

Lawfare: A Decisive Element of 21st-Century Conflicts?

By CHARLES J. DUNLAP, JR.

If anyone doubts the role of law in 21st-century conflicts, one need only pose the following question: what was the U.S. military's most serious setback since 9/11? Few knowledgeable experts would say anything other than the detainee abuse scandal known as "Abu Ghraib." That this strategic military disaster did not involve force of arms, but rather centered on illegalities, indicates how law has evolved to become a decisive element—and sometimes *the* decisive element—of contemporary conflicts.

It is not hard to understand why. Senior commanders readily characterized Abu Ghraib in customary military terms as "clearly a defeat" because its *effect* is indistinguishable from that imposed by traditional military clashes. No one debates that the revelations energized the insurgency and profoundly undermined the ability

of U.S. forces to accomplish their mission. The exploitation of the incident by adversaries allowed it to become the perfect effects-based, asymmetrical operation that continues to present difficulties for American forces. In early 2009, for instance, a senior Iraqi official conceded that the name "Abu Ghraib" still left a "bitter feeling inside Iraqis' heart."¹

For international lawyers and others involved in national security matters, the transformational role of law is often captured under the aegis of the term *lawfare*. In fact, few concepts have risen more quickly to prominence than lawfare. As recently as 2001, there were only a handful of recorded uses of the term, and none were in today's context. By 2009, however, an Internet search produces nearly 60,000 hits. Unfortunately, lawfare has also generated its share of controversy.

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Taliban and al Qaeda use lawfare tactics by manipulating unintended civilian casualties from airstrikes



U.S. Air Force (Larry E. Reid, Jr.)

Law in Warfare

To the best of my knowledge, lawfare as used in today's context first appeared in my 2001 essay for Harvard University's Carr Center.² At that time, the term was defined to mean "the use of law as a weapon of war" and, more specifically, to describe "a method of warfare where law is used as a means of realizing a military objective." Today, the most refined definition is "the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective."³

The purpose of the lawfare conceptualization in the national security context is to provide a vehicle that resonates readily with nonlegal audiences, particularly in the Armed Forces. Historically, the role of law in armed conflict was variously presented, but often simply as yet another requirement, one to which adherence was a matter of integrity and moral rectitude. As powerful as such values may be as incentives, especially to the militaries of liberal democracies, conceiving of the role of law in more conventional military terms has its advantages. Understanding that the law can be wielded much like a weapon by either side in a belligerency is something to which a military member can relate. It facilitates accounting for law, and particularly the fact and perception of adherence to it, in the planning and conduct of operations.

While recognizing the ever-present ethical responsibility to comply with the law, how does transforming adherence to law into a strategy serve the purposes of the warfighter? The answer is found in the work of Carl von Clausewitz. A man of his times, Clausewitz had little regard for international law as a factor in war.⁴ Nevertheless, he was keenly aware of the political dimension, and this is the linkage to today's understanding of lawfare.

Clausewitz's famous dictum that war is a "continuation of political intercourse, carried on with other means" relates directly to the theoretical basis of lawfare.⁵ Moreover, his analysis of the "trinity" of the people, government, and military whose "balance" produces success in war is likewise instructive. Specifically, in modern democracies especially, maintaining the balance that "political intercourse" requires depends largely upon adherence to law in fact and, importantly, *perception*.

Legal experts Michael Reisman and Chris Antoniou put it this way:

*In modern popular democracies, even a limited armed conflict requires a substantial base of public support. That support can erode or even reverse itself rapidly, no matter how worthy the political objective, if people believe that the war is being conducted in an unfair, inhumane, or iniquitous way.*⁶

Some adversaries see opportunity in this aspect of our political culture. Professor William Eckhardt observes:

*Knowing that our society so respects the rule of law that it demands compliance with it, our enemies carefully attack our military plans as illegal and immoral and our execution of those plans as contrary to the law of war. Our vulnerability here is what philosopher of war Carl von Clausewitz would term our "center of gravity."*⁷

In short, by anchoring lawfare in Clausewitzian logic, military personnel—and especially commanders of the militaries of democracies—are able to recognize and internalize the importance of adherence to the rule of law as a *practical* and necessary element of mission accomplishment. They need not particularly embrace its philosophical, ethical, or moral foundations; they can be Machiavellian in their attitude toward law because adherence to it serves wholly *pragmatic* needs. Thus,

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the concept of lawfare aims to insinuate law into military thinking in a new way, one that rationalizes it in terms compatible with the realities of 21st-century operations.

Legal "Weaponry"

The new emphasis on law in war derives from the larger, worldwide legal revolution. George Will recently characterized the United States as the "Litigation Nation" to describe how deeply legal consciousness has penetrated American society.⁸ Furthermore, international commerce depends upon law, along with a variety of international forums, to operate efficiently. This, in turn, is accelerating a globalization of law. As international law generally penetrates modern life, it tends to influence, as other trends have, the way war is conducted. Add to that the enormous impact of informa-

tion mediums, from round-the-clock news sources to cell phone cameras that empower almost anyone to record events, and it is easy to understand why incidents that seemingly implicate the international law of war can rapidly have significant ramifications among the body politic.

Commanders today, keenly aware of the devastating impact on operations that incidents such as Abu Ghraib can have, typically are willing partners in efforts to ensure that compliance with the law is part and parcel of their activities. It is no surprise, for example, that the much-heralded counterinsurgency manual devotes a considerable amount of text to law and law-related considerations.⁹ Counterinsurgency and other contemporary "irregular warfare" situations are especially sensitive to illegalities that can undermine the efforts to legitimize the government (and those wishing to assist it) that the insurgency is aiming to topple.

The new counterinsurgency doctrine also emphasizes that lawfare is more than just something adversaries seek to use against law-abiding societies; it is a resource that democratic militaries can—and should—employ *affirmatively*. For example, the reestablishment of the rule of law is a well-understood component of counterinsurgency and has proven an important part of the success U.S. forces have enjoyed in Iraq.¹⁰

There are other examples of how legal instruments can substitute for military means and function as an affirmative good. To illustrate: during the early stages of operations in Afghanistan, a legal "weapon"—a contract—was used to deny potentially valuable military information (derived from commercially available satellite imagery) from hostile forces.¹¹ In addition, although strategists argue that 21st-century threats emerge most frequently from nonstate actors who often operate outside of the law, these actors are still vulnerable to its application. Legal "weaponry," for instance, may well be the most effective means of attacking the financial networks terrorist organizations require to function. Likewise, sanctions and other legal methodologies can isolate insurgencies from the external support many experts believe is essential to victory.

A Tool for the Enemy?

While the employment of legal methodologies can create offensive opportunities for savvy U.S. commanders, too frequently our opponents use an exploitative form of lawfare along the lines of that arising in Abu Ghraib's aftermath. In fact, lawfare has emerged as the principal effects-based air defense methodology employed by America's adversaries today. Nowhere is this truer than in Afghanistan, where the Taliban and al Qaeda are proving themselves sophisticated and effective lawfare practitioners.

Specifically, the Taliban and al Qaeda are attempting to demonize the air weapon through the manipulation of the unintended civilian casualties airstrikes can produce. Their reason is obvious: precision air attacks are the most potent weapon they face. In June 2008, the *Washington Times* reported a Taliban fighter's lament that "tanks and armor are not a big deal. The fighters are the killers. I can handle everything but the jet fighters."¹² More recently, *Newsweek* told of a Taliban commander who, visiting the site of an attack by a Predator drone, marveled at how a "direct hit" was scored on the exact room an al Qaeda operative was using, leading the publication to conclude that a "barrage of pinpoint strikes may be unsettling al Qaeda."¹³

Yet the enemy is fighting back by mounting a massive—and increasingly effective—lawfare campaign. Using the media, they seek to create the perception, especially

among Afghans, that the war is being waged in an "unfair, inhumane, or iniquitous way."¹⁴ Unfortunately, some well-intended efforts at countering the adversary's lawfare blitz are proving counterproductive. For example, in June 2007, a North Atlantic Treaty Organization (NATO) spokesman in Afghanistan insisted that the Alliance "would not fire on positions if it knew there were civilians nearby."¹⁵ A little more than a year later, another NATO spokesman went even further, stating that if "there is the likelihood of even one civilian casualty, we will not strike, not even if we think Osama bin Laden is down there."¹⁶ The law of war certainly does not

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require zero civilian casualties; rather, it only requires that they not be excessive in relation to the military advantage sought.

Regardless, NATO's pronouncements unintentionally telegraphed an opportunity for lawfare-based strategy by which the enemy could avoid (or manipulate) airstrikes. That strategy is in effect today as evidenced by a November 2008 report wherein U.S. officers advised that the Taliban is "delib-

erately increasing the risk to civilians" by locating themselves among them.¹⁷ In terms of manipulation, consider an incident in which the Taliban, according to an American official, held a wedding party hostage as they fired on U.S. forces in an "attack designed to draw airstrikes on civilians and stoke anti-American sentiment."¹⁸

What is frustrating is the fact that revolutionary advances in aerial surveillance technologies and precision munitions have made airstrikes, in the words of Marc Garlasco of Human Rights Watch, "probably the most discriminating weapon that exists."¹⁹ The problem concerns perceptions. Accordingly, Jaap de Hoop Scheffer, the Secretary-General of NATO, correctly recognizes that perceptions are a "strategic battleground" and wants to "prioritize strategic communications" to remind the world "that the Taliban remain the ruthless killers and abusers of human rights that they have always been."²⁰

The Taliban is not the only adversary employing abusive lawfare tactics. In their air and ground operations in Gaza in late 2008 and early 2009, the Israelis faced a foe who, according to Israeli officials, flouted international law in an unprecedented manner. Specifically, the *New York Times* reported:

*Hamas rocket and weapons caches, including rocket launchers, have been discovered in and under mosques, schools and civilian homes, the [Israeli] army says. The Israeli intelligence chief, Yuval Diskin, in a report to the Israeli cabinet, said that the Gaza-based leadership of Hamas was in underground housing beneath the No. 2 building of Shifa Hospital, the largest in Gaza.*²¹

It appears that based on its experiences in the 2006 Lebanon War, the Israelis made careful and innovative counter-lawfare preparations for the Gaza operation. Besides using "meticulous technical and human intelligence" to validate targets—as well as employing low collateral damage munitions in strikes—the Israelis also subjected plans to review by military lawyers "huddling in war rooms."²² In addition, Israel "distributed hundreds of thousands of leaflets and used its intelligence on cell phone networks in Gaza to issue warnings to civilians, including phone calls to some families in high-risk areas."²³

Perhaps of most interest is the implementation of a concept called "operational verification."²⁴ According to *Defense News*, almost every Israeli army unit has specially



Courtroom sketch of Khalid Sheikh Mohammed and four other alleged September 11 co-conspirators

trained teams equipped with video cameras, tape recorders, and other documentation gear. The aim is to “document the story in real time” while there is still a “chance to influence public opinion” about the conduct of the operation.

Anthony Cordesman argues that although he believes that Israel did not violate the law of war and made a “systematic effort to limit collateral damage,” there was nevertheless “almost constant negative coverage of Israel in the Arab and Islamic world, as well as in much of Europe,” despite Israel’s efforts.²⁵ Consequently, as *Der Spiegel* reported, Israeli officials are “gearing up for a wave of lawsuits from around the world” claiming violations of the law of war.²⁶ Other news agencies report that the Israeli government is vowing to defend its soldiers against legal attack. Interestingly, *Der Spiegel* characterized the expected legal action in what are in effect lawfare terms in paraphrased Clausewitzian language as a “continuation of the war with legal means.”²⁷

Operationalizing Law

What does all this mean for commanders in 21st-century conflicts? In the first place, it is imperative that warfighters reject interpretations of lawfare that cast the law as a villain. A better, more realistic assessment is set forth by attorney Nathaniel Burney:

*[Lawfare] is often misused by those who claim that there is too much law, and that the application of law to military matters is a bad thing that hamstring commanders in the field. The fact of the matter is that lawfare is out there; it happens. It is not inherently good or bad. . . . It might be wiser for such critics to take it into account, and use it effectively themselves, rather than wish it didn't exist.*²⁸

Besides the fact that law may sometimes offer ways of bloodlessly achieving operational objectives, it is simply historically untrue that totalitarians who operate outside of humanitarian norms that the law reflects are more likely to succeed. Scholar Victor Davis Hanson points out that the basis for the enormous success of Western militaries is their adherence to constitutional government and respect for individual freedoms, and constant external audit and oversight of their strategy and tactics.²⁹ Historian Caleb Carr goes a step further by insisting that the “strategy of terror” of waging war against civilians nearly always has proven to

be a “spectacular” failure.³⁰ In short, adherence to the rule of law does not present the military disadvantage so many assume.

Next, the commander must be concerned with “legal preparation of the battlespace.” This means that command must ensure that troops have been properly trained to understand the law applicable to the operation and are ready to apply it under extreme stress. In this regard, the 2007 Department of Defense study of Soldiers and Marines

conclusion is a September 2008 report by Human Rights Watch that found that civilian casualties “rarely occur during planned airstrikes on suspected Taliban targets” but rather “almost always occurred during the fluid, rapid-response strikes, often carried out in support of ground troops.”³⁴ Thus, small-footprint operations can limit the risk to civilians, as well as limit the adversary’s opportunity for lawfare-exploitable events with strategic consequences.

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in Iraq is troubling as it revealed that only “47 percent of the soldiers and 38 percent of Marines agreed that non-combatants should be treated with dignity and respect, and that well over a third of all soldiers and Marines reported that torture should be allowed to save the life of a fellow soldier or Marine.”³¹

Although intensive training and strong leadership may mitigate such attitudes, experts doubt such efforts can wholly prevent incidents from occurring.³² Furthermore, Stephen Ambrose observed that it is a “universal aspect of war” that when young troops are put “in a foreign country with weapons in their hands, sometimes terrible things happen that you wish had never happened.”³³

This could suggest that the best way to avoid incidents is to limit the number of troops on the ground. Supporting this con-

Legal preparation of the battlespace also requires robust efforts to educate the media as to what the law does—and does not—require. Adversaries today are clever in their relations with the global media, and U.S. forces must be able to respond as quickly (and ideally before inquiries are made) and transparently as possible to lawfare-related incidents. Relationships with the media must be built in advance; once an incident occurs, it is difficult to explain legal complexities or to demonstrate the efforts to avoid unnecessary civilian losses on a timeline that will be meaningful.

Commanders would be wise to emulate the Israeli initiative by establishing “operational verification” teams to record activity in real time in instances where the adversary is employing an effects-based lawfare strategy centered around allegations of war crimes. In any event,

Marine combat photographer videotapes Marines conducting searches of Iraqi males



II MEF Combat Camera (Paul D. Bishop)

multidisciplinary teams of legal, operational, intelligence, and public affairs specialists ought to be organized, trained, and equipped to rapidly investigate allegations of incidents of high collateral damage. Likewise, command and control systems ought to be evaluated for their ability to record data for the purpose of accurately reconstructing processes if required.

“Operational verification” teams could be more than simply sophisticated elements of an information operations effort. Properly organized, trained, and equipped, they can fulfill legitimate public diplomacy needs, but they can also provide near-real-time feedback to commanders as to how operations are being executed. Thus, commanders could rapidly adapt procedures if the empirical data gathered by such teams indicate opportunities to better protect innocents.

Of course, the availability of expert legal advice is absolutely necessary in the age of lawfare. The military lawyers (judge advocates) responsible for providing advice for combat operations need schooling not only in the law, but also in the characteristics of the weapons to be used, as well as the strategies for their employment. Importantly, commanders must make it unequivocally clear to their forces that they intend to conduct operations in strict adherence to the law. Helping commanders do so is the job of the judge advocate.

Assuring troops of the legal and moral validity of their actions adds to combat power. In discussing the role of judge advocates, Richard Schragger points out:

Instead of seeing law as a barrier to the exercise of the client's power, [military lawyers] under-

stand the law as a prerequisite to the meaningful exercise of power. . . . Law makes just wars possible by creating a well-defined legal space within which individual soldiers can act without resorting to their own personal moral codes.³⁵

That said, commanders should aim not to have a judge advocate at the elbow of every rifleman, but rather to imbue troops with the right behaviors so they instinctively do the right thing on the battlefield. The most effective way is to carefully explain the enemy's lawfare strategies and highlight the pragmatic, real-world impact of Abu Ghraib-type incidents on the overall success of the mission. One of the most powerful motivators of troop conduct is the desire

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to enhance the security of fellow soldiers. Making the connection between adherence to law and troop safety is a critical leadership task.

Integral to defensive lawfare operations is the education of the host nation population and, in effect, the enemy themselves. In many 21st-century battlespaces, these audiences are not receptive to what may appear as law imposed by the West. In 1999, for example, a Chinese colonel famously argued that China was “a weak country, so do we need to fight

according to your rules? No. War has rules, but those rules are set by the West. . . . [I]f you use those rules, then weak countries have no chance.”³⁶

To counter such beliefs, it is an essential lawfare technique to look for touchstones within the culture of the target audience. For example, in the early 1990s, the International Committee of the Red Cross produced an illustrated paperback that matched key provisions of the Geneva Convention “with bits of traditional Arab and Islamic wisdom.”³⁷ Such innovations ought to be reexamined, along with creative ideas that would get the messages to the target audience. One way might be to provide audio cassettes in local languages that espouse what are really Geneva Convention values in a context and manner that fit with community religious and cultural imperatives.

The point is to delegitimize the enemy in the eyes of the host nation populace. This is most effectively accomplished when respected indigenous authorities lead the effort. Consider Thomas Friedman's favorable assessment of the condemnation by Indian Muslim leaders of the November 2008 Mumbai attacks:

The only effective way to stop [terrorism] is for “the village”—the Muslim community itself—to say “no more.” When a culture and a faith community delegitimize this kind of behavior, openly, loudly and consistently, it is more important than metal detectors or extra police.³⁸

Moreover, it should not be forgotten that much of the success in suppressing violence in Iraq was achieved when Sunnis in Anbar Province and other areas realized that al Qaeda operatives were acting contrary to Iraqi, and indeed Islamic, sensibilities, values, and law. It also may be possible to use educational techniques to change the attitudes of enemy fighters as well.

Finally, some critics believe that “lawfare” is a code to condemn anyone who attempts to use the courts to resolve national security issues. For example, lawyer-turned-journalist Scott Horton charged in the July 2007 issue of *Harper's Magazine* that “lawfare theorists” reason that lawyers who present war-related claims in court “might as well be terrorists themselves.”³⁹ Though there are those who object to the way the courts have been used by some litigants,⁴⁰ it is legally and morally wrong to paint anyone legitimately using legal processes as the “enemy.”



BG Michael A. Ryan, U.S. Forces Afghanistan, offers condolences to families of those killed during an operation targeting insurgents, February 2009

U.S. Army (John Gray)

Indeed, the courageous use of the courts on behalf of unpopular clients, along with the insistence that even our vilest enemies must be afforded due process of law, is a deeply embedded American value, and the kind of principle the Armed Forces exist to preserve. To be clear, recourse to the courts and other legal processes is to be encouraged; if there are abuses, the courts are well equipped to deal with them. It is always better to wage legal battles, however vicious, than it is to fight battles with the lives of young Americans.

Lawfare has become such an indelible feature of 21st-century conflicts that commanders dismiss it at their peril. Key leaders recognize this evolution. General James Jones, USMC (Ret.), the Nation's new National Security Advisor, observed several years ago that the nature of war has changed. "It's become very legalistic and very complex," he said, adding that now "you have to have a lawyer or a dozen."⁴¹ Lawfare, of course, is about more than lawyers; it is about the rule of law and its relation to war.

While it is true, as Professor Eckhardt maintains, that adherence to the rule of law is a "center of gravity" for democratic societies such as ours—and certainly there are those who will try to turn that virtue into a vulnerability—we still can never forget that it is also a vital source of our great strength as a nation.⁴² We can—and must—meet the challenge of lawfare as effectively and aggressively as we have met every other issue critical to our national security. **JFQ**

NOTES

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