in 2001, the U.S.'s purchase of exclusive rights to selected commercial satellite imagery eliminated the need to explore military means to deny such data to hostile forces.[10]

Legal 'weaponry' can have effects utterly indistinguishable from those produced by their kinetic analogs. During the 2003 invasion, for example, the Iraqi Air Force found itself hobbled by a legal device—sanctions—as effectively as by any outcome from traditional aerial combat.[11] By preventing the acquisition of new aircraft, as well as spare parts

---

[8] *See, e.g.*, Scott Horton, *Lawfare Redux*, HARPER'S, Mar. 12, 2010, *available at* http://www.harpers.org/archive/2010/03/hbc-90006694 (noting that the integrity of Pakistani law continued even after one-time dictator Pervez Musharraf attempted to suspend the country's constitution and put its Supreme Court under house arrest); Dunlap and Letendre, *supra* note 6, at 425–426 (addressing the benefits of defending Guantanamo Bay detainees).

[9] *See, e.g.*, David B. Rivkin, Jr. and Lee A. Casey, *Lawfare*, WALL ST. J., Feb 23, 2007, at A11; s*ee also*, James Dunnigan, *Lawfare Gives Terrorists an Edge*, THE STRATEGY PAGE (Feb. 27, 2005), http://www.strategypage.com/dls/articles2005/20052270.asp.

[10] *See* John J. Lumpkin, *Military Buy's Exclusive Rights to Space Imaging's Pictures of Afghanistan War Zone*, SPACE.COM (Oct. 15, 2001), http://www.space.com/news/dod_space imaging_011015.html.

[11] Daniel L. Haulman, *Whatever Happened to the Iraqi Air Force*, 2009 AIR FORCE HISTORICAL AGENCY 1, 6, *available at* http://www.au.af.mil/au/aunews/archive/2010/0516/05

for the existing fleet, Iraqi airpower was so debilitated that not a single aircraft rose in opposition to the coalition air armada.[12]

In counterinsurgency (COIN) situations such as those in Iraq and Afghanistan, senior commanders now insist that "enhancing the rule of law" is critical to securing the population from insurgents, a condition fundamental to COIN success.[13] Thus, current military doctrine calls establishing the rule of law "a key goal and end state in COIN," and the armed forces have developed sophisticated processes to achieve that objective.[14] One might rightly describe this as a classic lawfare strategy, and one that is a markedly more pacific alternative to COIN strategies that try, as one officer described them, to "kill or capture every bad guy in the country."[15]

Furthermore, the complex problem of global terrorism that typically involves non-state actors is a challenge for which lawfare is especially well-suited to confront. For example, using legal means to "attack the funding of terrorist groups" is a core strategy to combat this unconventional threat.[16] What is more is that the parallel application of legal weaponry coincident with more traditional arms can have an exceptionally productive synergistic effect.

Quite recently the New York Times reported a number of legal offensives that have, as the Times put it, "ratcheted up the legal pressure on the Pakistani Taliban."[17] Specifically, the Department of Justice (DOJ) issued a criminal complaint against the Hakimullah Mehsud, "the self-proclaimed emir of the Pakistani Taliban . . . for his alleged involvement in the murder of seven American citizens on Dec. 30, 2009 at a U.S. military base in Afghanistan."[18]

16Articles/Haulman30514.pdf (last visited Nov. 6, 2010).

12 *Id.*

13 *See, e.g.*, *Meet the Press* (NBC television broadcast Aug. 15, 2010) (transcript available at http://www.msnbc.msn.com/id/38686033/ns/meet_the_press-transcripts).

14 DEP'T OF THE ARMY, COUNTERINSURGENCY, FM 3-24 at D-8, Dec. 15, 2006, (also known as DEP'T OF THE NAVY, COUNTERINSURGENCY, MCWP 3–33.5), *available at* http://www.scribd.com/doc/9137276/US-Army-Field-Manual-FM-324-Counterinsurgency [hereinafter FM 3-24]; *see, e.g.*, DEP'T OF THE ARMY, RULE OF LAW HANDBOOK (2009), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/rule-of-law_2009.pdf.

15 *Meet the Press*, *supra* note 13.

16 Although this strategy may be called "financial warfare" rather than "lawfare," it nevertheless depends upon legal instruments and methodologies. *See* Paul Bracken, *Financial Warfare*, FOREIGN POL'Y RES. INST. (Sept. 2007), http://www.fpri.org/enotes/200709.bracken.financialwarfare.html.

17 Charlie Savage, *U.S. Adds Legal Pressure on Pakistani Taliban*, N.Y. TIMES, Sept. 2, 2010, at A13.

18 Press Release, Dep't of Justice, Pakistani Taliban Leader Charged in Terrorism Conspiracy Resulting in Murder of Seven Americans in Afghanistan (Sept 1, 2010), *available at* http://www.justice.gov/opa/pr/2010/September/10-nsd-987.html (last visited Nov. 6, 2010).

In separate but related action, the State Department officially designated the Pakistani Taliban as a "foreign terrorist organization" and Mehsud himself—along with another associate—as "specially designated global terrorist[s]"—which has the effect of criminalizing material support provided them.[19] For good measure, the State Department's lawfare maneuvering includes deployment of a unilateral contract in the form of a five million dollar reward as a strategy to obtain information leading to their capture.[20]

Nothing in these pronouncements suggests that other more violent efforts to "ratchet up the pressure" against these self-proclaimed Taliban members would abate. I would expect, for example, that the controversial remotely-piloted aircraft (RPA) strikes against such unprivileged belligerents would continue.[21] As members of an organized armed group engaged in hostilities against the United States, they are subject to applications of force under the law of armed conflict regime.[22]

That the Taliban and other terrorists may simultaneously be subject to both law of armed conflict rules as well as law enforcement modalities is, in my view, consistent with a reasoned lawfare approach to non-state actors who choose to be both unprivileged belligerents and common criminals. From a normative perspective, the law must not reward those who, among other things, choose not to distinguish themselves from civilians when they engage in what they themselves describe as a war, or who chose to capitalize on contemporary information systems and commercial arrangements to participate in hostilities far remote from conventional battlefields.

A lawfare strategy calls for bringing both legal architectures to bear against such threats. In military parlance, doing so operates to inject friction into the adversary's operations as he seeks to defend himself from legal assaults on diverse fronts.

Lawfare can provide unique benefits, even for unprivileged belligerents. Specifically, if lawfare such as the DOJ and the State Department can be said to be waging works to limit the need for more militarized methodol-

---

[19] Press Release, Phillip Crowley, Assistant Secretary, Bureau of Public Affairs, U.S. Dep't of State, Designations of Tehrik-E-Taliban Pakistan and Two Senior Leaders, (Sept. 1, 2010), *available at* http://www.state.gov/r/pa/prs/ps/2010/09/146545.htm.

[20] *Id.*

[21] For a description of an RPA, *see* Dep't of the Air Force, *MQ-1B Predator Unmanned Aerial Vehicle* (Jul. 20, 2010), *available at* http://www.af.mil/information/factsheets/factsheet.asp?fsID=122; *see also* Christopher J. Bowie and Michael W. Isherwood, *The Unmanned Tipping Point*, AIR FORCE MAGAZINE (Sept. 2010), 81, *available at* http://www.airforcemagazine.com/MagazineArchive/Pages/2010/September%202010/0910rpa.aspx (discussing the advantages of RPA's and reasons why the growth of its use may continue).

[22] For a superb discussion of the status under the law of armed conflict of persons who directly participate in hostilities, *see* Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SEC. J. 1, 11–39 (2010).

ogies, so much the better for the health of the targets. This is lawfare plainly in service of international humanitarian law's avowed purpose of attempting to "mitigate the human suffering caused by war."[23] In short, while lawfare may not eliminate human conflict, it can sometimes humanize that conflict by substituting juridical warfare for the more deadly variety.[24]

III. THE CHALLENGE FOR PRACTITIONERS

Importantly, lawfare was not—*and is not*—intended to assuage the penchant of academics and policy enthusiasts to put all human activity into some designated theoretical box suitable for explication in university texts. To paraphrase Steven Coll, lawfare is not law for northeastern graduate students.[25] Rather, the target audience is principally the "doers," and the goal of lawfare's development and use is wholly down-to-earth.[26] It was, and is, an effort to find a resonating "bumper sticker" to help to explain to a very unique client base—military personnel and, especially, their leaders—how and, equally important, *why* the law needs to be incorporated into their thinking and planning.

A segue: in my opinion too little effort has been made by national and international security law practitioners to cogently convey and, indeed, *advocate* legal concepts to soldiers and others directly involved in life-and-death struggles with a ruthless enemy.[27] There needs to be recognition that

---

[23] GARY D. SOLIS, THE LAW OF ARMED CONFLICT 22 (2010) (quoting FRITS KALSHOVEN AND LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN WAR 12 (2001)).

[24] "Juridical warfare" is sometimes used interchangeably with lawfare. *See, e.g.*, Harvey Rishikof, *Juridical Warfare: The Neglected Legal Instrument*, 48 JOINT FORCE QUARTERLY 11, 12 (2008).

[25] Steve Coll, *The General's Dilemma*, THE NEW YORKER, Sept. 8, 2008, *available at* http://www.newyorker.com/reporting/2008/09/08/080908fa_fact_coll?currentPage=all (last visited Nov. 6, 2010) (describing FM 3-24, *supra* note 10, as "[Popular] among sections of the country's liberal-minded intelligentsia. This was warfare for northeastern graduate students—complex, blended with politics, designed to build countries rather than destroy them, and fashioned to minimize violence. It was a doctrine with particular appeal to people who would never own a gun.").

[26] MICHAEL IGNATIEFF, VIRTUAL WAR 199 (2000) *in* Dunlap, *supra* note 1, at 6 (describing the operational definition of lawfare and its use during the Balkan conflict to convert ethical questions into operational legal questions).

[27] While every country party to the Geneva Conventions has an obligation to include training programs on the law of armed conflict in their legal training programs, there is little uniformity or sustained regularity in those programs. *See, e.g.*, LAURIE BLANK AND GREGORY NOONE, LAW OF WAR TRAINING: RESOURCES FOR MILITARY AND CIVILIAN LEADERS 3 (United States Institute for Peace, 2008) *available at* http://www.usip.org/files/resources/LawofWar text-final.pdf ("Under the Geneva Conventions, states are explicitly required to 'include the study [of the law of armed conflict]in their programmes of military . . . instruction, so that the principles thereof may become known to all their armed forces.'Yet not all countries

however schooled in the law an attorney may be, absent a very thorough understanding of the uniqueness of the "client"—the warfighter—and the very special "business" of war, all the legal erudition goes for naught. Underestimating the difficulty and importance of mastering the special nature of war and those who wage it is a serious deficiency.[28]

Practitioners ought to keep in mind that in the context of warfighting, their target audiences are historically disposed to consider presentations about the relevancy of legal factors more as aspirational hortations than as recitations of pragmatic, warfighting essentials. This is not to insinuate that considerations of law have been absent from military thinking. Adherence to the rule of law, if sometimes grudging, has always been fundamental to successful militaries, and especially those of democracies.[29] Still, there has long seemed to be something of a sense among military professionals that the aphorism attributed to Cicero of *inter arma enim silent leges*, has much truth about it.[30]

This perception, widespread until recently, is traceable to classic military thinking. As the great military theorist Carl von Clausewitz put it, "War is thus an act of force to compel our enemy to do our will . . . [a]ttached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it."[31] That is not, however, how today's military commanders typically view war in the 21st century. General James Jones, then the com-

currently include law of war training as part of their regular military training or offer it in any form. Although this shortcoming sometimes results from a lack of motivation or a simple disregard for the Geneva Conventions, in most countries this lack of law of war training stems primarily from an absence of knowledge and opportunity.") (internal citations omitted).

[28] *See, e.g.*, Parker v. Levy, 417 U.S. 733, 743 (1974) ("This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society."). In addition, the eminent military historian John Keegan noted that the difference between the civilian and military world is something it took "a life cast among warriors" to learn: The lesson has taught me to view with extreme suspicion all theories and representations of war that equate it with any other activity in human affairs . . . Connection does not amount to identity or even to similarity . . . . War . . . must be fought by men whose values and skills [differ]. . . .They are those of a world apart, a very ancient world, which exists in parallel with the everyday world but does not belong to it. Both worlds change over time, and the warrior world adapts in step to the civilian. It follows it, however, at a distance. The distance can never be closed, for the culture of the warrior can never be that of civilization itself. JOHN KEEGAN, HISTORY OF WARFARE xvi (1993).

[29] *See, e.g.*, VICTOR DAVIS HANSEN, CARNAGE AND CULTURE (2001); *cf. Leveling the Battlefield*, FOREIGN POL'Y, Nov./Dec. 2007, at 21 ("Countries with greater economic equality are far more likely to emerge victorious in conflicts that less egalitarian ones").

[30] DICTIONARY OF MILITARY AND NAVAL QUOTATIONS 166 (Robert Heinl, ed., 1966) ("The laws are silent in the midst of arms.").

[31] CARL VON CLAUSEWITZ, ON WAR 75 (Michael Howard & Peter Paret trans., 1989).

mander of NATO, conceded a few years ago that warfare had now become "very legalistic and very complex" requiring "a lawyer or a dozen."[32]

The challenge was—and continues to be—to communicate effectively with those actually doing the fighting.[33] If lawfare can summarize in a digestible way the notion that legal considerations are more than just moral imperatives, and that they have a constructive role to play in achieving mission success, then we should be less concerned as to whether or not the terminology fits neatly into the epistemology of academic theory or, for that matter, think tank salons. Simplifying complex concepts into readily-understandable shorthand is standard military practice; lawyers who disdain lawfare as intellectually plebian misperceive its purpose, and do so at the peril to their own effectiveness.

I do think that were Clausewitz alive today, he no doubt would—notwithstanding his earlier admonition—find law very much worth mentioning, and not just to the lawyers who are admittedly proliferating in battlespaces—to the alarm of some.[34] In fact, I would submit, as already suggested in General Jones's remark, that in contemporary operations, and especially in Afghanistan, an essential principle of the law of armed conflict—distinction—has taken *center stage* in the all-important strategic battle for hearts and minds.

One might say that this is how it should be because, as Professor Gary Solis observes in his magnificent new book on the law of war, the principle of distinction—that is, the requirement to at all times distinguish between civilians and combatants, and direct attacks only against the latter—is "the most significant battlefield concept a combatant must observe."[35] Parenthetically, I would agree, but with one caution relevant to lawfare: we should not necessarily equate civilian status with moral innocence or, for that matter, some kind of moral superiority that makes their lives more valued than those of combatants.[36]

Interestingly, the late Daniel J. Boorstin, the former Librarian of Congress, believed that Americans suffer from the "Myth of Popular Inno-

---

[32] Lara L. Griffith, *The Evolution of the Laws of War in the War on Terror*, 38 DENV. J. INT'L L. & POL'Y 550 (2010); *See* Lyric Wallwork Winik, A Marine's Toughest Mission (Gen. James L. Jones), PARADE MAG., Jan. 19, 2003, *available at* http://www.parade.com/articles/editions/2003/edition_01-19-2003/General_Jones.

[33] *Id.*

[34] *See supra* note 31, and accompanying text. *See, e.g.*, Michael Barone, *The Overlawyered War*, REALCLEARPOLITICS, Sept. 17, 2007, http://www.realclearpolitics.com/articles/2007/09/the_overlawyered_war.html.

[35] Solis, *supra* note 23, at 251.

[36] *See* Norman Friedman, *Is Modern Wear Too Precise?*, U.S. NAVAL INST PROCEEDINGS, Dec. 2004, at 4 (arguing that the devastating air assault on Germany did "not change necessarily the hearts and minds" of the German people "but it did help preclude any post-surrender violence like what is now being seen in Iraq.").

cence."[37] This is the curious tendency to demonize certain individual adversaries, but absolve of any responsibility the populations from which they arise and which often support them.[38] Many people want to believe that societies are helpless victims of powerful tyrants despite evidence, as Boorstin contends that "history proves that ruthless rulers can be removed by popular will."[39]

This is, perhaps, something to keep in mind when we try to reconcile assertions that only 10% of Afghans support the Taliban with reports that Taliban power is nevertheless increasing.[40] As I will suggest later, the values of Afghan culture, even with respect to such seemingly universal norms as to civilian casualties, may not be what so many assume they are.[41] Failure to fully appreciate the environment in which the law must operate, to include cultures other than our own, carries the potential to twist legal policies in a way that generates negative perceptions of what we have come to call lawfare.

Regardless, it is one thing to say that *within* the realm of the law of armed conflict, a particular standard like distinction is in the forefront. It is quite another, however, to say that with respect to the conflict *generally*, a legal principle trumps more traditional military matters to form a linchpin of the whole endeavor. This would be lawfare writ large. Yet Secretary of Defense Robert Gates acknowledged just that to be the case in Afghanistan when he stated flatly in May of 2009 that "provoking or exploiting civilian casualties is a 'principle strategic tactic' of the Taliban."[42]

---

[37] Daniel J. Boorstin, *Myths of Popular Innocence*, U.S. NEWS & WORLD REPT., Mar. 4, 1991, at 41.

[38] *Id.*; *See also* Charles J. Dunlap, *Technology and the 21st Century Battlefield; Recomplicating Moral Life for the Statesman and the Soldier*, U.S. ARMY STRATEGIC STUDIES INST., Jan. 15, 1999, at 18, *available at* http://www.strategicstudiesinstitute.army.mil/pdffiles/pub229.pdf.

[39] *Id.*

[40] *Poll: 7 in 10 Afghans Support US Forces*, CBS News, Jan. 11, 2010, *available at* http://www.cbsnews.com/stories/2010/01/11/world/main6082241.shtml; *See also*, REPORT ON PROGRESS TOWARD SECURITY AND STABILITY IN AFGHANISTAN AND UNITED STATES PLAN FOR SUSTAINING THE AFGHANISTAN NATIONAL SECURITY FORCES, Report to Congress in Accordance with Sections 1230–31 of the National Defense Authorization Act for Fiscal Year 2008 (Apr. 2010) at 21, *available at* http://www.dodbuzz.com/wp-content/uploads/2010/04/Report_Final_SecDef_04_26_10.pdf.

[41] *See generally* Richard Falk, *Think Again: Human Rights*, FOREIGN POLICY MAGAZINE, Mar. 1, 2004, *available at* http://www.foreignpolicy.com/articles/2004/03/01/think_again_human_rights (arguing that "all persons and peoples" do not aspire to the same human rights).

[42] John J. Kruzel, *U.S. Denies Using White Phosphorous in Afghanistan, Gates Pledges More Investigation*, AMERICAN FORCES PRESS SERVICE, May 11, 2009, *available at* http://www.defense.gov/news/newsarticle.aspx?id=54294 (quoting Robert Gates).

Exploiting civilian casualties, or more academically, exploiting the adherence—or lack thereof—to the law of armed conflict axiom of distinction has become *the* "principle strategic tactic" of the Taliban much out of sheer necessity.[43] The astonishing effectiveness of the high-technology capabilities of the U.S. military—and those of other advanced nations—is devastating to the extremists.[44] And airpower heads the list of those technologies.

A. The Remotely-Piloted Aircraft Debate

Recent events demonstrate the effectiveness of airpower. In August of 2010, the Washington Post reported that al-Qaeda has largely decamped to Yemen from Central Asia.[45] The reason is not because an allied ground operation drove them out, and not because some clever "hearts and minds" campaign made them feel unwelcome in the Hindu Kush, but rather because of the persisting application of hard and uncompromising force in the form of airstrikes from Remotely-Piloted Aircraft (RPA).[46]

According to the Post, the move was made "largely because al-Qaeda has been decimated by Predator strikes," and quoted a senior U.S. official as saying that the air attacks caused "major losses" among al-Qaeda operatives.[47] So severe were the losses, the official said, that al-Qaeda had been "unable to replenish ranks and recover at a pace that would keep them on the offense."[48]

That this highly-effective system of RPAs nonetheless has been the object of so much derision in certain legal quarters feeds the perception that an abusive form of lawfare is being waged against it.[49] The recent report of

---

[43] *Id.*

[44] *See generally* Charles J. Dunlap Jr., *America's Asymmetric Advantage*, ARMED FORCES JOURNAL, Sept. 2006, at 20 (discussing the U.S.' advantage in war because of its high technology air power capability and how an adversary's lack of such air power hinders their abilities to combat the United States).

[45] Greg Miller and Peter Finn, *CIA Sees Increased Threat From al-Qaeda in Yemen*, WASH. POST, Aug. 24, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/08/24/AR2010082406553.html.

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *See generally Hearing on the Rise of Drones: Unmanned Systems and the Future of War Before the Subcomm. on Nat'l Sec. and Foreign Affairs*, 111th Cong. (2010) (addressing "the rise in unmanned systems technology and the implications for the current U.S. war efforts in the Middle East and South Asia, U.S. National Security, and the future of war"); *Hearing on the Rise of Drones II: Examining the Legality of Unmanned Targeting*, 111th Cong. (2010) (examining " the requirements and application of both international and domestic laws under various combat circumstances, the consequences of using civilians or

the U.N. Special Rapporteur Phillip Alston's stokes much of the controversy.[50] A close reading of the report finds its main weakness not so much in its legal analysis (though it has flaws), but in its consideration of war-making and warriors. Allow me to make a short remark with respect to the latter issue. In his report, Professor Alston speculates that because RPA operations can be conducted "entirely through computer screens and remote audiofeed, there is a risk of developing a 'Playstation' mentality to killing."[51] Where is the evidence that such a blasé and cavalier attitude towards killing other human beings ever existed—or *could* exist—among the honorable military professionals and others operating these systems?[52]

Apart from everything else, such *ad hominem* attacks will not likely play well to American audiences who have a strong tradition of having more confidence in the military[53] and their leaders[54] than any other institution—to include, especially, the United Nations.[55] That such a demeaning remark should be part of a supposedly sophisticated legal document undermines the respect the law, as well as institutions like the United Nations, need to be effective.

Words matter in lawfare. Professor Alston's reliance, and that of others, on the term "drone" is unfortunate because it generates a perception of a mindless, heartless, and autonomous killer.[56] Of course, the machines are actually piloted—albeit remotely—and all decisions, especially those relating to the use of force, are made in real time by human beings.[57] Still, to a degree he—and especially more so other academics and commentators—seem fixated on the idea that there must be something illicit about comba-

---

military personnel to operate unmanned weapons, the considerations involved with targeting American citizens, and future legal and policy considerations").

50 *See* Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, delivered to the Human Rights Council, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston).

51 *Id.* at 25.

52 Indeed, what evidence that does exist clearly demonstrates the operators take their responsibilities extremely seriously. *See, e.g.*, Aaron Retica, *Drone Pilot Burn-out*, N.Y. TIMES MAG., Dec. 12, 2008, *available at* http://www.nytimes.com/2008/12/14/magazine/14Ideas-Section2-B-t-001.html.

53 Lydia Saad, *Congress Ranks Last in Confidence in Institutions*, GALLUP, Jul. 22, 2010, http://www.gallup.com/poll/141512/Congress-Ranks-Last-Confidence-Institutions.aspx ("The military continues its long-standing run as the highest-rated U.S. institution.").

54 *Virtually No Change in Annual Harris Poll Confidence Index from Last Year*, HARRIS POLL, Mar. 9, 2010, http://www.harrisinteractive.com/vault/Harris-Interactive-Poll-Research-Education-Confidence-2010-03.pdf (showing military leaders as topping the poll).

55 Jeffrey M. Jones, *Americans' Rating of United Nations Improved, but Still Low*, GALLUP POLL, Feb. 19, 2010, http://www.gallup.com/poll/126134/Americans-Rating-United-Nations-Improved-Low.aspx.

56 *See supra* note 50 (Professor Alston is hardly alone in his use of the word "drone.").

57 *See supra* note 21.

tants who are able to employ weapons that outrange those of their adversary.[58]

In fact, such weaponry is basic to war-making. David slew Goliath with a missile weapon before the giant could bring his weapons to bear; the sixteen-foot pikes of Alexander the Great's phalanxes reached their targets well ahead of the twelve foot pikes wielded by their opponents; English longbowmen destroyed the flower of French knighthood at Agincourt from afar when they rained arrows down upon the horsemen; and, more recently, U.S. and British tanks destroyed the heart of Saddam's armor forces during 1991's Battle of 73 Easting much because their guns outranged those of Iraq's T-72 tanks.[59] There is nothing new about killing from a distance.

Although a complete discussion of the many issues arising from Professor Alston's report is beyond the scope of this Article, a few additional notes are in order. One of the most problematic aspects in the report is the degree of transparency he wrongly claims is *required* of RPA users by international law.[60] With respect to legal process, transparency may not be required, but may nevertheless be useful.

In this regard, there is much already in the public domain about the intimate involvement, at least insofar as the United States is concerned, by specially-trained uniformed lawyers in military air operations, to include those of RPAs.[61] Moreover, Harold Koh's March 2010 speech made it ap-

---

[58] *See Hearing on the Rise of the Drones II: Examining the Legality of Unmanned Targeting Before the Subcomm. on Nat'l Sec. & Foreign Affairs*, 111th Cong. (2010) (statement of Kenneth Anderson, Professor, Washington College of Law, American University), *available at* http://oversight.house.gov/images/stories/subcommittees/NS_Subcommittee/3.23.10_Drones/Singer.pdf ("Some commentators, including eminent laws of war scholars, have suggested that the activities of the CIA operating drones (including from locales in the United States) in the context of the armed conflict in AfPak constitutes unlawful combatancy by CIA personnel."); s*ee also Hearing on Rise of the Drones: Unmanned Systems and the Future of War Before the Subcomm. on Nat'l Sec. & Foreign Affairs*, 111th Cong. (2010) (statement of Peter Warren Singer, Ph.D., Senior Fellow & Director, 21st Century Defense Initiative, The Brookings Institute), *available at* http://oversight.house.gov/images/stories/subcommittees/NS_Subcommittee/3.23.10_Drones/Singer.pdf (drawing attention to the perceptions abroad including those of Lebanon and Pakistan, which believe the use of drones by the United States is both cowardly and dishonorable).

[59] 73 EASTING: LESSONS LEARNED FROM DESERT STORM VIA ADVANCED DISTRIBUTED SIMULATION TECHNOLOGY I-114 to I-115 (Jesse Orlansky & Jack Thorpe, eds. 1992).

[60] Alston, *supra* note 50, at 26.

[61] *See, e.g.*, Thom Shanker, *Civilian Risks Curbing Strikes in Afghan War*, N.Y. TIMES, Jul. 23, 2008, *available at* http://www.nytimes.com/2008/07/23/world/asia/23military.html ("Air Force lawyers vet all the airstrikes approved by the operational air commanders."); *see also* Maj. David Kurle, *Lawyers Provide Operational Advice to Commanders*, U.S. AFCENT PUBLIC AFFAIRS, (Mar. 12, 2010), http://www.af.mil/news/story.asp?id=123193544 (explaining how legal advisors provide simultaneous information to battle directors enabling them to make critical decisions that comply with the laws of war); *see also* Anne Mulrine, *Targeting*

parent that RPA strikes by all U.S. entities are subject to a careful legal analysis, and that targeting is based upon established principles of international law.[62] Still, greater exposition on the process and the broad legal theories relied upon would not seem to compromise sovereignty interests or military needs.

What is more problematic is Professor Alston's contention that those who use RPAs *must* also disclose, to international scrutiny, much specific factual information about the exact identity of targets, the criteria by which they are selected, the assessment of the target's ability to defend himself and thus evade capture, as well as specifics about outcomes when attacks do take place.[63]

The cruel realities of modern conflicts are such that if any nation were so unwise as to provide publically the level of operational detail Professor Alston wants, it is certain that the potential targets would 'go to school' on such immensely valuable information so as to evade a strike. This could give rise to allegations that the law mandates, in effect, an intelligence-gathering process that helps militants live on to carry out their reign of terror. Again, it would perpetuate a negative perception of lawfare—in fact, the law itself—as weapon that too often favors America's adversaries.

B. Airstrike Restrictions and Self-Inflicted Lawfare

Presumably, Professor Alston has no malicious agenda to aid America's adversaries, but his approach does reveal a persisting issue of contemporary lawfare: insufficient attention to unintended consequences of well-meant positions, as well as an inadequate appreciation for the degree to which some belligerents will seek to exploit the efforts of those who try to "improve" upon existing law.

Consider the effect of NATO's effort to impose more restrictive airstrike rules than the law of armed conflict requires. Specifically, NATO

---

the Enemy: Inside the Air Force's Control Center for Iraq and Afghanistan, U.S. NEWS & WORLD REPT., Jun. 9, 2008, at 26, *available at* http://politics.usnews.com/news/world/articles/2008/05/29/a-look-inside-the-air-forces-control-center-for-iraq-and-afghanistan.html (providing insight into how the Air Force targets insurgents as well as the challenges the Air Force faces in implementing its targeting procedures).

[62] Address to the Annual Meeting of the American Society of International Law by Harold Hongju Koh, Legal Adviser, U.S. Department of State (Mar. 25, 2010), http://www.state.gov/s/l/releases/remarks/139119.htm; *see also* Norman G. Printer, *The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 UCLA J. INT'L L & FOREIGN AFF. 331, 381–83 (2003) (explaining that the United States may lawfully target terrorists by invoking its right to self-defense).

[63] *See* Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, Human Rights Council, ¶¶ 87–90, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston) (discussing the State's obligation to disclose all reliable information relating to targeted killings).

announced in June 2007 that its forces "would not fire on positions if it knew there were civilians nearby."[64] Just a year later, a spokesman reiterated that "[I]f there is the likelihood of even one civilian casualty, [NATO] will not strike, not even if we think Osama bin Laden is down there."[65] The law of armed conflict certainly does not demand such deference to the likes of Osama bin Laden.[66]

By creating restrictions beyond what the law of armed conflict would require, NATO's pronouncements encourage the Taliban to shield themselves from air attack by violating the law of armed conflict through embedding themselves among civilians.[67] This permits a form of lawfare where NATO's adherence to its own rules, in essence, creates for its adversary a substitute for conventional military weaponry. By this I mean that for the Taliban to survive, it is not necessary for them to build traditional air defenses; rather, just by operating amidst civilians, they enjoy a legal sanctuary created by NATO's own self-imposed restrictions that is as secure as any fortress bristling with anti-aircraft guns.

And it appears that civilians have suffered most as a result. The fact is that the imposition of special restrictions on airstrikes by General Stanley McChrystal in June 2009 marked the beginning of an enormous increase in Afghan civilian deaths that would reach all-time highs by the summer of 2010.[68] In addition, the coalition's military casualties likewise skyrocketed, a fact that is eroding support among troop-contributing publics.[69] This exemplifies how self-inflicted lawfare can produce unintended, second-order negative consequences. Specifically, diminishing public support due to rising casualty figures could well lead to a military withdrawal that many con-

---

[64] Noor Khan, *Afghan Civilians Said Killed in Clash*, WASH. POST., June 30, 2007, http://www.washingtonpost.com/wpdyn/content/article/2007/06/30/AR2007063000028.html.

[65] Pamela Constable, *NATO Hopes to Undercut Taliban With "Surge" of Projects*, WASH. POST., Sept. 27, 2008, at A12.

[66] *See, e.g.*, Maj. Gen. Charles J. Dunap, Jr., *Lawfare Amid Warfare*, WASH. TIMES, Aug. 3, 2007, at A17, *available at* http://www.washingtontimes.com/news/2007/aug/03/lawfare-amid-warfare/?page=1 (stating that a zero tolerance policy for civilian casualties creates a sanctuary for enemies).

[67] *See* Thom Shanker, *Civilian Risks Curbing Strikes in Afghan War*, N.Y. TIMES, July 23, 2008, at A12 (describing how Taliban leaders have learned to exploit restrictions on civilian causalities by hiding among the civilian population).

[68] Featured News, United Nations Assistance Mission in Afghanistan (UNAMA), Afghan civilian casualties rise thirty-one percent in first six months of 2010 (Aug 10, 2010) http://unama.unmissions.org/Default.aspx?tabid=1741&ctl=Details&mid=1882&ItemID=9955 (last visited Nov. 6, 2010).

[69] *See, e.g.*, David Zuchinno, *As U.S. deaths in Afghanistan rise, military families grow critical*, L.A. TIMES, Sept 2. 2010, at A1, *available at* http://www.latimes.com/news/nation world/nation/la-na-casualties-20100902,0,6702051.story.

tend would produce, in turn, further horrific consequences for Afghan civilians.[70]

What is particularly frustrating about this form of self-inflicted lawfare is that it is well established from studies of the Iraq war and, more recently, Afghanistan, that notwithstanding popular perceptions, only about 6% of civilian deaths in the conflicts are the result of airstrikes.[71] In fact, traffic accidents with U.S. and coalition forces are almost two and a half times as deadly for Afghan women and children as are airstrikes.[72] Do civilian deaths create more enemies? Not necessarily. Although insurgents are responsible for the vast majority (some 76%, of civilian deaths), the Christian Science Monitor reports that "there[is] little indication that these Taliban indiscretions have backfired on the movement so far."[73] Furthermore, other analysts suggest that Afghans may not be assessing the issue of civilian casualties as those outside their culture might assume they do.[74]

The point is that the additional restrictions are likely based on faulty or incomplete factual premises and, most tragically, are producing effects that are precisely the opposite of the aim of the law to ameliorate civilian suffering in war. Again, self-imposed lawfare can have dire impacts if practitioners do not fully educate themselves to the facts, and conduct dispassionate and thorough analysis. If the existence of the concept of lawfare—even as an epithet of sorts—serves as nothing more than a way to alert practitioners to how their efforts might be warped and exploited, it would seem to be serving an undeniably productive purpose.

---

[70] *See, e.g.*, Aryn Baker, *Afghan Women and the Return of the Taliban*, TIME, Aug. 9, 2010, *available at* http://www.time.com/time/world/article/0,8599,2007238,00.html.

[71] Madelyn Hsiao-Rei Hicks, et al., *The Weapons That Kill Civilians—Deaths of Children and Noncombatants in Iraq, 2003–2008*, 360 NEW ENG. J. MED. 1585, 1586 (Apr. 16, 2009), *available at* http://content.nejm.org/cgi/reprint/360/16/1585.pdf; Luke N. Condra, et al., *The Effect of Civilian Causalities in Afghanistan and Iraq*, 34 (Nat'l Bureau of Econ. Research, July 2010) *available at* http://www.nber.org/papers/w16152.

[72] Hsiao-Rei Hicks, et al. and Condra, et al., *supra* note 71.

[73] Ben Arnoldy, *History sides with Taliban, for now*, CHRISTIAN SCIENCE MONITOR, April 23, 2010, at 9, *available at* http://www.csmonitor.com/World/Asia-South-Central/2010/0423/Precedent-suggests-Afghanistan-Taliban-could-win-report. *See also* UNAMA, *supra* note 68 and Condra, et al., *supra* note 71, at 28–29.

[74] *See, e.g.*, Jeremy Shapiro, Afghanistan and Pakistan Index and Assessments, Brookings Institution, at 32 (Oct. 5, 2009), *available at* http://www.brookings.edu/~/media/Files/events/2009/1005_afghanistan_pakistan/20091005_afghanistan_pakistan.pdf (contending that the Afghan government highlights civilian casualties to get leverage with the coalition, but local officials in his experience "tend actually not to be too concerned" with the civilian casualties).

C. Lawfare and the Goldstone Report

Candidly, negative references to lawfare are many. The most recent catalyst for casting lawfare as a diabolical scheme is the Goldstone Report on Israel's military operations in the Gaza Strip in late 2008 and early 2009.[75] Although this is a huge topic much beyond the scope of this Article, it must be recognized that the Report has generated a blizzard of lawfare charges, particular by the defenders of Israel's position.[76] Lawfare, in this widely discussed context, is invariably used pejoratively.[77]

To reiterate, this essay is not an analysis of the Goldstone Report. Nevertheless, one aspect does raise a very serious concern: are we at risk of reaching a dangerous "tipping point" with our target audiences as to their view of the role of law in modern conflicts? Consider the Goldstone Report's assessment of Israel's advance warning to Gaza civilians. Professor Michael Schmitt observes:

> [Israel's] warnings included approximately 165,000 telephone calls, the dropping of 2,500,000 leaflets, radio broadcasts, and "roof-knocking"—warning shots fired at rooftops after the individuals inside had ignored earlier warnings. Astonishingly, the [Goldstone] [R]eport found these measures insufficient, despite the fact that they constituted probably the most extensive, and most specific, warnings of offensive operations over such a short period in the history of warfare.[78]

---

[75] Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict*, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009), *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf.

[76] *See, e.g.*, K. Boyko, *Conference "The Goldstone Report: Lawfare & The Threat to Israeli and American National Security in the Age of Terrorism,"* AMERICAN ASSOCIATION OF JEWISH LAWYERS AND JURISTS (Apr. 8, 2010), http://www.jewishlawyers.org/BlogArticle.asp?x_id=134 (stating in an advertisement for a conference that "In particular, the semblance of authenticity and the cloak of legal language surrounding the Goldstone Report have given it an undeserved legitimacy and inspired a plethora of further mechanisms intended to demonize and delegitimize the state of Israel. The report and the lawfare strategy it embodies, erode the legitimacy of international law and pose a clear and present danger to the right of all democratic states . . . .").

[77] Some do acknowledge lawfare's generic definition, but focus on its negative uses. For example, The Lawfare Project states its "concentration is on the *negative* manipulation of international and national human rights laws to achieve purposes other than, or contrary to that for which those laws were originally enacted." *What is Lawfare?*, THE LAWFARE PROJECT, http://www.thelawfareproject.org (last visited Nov. 6, 2010).

[78] Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT'L L. 795, 828 (2010), *available at* http://www.vjil.org/wp-content/uploads/2010/05/VJIL-50.4-Schmitt-Essay.pdf.

While lawyers might wish to ruminate about the details of these efforts, many observers— to include particularly military commanders— quite likely will share Professor Schmitt's astonishment and conclude, rightly or wrongly, that it is pointless to try to satiate what they could perceive as illogical and excessive demands. Will senior officers see the criticism of this unprecedented effort to protect civilians and think "what's the point of trying" to go the proverbial "extra mile"? Will it lead to yet another disparaging conception of lawfare?

I rather doubt we are at risk of a Hobbesian descent into immoral and illegal behaviors, but an attitude could emerge that tends to marginalize the role of law into its most technical minimums. It likely will play to negative stereotypes of lawyers, and may serve to revive the Clausewitzean perspective on the law of armed conflict.[79] In my view, it risks a setback in what I have long hoped would be an outcome of the proliferation of lawfare, that is, that military personnel would consider the law not just as a formal limitation and moral imperative, but also as an affirmatively useful—and very pragmatic—arrow in their quiver.

D. U.S. Litigation: Lawfare?

Regrettably, the intensification of hostile lawfare rhetoric occasioned by the Goldstone Report is receiving renewed impetus as a result of very recent events in this country. In a September 2, 2010, editorial entitled "*The Lawfare Wars*," the Wall Street Journal asserts that however well the troops do on the traditional battlefield, the "U.S. can still lose the war on terror in the courtroom."[80] In finding that "lawfare is alive and dangerous," the Journal notes with dismay the delay in the trial by military commission of Abd al-Rahim al-Nashiri, who the Journal alleges is the "mastermind behind the al-Qaeda suicide attack on the U.S.S. Cole in 2000."[81]

Furthermore, the Journal especially decries the filing of a lawsuit by the American Civil Liberties Union and the Center for Constitutional Rights on behalf of Anwar al-Awlaki, who the Journal describes as "the U.S. cleric turned al-Qaeda operative who is now thought to be hiding in Yemen."[82] According to the Journal, U.S. intelligence officials linked Mr. al-Awlaki to the Fort Hood shooter, the Christmas Day bomber, the Times Square bomber, "and even the 9/11 hijackers."[83]

---

79 *See supra* note 32 and accompanying text.

80 Editorial, *The Lawfare Wars: The al-Nashiri Bugout, and Attack of the Killer Lawyers—on Drones*, WALL ST. J., Sept. 2, 2010, at A14, *available at* http://online.wsj.com/article/SB10001424052748703467004575463721720570734.html.

81 *Id.*

82 *Id.*

83 *Id.*

The suit alleges that Mr. al-Awlaki is on a U.S. government "kill list" for essentially no bona fide reason, and that he is in peril of an extra-judicial "targeted killing" by a RPA attack—or some other means—in the absence of the due process to which it is alleged he is entitled.[84]

While the complaint's arguments (elaborated upon in the supporting brief[85]) are unlikely to survive dismissal on political question or other grounds,[86] the lawsuit nevertheless raises some intriguing policy (if not legal) issues. Among them: Does Mr. al-Awlaki's status as an American citizen merit different and more lenient treatment by targeteers? If so, would this intensify recruitment of Americans by enemy forces? To what degree should RPA strikes be restricted to the geographical battlefields of Iraq and Afghanistan?[87] Would doing so tend to metastasize terrorism by encouraging extremists to concentrate themselves in other weak states to an even greater degree than they are already doing?

In any event, I am not as alarmed about the prospect of litigation as are, evidently, the Journal's editors. Notwithstanding some critics,[88] I believe American courts (to include especially the Supreme Court) have generally conducted very rationale analyses of national security issues, and typically have decided cases in a way that does not interfere with the necessary and appropriate degree of discretion that civilian and military leaders need for success. If judicial processes are abused, there are extant processes for addressing them, and the government has formidable legal resources with which to ensure that its interests are well-represented.[89]

IV. LAWFARE'S CRITIC'S LEGITIMATE CONCERNS

I do, however, share the concern of those lawfare critics who worry that the very existence of the term and its frequent association with alleged terrorists makes it too easy for some pundits to label with untoward motiva-

---

[84] Compl. ¶¶ 3, 29, Al-Aulaqi v. Obama, No. 10-cv-01469, (D.D.C. *filed* Aug. 30, 2010). As an aside, from a military perspective the complaint suffers from some obvious illogic in that it is premised on the notion that the U.S. government would prefer to simply kill Mr. Al-Aulaqi instead of capturing him. Any serious security professional would much prefer to interrogate a captive al-Qaeda operative as opposed to killing him.

[85] Mem. in Supp. of Pl.['s] Mot. for a Prelim. Inj., Al-Aulaqi v. Obama, No. 10-CV-1469 (D.D.C. Aug. 30, 2010).

[86] *See, e.g.*, El-Shifa Pharm. v. United States, 607 F.3d 836, 842 (D.C. Cir. Jun. 8, 2010) (relying upon the political question doctrine to dismiss a suit arising out of a 1998 military strike against the Sudanese factory, allegedly based on faulty intelligence).

[87] *See* Drones II, *supra* note 49, at *Statement for the Record of Professor Michael Lewis* (a cogent analysis of this issue).

[88] *See, e.g.*, Alberto Gonzales, *Waging War Within the Constitution*, 42 TEX. TECH L. REV. 843 (2010).

[89] *See, e.g.*, Philip Carter, *Legal Combat*, SLATE (Apr. 4, 2005, 5:51 PM), *available at* http://www.slate.com/id/2116169.

tions everyone who uses the courts or other legal processes to address the myriad of security-related issues of the post-9/11 world. This model of distorted lawfare may even routinely brand such litigants as the fellow travelers of terrorists, if not terrorists themselves.[90]

Of course, this is not how lawfare ought to be envisioned, and it is wholly unfair to the overwhelming majority of people who are properly and justifiably availing themselves of legal options. Still, Scott Horton and others have ably and repeatedly warned us about this dark side of the lawfare phenomenon, and we need to address it aggressively.[91]

That said, in today's world—at least until the next tragic act of terrorism—it does not require, particularly, an act of moral courage or professional nobility to take these cases; indeed, in many, if not most, quarters of the legal profession it is *chic* to volunteer to represent, for example, detainees and others accused of national security offenses.[92] And in a nation where thousands if not millions of ordinary citizens are unrepresented or under-represented, commentators like Andrew C. McCarthy are going to disparage such representation by saying "[O]f all the causes to which [such attorneys] could have donated their services, they chose our enemies."[93]

Actually, the use of the adversarial system by honorable and ethical litigants not only serves the ethos of the legal profession, it can significantly enhance national security. History demonstrates that societies that respect such qualities of liberty as searching inquiry, constructive criticism, and open debate—all of which are also features of legal systems like ours—tend to be extremely powerful and successful warfighters.[94]

As counterintuitive as it may seem, totalitarian societies which suppress liberty, along with the proper function of the rule of law, seldom achieve lasting battlefield success.[95] Robust adversarial systems like our

---

[90] *See* Michael Kinsley, *Support the Troops: Bring Them Home*, TIME, Mar. 5, 2007, at 26 ("It's time to end the myth that opposition to war is a betrayal of our soldiers").

[91] *See, e.g.*, Scott Horton, *Lawfare Redux*, HARPER'S, Mar. 12, 2010, *available at* http://www.harpers.org/archive/2010/03/hbc-90006694 (explaining the unfair criticism that lawyers defending accused terrorist must undergo).

[92] *See* Dunlap and Letendre, *supra* note 6, at 425–426 (noting that some lawyers defending those accused of terrorism have actually been praised for their efforts).

[93] Andrew C. McCarthy, *No Right to Counsel*, USA TODAY, Mar. 12, 2010, *available at* http://www.usatoday.com/printedition/news/20100312/editorial12_st1.art.htm

[94] *See generally, e.g.*, VICTOR DAVIS HANSEN, CARNAGE AND CULTURE (2001). *Cf. Leveling the Battlefield*, FOREIGN POL'Y MAG., Nov./Dec 2007, at 21 (citing a study that concludes that "[c]ountries with greater economic equality are far more likely to emerge victorious in conflicts that less egalitarian ones").

[95] *See, e.g.*, 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 ("One of the hallmarks of tyrannical regimes, of whatever political flavor, is their intense dislike of defense

own are powerful counters to the suffocating authoritarianism that so often leads to warfighting defeat. As a practical matter, litigation is a potent engine for truth-finding as it ruthlessly eliminates the irrelevant and systematically drives towards reasoned and principled conclusions. In the national security realm, litigation can help us to creatively focus, sharpen, and strengthen our response to a range of threats. It has genuine potential to make us better and, therefore, more dangerous to our enemies.

Yet it also would be a mistake to be too dismissive of the worst fears of those who see grave peril in the growing use of litigation in matters related to armed conflict. Such concerns are not new; indeed, they were reflected in the 1950 opinion of the Supreme Court in *Johnson v. Eisentrager*.[96] In finding, *inter alia*, that enemy aliens captured and imprisoned abroad had no right to a *habeas corpus* hearing, the Court observed that:

> It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.[97]

Of course, such fettering of field commanders, not to mention military-judicial conflict, is exactly what some adversaries would like to use the law to cause.[98] And we must accept that litigiousness that is "highly comforting" to adversaries can and does occur. Journalist Mary Anastasia O'Grady reported in 2001 that Colombia's Revolutionary Armed Forces (FARC) insurgents were forcing peasants to use the "courts to press false charges" against government commanders as a means of "decapitating" military efforts as the commanders found themselves distracted by lengthy legal proceedings.[99]

U.S. authorities and courts are, I believe, significantly less vulnerable to such machinations. But, however sanguine I may be about American

---

lawyers in general, and in particular defense lawyers who do their work effectively and professionally.").

[96] Johnson v. Eisentrager, 339 U.S. 763, 779 (1950) ("The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals.").

[97] *Id.*

[98] Mary Anastasia O'Grady, *What About Columbia's Terrorists?*, WALL ST. J., Oct. 5, 2001.

[99] *Id.* at A15.

courts and their potential for avoiding abusive lawfare, I am much less confident about international tribunals. The risk of abusive lawfare may be low, as the advocates of international forums insist, but it exists.[100] Some adversaries may see real opportunities in such judicial settings.

These potential lawfare-style developments raise other concerns. As a nation dependent upon an all-volunteer force, we ought to be concerned about the impact on military morale of the very possibility, however theoretical, that those sent in harm's way might find themselves someday surrendered to unfamiliar foreign courts to be judged by other than their peers. Publics might understandably inquire: is this the end for which we ask our sons and daughters to fight? If enough people conclude that service to the country should not include this kind of vulnerability to foreign entities, then the force recruitment that underpins our military establishment could be in jeopardy.

V. CONCLUSION

Given the controversies generated, lawfare may indeed need an *apologia* of sorts, even as the law itself does not. Despite the widely differing views of lawfare's meaning and connotations, it would seem that castigating the concept is simply shooting-the-messenger of a phenomenon that is not just here to stay, but is likely to continue to grow and proliferate. Globalization and the widespread use of international forums energized by trade and commerce have had the effect of normalizing—and popularizing—international law.[101] That is not going to change and, historically, such developments in the economic sphere inevitably impact the conduct of war. Lawfare is only the latest example.

Importantly, we need not be too pessimistic about lawfare's implications simply because some belligerents seem to manipulate the law while operating largely outside of it. Consider the evidence that the behavior of those who formally reject international law may nevertheless find themselves temporized as lawfare, in whatever form, exposes it. For example, Senator John McCain, who suffered for years as a prisoner of war, observes:

---

100 *See, e.g.*, W. Chadwick Austin & Anthony Barone Kolenc, *Who's Afraid of the Big Bad Wolf? The International Criminal Court as a Weapon of Asymmetric Warfare*, 39 VAND. J. TRANSNAT'L L. 291 (2006); *see also* David G. Bolgiano, *A Nationalist's View of Lawfare*, ORBIS, Summer 2010, at 387 (arguing that the International Criminal Court is incompatible with the United States Constitution); *see also* Chitra Ragavan, *A Different Brand of Warfare*, U.S. NEWS & WORLD REPT., Mar. 19, 2007, at 30 (reporting on a number of international legal actions taken against members of the Bush Administration in foreign countries).

101 *See* Margaret K. Lewis, *International Law Takes Center Stage in Legal Education*, NAT'L L. J. (Sept. 7, 2009), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202433567511&slreturn=1&hbxlogin=1.

> Until about 1970, North Vietnam ignored its obligations not to mistreat the Americans they held prisoner, claiming that we were engaged in an unlawful war against them and thus not entitled to the protections of the Geneva Conventions. But when their abuses became widely known and incited unfavorable international attention, they substantially decreased their mistreatment of us.[102]

The visibility that the rise of lawfare has given to breaches of the law has even penetrated the rhetoric of the most recalcitrant of today's extremists. Last year, the Taliban issued a code of conduct in which their fighters were told that they "must do their best to avoid civilian deaths, civilian injuries and damage to civilian property."[103] While very understandably dismissed as propaganda by many, the mere existence of this code suggests some recognition of a need to at least acknowledge a key legal norm of the law of armed conflict.[104]

Remarkably, even a respected democracy that believes itself the victim of lawfare predations finds it can distill benefits from the experience. In a fascinating development, Newsweek recently reported that for all of Israel's objections to the Goldstone Report, it is having a real effect on its armed forces.[105] According to journalist Dan Ephron, the Report "in subtle ways . . . seems to be shaping military decisions and even doctrine."[106] Ephron points to changes in rules of engagement for urban areas and other steps to illustrate the impact of the report. "However reluctantly," Ephron says, "the Israeli military seems to have taken the criticism to heart."[107]

All of this indicates that—*on balance*—lawfare in its many forms has been much more of a positive force than a negative one. It has illuminated the role of law in armed conflict in new ways and to new audiences. True, like a weapon it will from time to time be employed wrongly and abusively, but that need not become the norm. Lawfare's utility is optimized when it is used consistently with its original purpose of communicating to non-specialists how law might be used as a positive good in modern war as a substitute for traditional arms.

Those disposed to do so can always find reasons to criticize lawfare for some deficiency. At a minimum, however, it would seem that rather than warring over semantics, we should enthusiastically embrace the extent to

---

102 John McCain, *Torture's Terrible Toll*, NEWSWEEK, Nov. 21, 2005, at 34, 34–35.

103 Issam Ahmed, *New Taliban Code: Don't Kill Civilians, Don't Take Ransom*, CHRISTIAN SCI. MONITOR, July 31, 2009, at 6, *available at* http://www.csmonitor.com/World/Asia-South-Central/2009/0731/p06s19-wosc.html.

104 *See also supra* text accompanying notes 56–63.

105 *See supra* text accompanying notes 43–68.

106 Dan Ephron, *Israel Reconsiders its Way of War*, NEWSWEEK, July 19, 2010, at 9.

107 *Id.*

which lawfare may facilitate courtroom combat replacing conventional combat as the situs of many 21st century conflicts. As Phillip Carter, the former Deputy Assistant Secretary of Defense for Detainee Affairs, puts it; "Truth be told, we have every reason to embrace lawfare, for it is vastly preferable to the bloody, expensive, and destructive forms of warfare that ravaged the world in the 20th century."[108]

[108] Carter, *supra* note 89.