

Chapter 17

Lawfare

Charles J. Dunlap Jr.

In this chapter:

Introduction to the Concept of Lawfare

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The concept of lawfare continues to evolve and proliferate.¹ At the time of its modern incarnation in 2001,² an Internet search would have revealed only a handful of references but, as noted below, that number had risen to 60,000 by 2009. Today, however, it would produce *hundreds of thousands* of results.³ Lawfare today not only persists as a key aspect of asymmetrical conflicts involving non-state actors, but has also become the weapon of choice for the U.S. government's efforts to unwind the financial underpinnings of terrorist organizations.

And there is more: private plaintiffs are now waging a form of courtroom lawfare by using novel legal theories to sue (in U.S. courts) banks that are alleged to have helped finance terrorist operations. At the same time, in 2010 the Supreme Court endorsed what is, in reality, a *counter-lawfare* technique by sustaining the criminalization of legal advice (and legal training) if provided to designated terrorist organizations.

Technology has also impacted lawfare. As cyber incidents grow in frequency and seriousness, lawfare considerations (albeit not necessarily by that appellation) are increasingly taking center stage. Yet perhaps the most dramatic development in lawfare is the rising number of countries—to include such global powers as China and the Russian Federation—which are embracing lawfare tactics in their kinetic and non-kinetic confrontations with nation-state opponents.

The 2009 article that follows *Lawfare: A Decisive Element of 21st Century Conflicts?*⁴ remains a useful primer on the modern concept of lawfare. The purpose of this introduction

1. Benjamin Wittes and Stephanie Leutert, *On Wikipedia, Lawfare, Blogs, and Sources*, HARV. L. SCH. NAT'L SEC. J. (May 12, 2013 at 5:55 pm), <http://harvardnsj.org/2013/05/on-wikipedia-lawfare-blogs-and-sources/>.

2. Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* (Carr Center for Human Rights, John F. Kennedy School of Government, Harvard University, Working Paper, 2001), available at <http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>.

3. Many of these cites relate to the name of a popular blog. See, *About Lawfare: A Brief History of the Term and the Site*, LAWFARE, <http://www.lawfareblog.com/about/>.

4. Charles J. Dunlap Jr., *Lawfare: A Decisive Element of 21st-Century Conflicts?*, 54 JOINT FORCE QUARTERLY 34–39 (2009), available at http://scholarship.law.duke.edu/faculty_scholarship/3347.

is to provide an overview of some of the lawfare-related issues that have arisen since that time. And, as already indicated, there have been a number of significant developments.

Among other things, the 2009 article highlighted lawfare issues arising from the conflict between Israel and Hamas in the 2008-2009 timeframe. Tragically, that conflict re-ignited in 2014, and it demonstrates that lawfare remains a central tenet of the strategy of both sides. As this writer observed in 2014:

[I]n the present conflict, Hamas and Israel have sought to assign the other blame for the rising numbers of civilian casualties in an obvious effort to convince world opinion as to who is acting unlawfully and, therefore, gain support around the world.

Hamas expertly wages lawfare by effectively publicizing the deaths of civilians as a result of deliberate Israeli attacks on them. Israelis counter by charging that Hamas is responsible since it operates amid civilians contrary to international law. In addition, Israelis insist that many civilian deaths are the result of Hamas rockets malfunctioning and falling onto Gaza.⁵

Israel clearly had superiority with respect to traditional military means, but Hamas seemed to have had the lawfare edge, at least initially.⁶ However, before that contest ended, Israeli counter-lawfare techniques (and Hamas overreaching), may have re-balanced the lawfare scales Israel's way.⁷ Regardless, this 2014 conflict shows that lawfare is alive and well in the 21st century.

While the description of lawfare (“the strategy of using or misusing law as a substitute for traditional military means to achieve an operational objective”) used in the 2009 article still resonates, it has evolved over the years.⁸ Recent developments suggest that perhaps a further adjustment is in order. One expression might be to simply identify lawfare as the use of law as a means of accomplishing what would otherwise require the application of force, or as a means of facilitating the same. So defined, the utility of the term lawfare can extend to circumstances that may not always amount to “war” or, as many prefer, “armed conflict.”⁹

Indeed, the most active growth area of lawfare is not as directly associated with traditional battlefields as it might be said about the term's original formulation. For example, in his book, *Treasury's War: The Unleashing of a New Era of Financial Warfare*, Juan Zarate relates how the U.S. Treasury used a variety of laws to “attack” the financial architecture of terrorists and other 21st century adversaries.

Importantly, Professor John Norton Moore, one of the authors of this textbook, was an early advocate of using what could be characterized as a lawfare methodology—civil

5. Charles J. Dunlap, Jr., *Will 'lawfare' define Palestinian-Israeli conflict?*, AL-MONITOR (Jul. 30, 2014), <http://www.al-monitor.com/pulse/originals/2014/07/lawfare-palestine-israel-gaza-conflict-dunlap.html#ixzz3NKTftCR4>.

6. *Id.*

7. Charles J. Dunlap, Jr., *Has Hamas Overplayed Its Lawfare Strategy?*, JUST SECURITY (Aug. 5, 2014), <http://justsecurity.org/13781/charles-dunlap-lawfare-hamas-gaza/>.

8. There have been a variety of interpretations, to include negative characterizations. See generally, M. Brittany Cassell, *The Future of Lawfare: A Necessity to the United States' Strategy and Success* (2014) (unpublished manuscript, on file with author)

9. Not every use of force, even by governments, necessarily means an armed conflict is underway. See e.g., Int'l Committee of the Red Cross, *How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, ICRC Opinion Paper, Mar. 2008, available at <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

litigation—to fight terrorism.¹⁰ That advocacy is beginning to bear fruit as the 2014 Eastern District of New York case of *Linde v. Arab Bank Plc* resulted in the first U.S. verdict holding a bank liable “in a civil suit under a broad antiterrorism statute.”¹¹ Specifically, a New York jury found that the Arab Bank, a Jordanian institution, “helped Hamas militants carry out a wave of violence in Israel that killed and wounded hundreds of Americans.”¹² Cases of this sort may become a key lawfare “tool” to “attack” the ability of terrorists to obtain financing.

Yet at the same time there also has been a disquieting development in the use of the law as a counter-terrorism weapon. In the 2010 case of *Holder v. Humanitarian Law Project*¹³ the Supreme Court held, *inter alia*, that providing legal advice or even teaching law to designated terrorist organizations amounted to providing material support to terrorism in violation of 18 U.S.C § 2339. It mattered not that the intent of the Humanitarian Law Project was simply to get the designated organizations to give up violence and “use humanitarian and international law to peacefully resolve disputes.”¹⁴

That ostensibly benign intent evidently did not sway the Court. Though they did not use the term “lawfare,” the Court did illustrate how terrorists might pervert the law by explaining that:

A foreign terrorist organization introduced to the structures of the international legal system might use the information to threaten, manipulate, and disrupt. This possibility is real, not remote.¹⁵

Still, this holding is troubling not just because of the Court’s (and, really, Congress’) evidently low opinion of the international legal system’s ability to deal with persons who might attempt to abuse the law, but also because the criminalization of an effort to get a group to use the law to resolve disputes peacefully prevents the use of a well-accepted and proven means of ending otherwise intractable hostilities.¹⁶ Moreover, most court systems have, or need to have, procedures in place to deal with *any* litigant who might seek to use the law to “threaten, manipulate, and disrupt.” Denying the ability to try to use this kind of lawfare technique to defang a violent adversary is not just puzzling, it is counterproductive.

Importantly, while the article below talks mainly about the use of lawfare in situations involving non-state actors in non-international armed conflicts, it is becoming increasingly clear that nation-states either have employed lawfare, or will employ it as a means and method of warfare. For example, China has developed a rather sophisticated understanding of how law might be used in future conflict.¹⁷

10. See, e.g., JOHN NORTON MOORE, *CIVIL LITIGATION AGAINST TERRORISM* (2004).

11. Stephanie Clifford, *Arab Bank Liable for Supporting Terrorist Efforts, Jury Finds*, NEW YORK TIMES, Sept. 22, 2014, http://www.nytimes.com/2014/09/23/nyregion/arab-bank-found-guilty-of-supporting-terrorist.html?_r=0.

12. Erik Larson and Christie Smythe, *Arab Bank Found Liable for Hamas Terrorist Attacks*, BLOOMBERG (Sep 23, 2014 9:50 AM ET), <http://www.bloomberg.com/news/2014-09-22/arab-bank-found-liable-for-hamas-terrorist-attacks.html>.

13. *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), available at <http://www.supremecourt.gov/opinions/09pdf/08-1498.pdf>.

14. *Id.* at 14.

15. *Id.* at 37.

16. See, e.g., Kristin Archick, *Northern Ireland: The Peace Process*, U.S. Congressional Research Service (RS21333 Jan. 8, 2014), available at <http://www.fas.org/sgp/crs/row/RS21333.pdf>.

17. See Dean Cheng, *Winning Without Fighting: Chinese Legal Warfare*, Backgrounder #2692 on Asia and Pacific, THE HERITAGE FOUNDATION, May 21, 2012, available at <http://www.heritage.org/research/reports/2012/05/winning-without-fighting-chinese-legal-warfare>.

Furthermore, in the ongoing dispute over the control of maritime areas (and the resources they might contain) in the South China Sea, China has used the law to reinforce its claims, while at the same time establishing a military presence.¹⁸ Similarly, the Philippines and other nations which are unable to challenge China militarily, are using a variety of juridical methodologies to launch their own legal attacks. It remains to be seen who will emerge as the victor in what may be the first major lawfare conflict of the 21st century.¹⁹

China is not alone in its effort to become a lawfare power. Although some scholars believe the Russian Federation (and the Soviets before them) have long employed lawfare strategies,²⁰ it is undisputed that what might be called lawfare was used in connection with several recent operations. For example, the Russians utilized “passportization” to try to establish an international law basis for their interventions in Georgia and, recently, the Ukraine. As one scholar explains, passportization is the “mass conferral of Russian citizenship to the citizens of other states” which is intended to allow Russia to then assert it was intervening simply for the lawful purpose of “protecting Russian citizens.”²¹

Another commentator, Joel Harding, insists that Russia is attempting to use another form of lawfare against the Ukraine by threatening to levy genocide charges.²² Harding contends that Russia’s effort involving “the International Criminal Court at the Hague appears to be the deliberate use of the criminal system for the purpose of creating propaganda in its fight to undermine the legitimacy of the government of Ukraine.”²³

Understandably, some have argued for a kind of lawfare ‘counter-attack’ against Russian aggression²⁴ (though others challenge the wisdom of doing so.²⁵) Even more recently, Russian officials—reeling from sanctions initiated by the U.S. in response to the Ukraine situation—appear to be conducting lawfare by calling for an “investigation of the United States’ atomic bombings of Hiroshima and Nagasaki during World War II as a ‘crime against humanity.’”²⁶

Obviously, lawfare is continuing to develop as a means and method of warfare in the 21st century, even though every expression of it may not be to our liking. As this writer has said before, it is useful to think of the law in the lawfare context as a weapon, which can be wielded for “good” or “bad” purposes. This is important to keep in mind as a number of emerging challenges are examined.

18. Zachary Keck, *China Builds Military Airstrip in Disputed South China Sea*, THE DIPLOMAT (Oct. 8, 2014), <http://thediplomat.com/2014/10/china-builds-military-airstrip-in-disputed-south-china-sea/>.

19. See generally, Richard Javad Heydarian, *The Fog of Law: China’s Great South China Sea Dilemma*, THE NATIONAL INTEREST, Dec. 19, 2014, available at <http://nationalinterest.org/feature/the-fog-law-chinas-great-south-china-sea-dilemma-11889> (“Lawfare is in full swing in the South China Sea. How will China respond to an unfavorable legal ruling?”).

20. See, e.g., CHRISTI SCOTT BARTMAN, LAWFARE: USE OF THE DEFINITION OF AGGRESSIVE WAR BY THE SOVIET AND RUSSIAN GOVERNMENTS (2010).

21. Vincent M. Artman, *Passport Annexation*, AL JAZEERA AMERICA (March 14, 2014), <http://america.aljazeera.com/opinions/2014/3/ukraine-russia-crimepassportizationcitizenship.html>.

22. Joel Harding, *Russia Attempting Lawfare against Ukraine*, TO INFORM IS TO INFLUENCE (blog) (Aug. 1, 2014), <http://toinformistoinfluence.com/2014/08/01/russia-attempting-lawfare-against-ukraine/>.

23. *Id.*

24. David B. Rivkin, Jr., and Lee A. Casey, *The Outlaw Valdimir Putin*, WALL ST. J., (Apr. 8, 2014), <http://www.wsj.com/news/articles/SB10001424052702304640104579485331656203834>.

25. Julian Ku, *Should the U.S. Use “Lawfare” Against Russia?* OPINIO JURIS (April 9th, 2014), <http://opiniojuris.org/2014/04/09/u-s-use-lawfare-russia/>.

26. Sergei L. Loiko, *Russian leaders seek to revisit history as tension with U.S. grows*, LOS ANGELES TIMES (Dec. 26, 2014), <http://www.latimes.com/world/europe/la-fg-russia-history-20141226-story.html>.

For example, cyber operations present a confounding lawfare issue, mainly because state practice—so important to the evolution of international law—remains underdeveloped in the area. For a variety of reasons, many nations are reluctant to specify their reactions to various cyber events in part because of the continuing difficulty of definitive attribution,²⁷ and in part because they do not want to reveal their capabilities—or vulnerabilities—to a global audience.

The hack of the Sony Corporation in late 2014 attributed to North Korean operatives²⁸ may prove to be important for the development of international law and, consequently, lawfare. President Barack Obama very carefully characterized the event as “cyber vandalism” as opposed to an “act of war”—the latter phrase often being interpreted as equivalent to an armed attack within the meaning of Article 51 of the UN charter which could trigger authority for violent acts in self-defense.²⁹ The Obama Administration seems to want to temper the precedent that might emerge, while at the same time vowing a “proportional” response, a phrase that sounds in the law of self-defense.³⁰

Others argue that notwithstanding the non-kinetic nature of cyber “attacks” the scale of the Sony incident should make it an “act of war” so that it can be considered “legally and politically, as an attack on the US itself.”³¹ Nevertheless, for the near term it is expected that many cyber events will fall below the “armed attack” threshold, and require countermeasures that are carefully crafted to conform to this complex area of international law.³² In short, reactions to cyber incidents are much more likely to be in the lawfare realm than that historically associated with “act of war” responses. That said, if incidents persist, the law itself may be strained as victims may engage in ‘cyber vigilantism’ in an effort to protect themselves.³³

That raises an important question: are contemporary challenges sapping the vitality of the law (and, necessarily, lawfare)? Besides the difficulties presented by cyber incidents, consider that the concept of reciprocity—which underpins the efficacy of the law of armed conflict (LOAC)—is becoming dangerously irrelevant in many 21st century wars.

27. See, e.g., Jack Goldsmith, *The Consequences of Credible Doubt About the USG Attribution in the Sony Hack*, LAWFARE (Dec. 30, 2014), <http://www.lawfareblog.com/2014/12/the-consequences-of-credible-doubt-about-the-usg-attribution-in-the-sony-hack/>.

28. Federal Bureau of Investigation, *Update on Sony Investigation*, Dec. 19, 2014, <http://www.fbi.gov/news/pressrel/press-releases/update-on-sony-investigation>.

29. Article 51 of the UN Charter provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

30. *Id.*

31. Michael B. Kelley and Arin Rosen, *The US Needs To Stop Pretending The Sony Hack Is Anything Less Than An Act Of War*, BUSINESS INSIDER (Dec. 15, 2014), <http://www.businessinsider.com/sony-hack-should-be-considered-an-act-of-war-2014-12#ixzz3NKQlbwpN>.

32. Michael N. Schmitt, “*Below the Threshold*” *Cyber Operations: The Countermeasure Response Option and International Law*, 54 VA. J. OF INT’L LAW 697 (2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2353898.

33. Michael Riley and Jordan Robertson, *FBI Investigating Whether Companies Are Engaged in Revenge Hacking*, BLOOMBERG (Dec. 30, 2014), <http://www.bloomberg.com/news/2014-12-30/fbi-probes-if-banks-hacked-back-as-firms-mull-offensives.html>. For a more detailed discussion of the legal and policy issues in the cyber domain see Chapter 12.

Why? Most contemporary conflicts involve non-state actors, and most of them are not just indifferent to charges of violating LOAC, they actually revel in using brutal methods that mock the law.³⁴ The Islamic State in Iraq and Syria (ISIS)³⁵ for example, uses beheadings of prisoners and other savagery to intimidate opponents into submission. Likewise, the use of young women as sex slaves in areas ISIS occupies is employed as a recruiting tool.³⁶ Extremists are even making children targets as a matter of *strategy*, a stunning affront to the rule of law.³⁷

Unfortunately, neither governmental nor nongovernmental actors have had much success in bringing the law to bear against such monstrous violations of the most basic tenets of international humanitarian law and international human rights law. Faced with complete impotence to influence the actions of groups like ISIS, many in the international community have focused the wrath on such nations as Israel and the United States. To be sure, neither of these countries should be exempt from scrutiny for their actions, but at the same time credit should be given for the enormous effort they have made to adhere to international law.

It does not advance the interests of the world community to demonize nations who are at least attempting to employ the rule of law, albeit imperfectly at times, just because they actually take charges seriously. The unfortunate fact is that the most egregious non-state violators simply ignore allegations and those who make them. This asymmetry in accountability and, especially, the absence of any reciprocity by non-state actors imperils the entire architecture of international law in conflict situations. Prof. Ken Anderson of American University warns:

Obligation without reciprocity risks breakdown [of the rules of war] even faster where one side is pressed to protect the civilians of both sides put at risk because that's how the other side deliberately wages war, not merely from indifference to them. A system of formal reciprocity in the rules of war (each side has the same formal obligations), but also independence of obligation to the rules of war (each side's obligation is independent of what the other side does, including if the other side violates the rules) over time is likely either to rupture in crisis or else simply have less and less purchase as universal rules.³⁸

The seriousness of this challenge to rule of law cannot be overstated. Nevertheless, as this writer has argued before, however complicated and frustrating it may be to deal with these law and lawfare-related issues, it is surely in the best interests of the U.S. and the world community to do so.³⁹ Far better to employ bloodless lawfare as opposed to

34. Eric Schmitt, *In Battle to Defang ISIS, U.S. Targets Its Psychology*, NEW YORK TIMES, Dec. 28, 2014, <http://mobile.nytimes.com/2014/12/29/us/politics/in-battle-to-defang-isis-us-targets-its-psychology-.html?referrer&r=1>.

35. Apparently, the U.S. Department of Defense prefers to call ISIS "Daesh." See Kristina Wong, *Pentagon calls ISIS 'Daesh' for first time*, THE HILL (Dec. 18, 2014), <http://thehill.com/policy/defense/227547-pentagon-calls-isis-daesh-for-first-time>.

36. Fiona Keating, *Iraq Slave Markets Sell Women for \$10 to Attract Isis Recruits*, INT'L BUSINESS TIMES (October 4, 2014), <http://www.ibtimes.co.uk/iraq-slave-markets-sell-women-10-attract-isis-recruits-1468506>.

37. Howard LaFranchi, *Why children are the targets of terror*, THE CHRISTIAN SCIENCE MONITOR WEEKLY, Dec. 29, 2014, at 10.

38. Kenneth Anderson, *Laurie Blank on proportionality in the international law of targeting*, The Volokh Conspiracy (Jul. 31, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/07/31/laurie-blank-on-proportionality-in-the-international-law-of-targeting/>.

39. Cf. Cassell, *supra*, note 8.

bloody traditional warfare in resolving the inevitable conflicts intrinsic to the human condition. Consider now the 2009 article that follows below.

**Charles J. Dunlap Jr., *Lawfare: A Decisive Element of
21st-Century Conflicts?***

54 JOINT FORCE QUARTERLY 34-39 (2009)

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—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.⁴⁰ 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, a senior Iraqi official conceded that the name "Abu Ghraib" still left a "bitter feeling inside Iraqis' heart."⁴¹

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 arisen more quickly to prominence as than that of 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.

Law in Warfare

To the best of the author's knowledge, lawfare as used in today's context first appeared in his 2001 essay for Harvard University's Carr Center.⁴² At that time the term was defined to mean "the use of law as a weapon of war"⁴³ and, more specifically, to describe "a method of warfare where law is used as a means of realizing a military objective."⁴⁴ Today, the most refined definition, at least in this writer's view, is one that interprets lawfare as "the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective."⁴⁵

The purpose of the "lawfare" conceptualization in the national security context is to provide a vehicle that resonates readily with non-lawyer audiences, particularly in the armed forces. Historically, the role of law in armed conflict was variously presented, but

40. Tom Brokaw, *Gen Sanchez: Abu Ghraib 'clearly a defeat'*, MSNBC.COM, Jun. 30, 2004 available at <http://www.msnbc.msn.com/id/5333895/>.

41. Kim Gamel, *Iraq to Open Notorious Abu Ghraib Prison*, ASSOCIATED PRESS (Jan. 24, 2009), available at <http://www.huffingtonpost.com/huff-wires/20090124/ml-iraq/>.

42. See Dunlap, note 2, *supra*.

43. *Id.* at 5.

44. *Id.* at 11.

45. Charles J. Dunlap, Jr., *Lawfare Today*, YALE JOURNAL OF INTERNATIONAL AFFAIRS, Winter 2008, at 146, available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5892&context=faculty_scholarship.

often simply as yet another requirement; one to which adherence was a matter of integrity and moral rectitude. As powerful as values such as “integrity” and “moral rectitude” 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 is it that transforming adherence to law into a strategy serves the purposes of the warfighter? The answer is to be found by recourse to the work of Baron Carl von Clausewitz, perhaps history’s foremost military theorist.⁴⁶ Being a man of his times, it is true that Clausewitz had little regard for international law as a factor in war.⁴⁷ 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.⁴⁸ Moreover, Clausewitz’s analysis of the “trinity” of the people, the government, and the military whose “balance” produces success in war is likewise instructive.⁴⁹ Specifically, in modern democracies especially, maintaining the “balance” that “political intercourse” requires very much depends upon adherence to law in fact and, importantly, *perception*.

Legal experts Michael Reisman and Chris T. Antoniou put it this way in their 1994 book, *The Laws of War*:

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.⁵⁰

Some adversaries see opportunity in this aspect of our political culture. Professor William Eckhart 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.’⁵¹

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 as a very *practical* and necessary element of mission accomplishment. They need not, particularly, embrace its philosophical,

46. See generally, *The Clausewitz Homepage* (Christopher Bassford, ed., Nov. 26, 2008), available at <http://www.clausewitz.com/CWZHOME/CWZBASE.htm>.

47. Clausewitz insisted that: “War is an act of force to compel our enemy to do our will . . . attached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it.” CARL VON CLAUSEWITZ, *ON WAR* 75 (Michael Howard & Peter Paret trans., 1989).

48. *Id.* at 87.

49. *Id.* at 89.

50. W. MICHAEL REISMAN AND CHRIS T. ANTONIOU, *THE LAWS OF WAR* xxiv (1994) (italics added).

51. William George Eckhardt, *Lawyering for Uncle Sam When He Draws His Sword*, 4 CHI. J. INTL L 431 (2003).

ethical, or moral foundations; they can be almost Machiavellian in their attitude towards law because adherence to it, in any event, serves wholly *pragmatic* needs. Thus, 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 is something of the artifact of the larger, world-wide legal revolution. George Will recently characterized the U.S. as the “Litigation Nation” to describe how deeply legal consciousness has penetrated American society.⁵² Furthermore, international commerce depends upon law, along with a variety of international fora, to operate efficiently. This, in turn, is accelerating a globalization of law.⁵³ As international law generally penetrates modern life it tends to influence, as other trends have, the way war is conducted.⁵⁴ Add to that the enormous impact of 21st century information 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 of incidents like Abu Ghraib, 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 manual⁵⁵ devotes a considerable amount of text to law and law-related considerations.⁵⁶ 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 underlines that lawfare is more than just something that adversaries seek to use against law-abiding societies; it is something that democratic militaries can, and should, employ *affirmatively*. For example, the re-establishment of the rule of law is a well-understood component of a successful counterinsurgency strategy,⁵⁷ and has proven itself to be an important part of the success U.S. forces have enjoyed in Iraq in recent years.⁵⁸

Of course, there are other illustrations as to 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

52. George Will, *Litigation Nation*, WASHINGTON POST, Jan. 11, 2009, at B07, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/09/AR2009010902353.html>.

53. See, e.g., *Globalization of Law*, GLOBAL POLICY FORUM, available at <http://www.globalpolicy.org/globaliz/law/index.htm>.

54. For a discussion of how the changing economic and technological environment influences war, see generally Alvin and Heidi Toffler, *WAR AND ANTI-WAR: SURVIVAL AT THE DAWN OF THE 21ST CENTURY* (Little, Brown and Company, 1993).

55. Headquarters Department of the Army, FIELD MANUAL NO. 3-24, *COUNTERINSURGENCY*, 15 Dec. 2006, [Hereinafter FM 3-24], also designated by Headquarters Marine Corps Development Command, Department of the Navy, as MARINE CORPS WARFIGHTING PUBLICATION NO. 3-33.5, 1 *COUNTERINSURGENCY*, 15 Dec 2006, available at <http://usacac.army.mil/cac2/Repository/Materials/COIN-FM3-24.pdf>.

56. See, e.g., *id.* at Chapter 7 and Appendix D.

57. See, e.g., “Establishing the Rule of Law”, *Id.*, Appendix D, at D-8.

58. Michael Gordon, *In Baghdad, Justice Behind the Barricades*, NEW YORK TIMES, July 20, 2007, available at <http://www.nytimes.com/2007/07/30/world/middleeast/30military.html?ref=world>.

valuable military information (derived from commercially-available satellite imagery) from hostile forces.⁵⁹

In addition, although strategists argue that 21st century threats emerge most frequently from nonstate actors who often operate outside of the law, they 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.⁶⁰ Likewise, sanctions and other legal methodologies can serve to isolate insurgencies from the external support that many experts believe is essential to victory.⁶¹

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 principle 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 to be 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 that airstrikes can produce. Their reason for doing so is obvious: precise air attacks are the most potent weapon they face. In June of 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.”⁶² More recently, *Newsweek* told of a Taliban commander who, visiting the site of an attack by a Predator,⁶³ 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.”⁶⁴

Yet the enemy is fighting back by mounting a massive and increasingly effective lawfare campaign. Using the media,⁶⁵ they seek to create the perception — especially among Afghans — that the war is being waged in an “unfair, inhumane, or iniquitous way.”⁶⁶ Unfortunately, some well-intended efforts at countering the adversary’s lawfare blitz are proving counterproductive. For example, in June of 2007 a NATO spokesman in Afghanistan insisted that “NATO would not fire on positions if it knew there were civilians nearby.”⁶⁷ A little more than a year later, another NATO spokesman went even further, stating that

59. See John J. Lumpkin, *Gov’t Buys Satellite War Zone Photos*, AP ONLINE, Oct. 15, 2001, available at <http://www.highbeam.com/doc/1P1-47533038.html>.

60. See, e.g., Steven R. Weisman, *World Group Tells Banks to Beware Deals With Iran*, NEW YORK TIMES, available at <http://www.nytimes.com/2008/02/29/world/middleeast/29sanctions.html>.

61. See, e.g., Jeffrey Record, BEATING GOLIATH: WHY INSURGENCIES WIN (2007) at 23–66.

62. Rowan Scarborough, *Pentagon Notebook*, WASHINGTON TIMES, Jun. 26, 2008, available at <http://www.washtimes.com/news/2008/jun/26/pentagon-notebook-mcpeak-calls-mccain-too-fat/?page=2>.

63. Department of the Air Force, *MQ-1B Predator Unmanned Aerial Vehicle*, July 20, 2010, available at <http://www.af.mil/AboutUs/FactSheets/Display/tabid/224/Article/104469/mq-1b-predator.aspx>.

64. Sami Yousafzai and Mark Hosenball, *Predators on the Hunt in Pakistan*, NEWSWEEK, Feb. 9, 2009, at 85, available at <http://www.newsweek.com/id/182653/output/print>.

65. See e.g., Sean D. Naylor, *Insurgents in Afghanistan Have Mastered Media Manipulation*, ARMED FORCES JOURNAL, April 2008, available at <http://www.armedforcesjournal.com/2008/04/3489740>.

66. See, note 50, *supra*, and accompanying text.

67. Associated Press, *US Coalition Airstrikes Kill, Wound Civilians in Southern Afghanistan*, Official Says, INTERNATIONAL HERALD TRIBUNE, Jun. 30, 2007, available at <http://www.iht.com/articles/ap/2007/06/30/asia/AS-GEN-Afghan-Violence.php> (quoting Maj John Thomas, spokesman for NATO’s International Security Assistance Force).

“[i]f there is the likelihood of even one civilian casualty, we will not strike, not even if we think Osama bin Laden is down there.”⁶⁸ The law of war certainly does not 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 US officers advise that the Taliban is “deliberately increasing the risk to civilians” by locating themselves among them.⁶⁹ In terms of manipulation, consider an incident where 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.”⁷⁰

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.”⁷¹ The problem is much about perceptions. Accordingly, Jaap de Hoop Scheffer, the Secretary General of NATO, correctly recognizes that perceptions are a “strategic battleground”⁷² 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.”⁷³

The Taliban are 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* reports:

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.⁷⁴

It appears that based on its experiences in the 2006 Lebanon War,⁷⁵ 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—they also subjected plans to review by military

68. Pamela Constable, *NATO Hopes to Undercut Taliban With Surge of Projects*, WASHINGTON POST, Sept. 27, 2008, at A12, available at http://www.washingtonpost.com/wp-dyn/content/article/2008/09/26/AR2008092603452_pf.html (quoting Brig. Gen. Richard Blanchette, chief spokesman for NATO forces).

69. *Inside US Hub for Air Strikes*, BBC AMERICA, Nov. 29, 2008, available at http://news.bbc.co.uk/2/hi/south_asia/7755969.stm.

70. Jason Stratzioso, *Official: Taliban Tricking the U.S. Into Killing Civilians*, THE ARIZONA REPUBLIC, Nov. 8, 2008, available at <http://www.azcentral.com/arizonarepublic/news/articles/2008/11/08/20081108afghanistan1108.html>.

71. As quoted by Josh White, *The Man on Both Sides of Air War Debate*, WASHINGTON POST, Feb. 13, 2008, at A05, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/12/AR2008021202692.html>.

72. Jaap de Hoop Scheffer, *Afghanistan: We Can Do Better*, WASHINGTON POST, Jan. 18, 2009, at B7.

73. *Id.*

74. Steven Erlanger, *A Gaza War Full of Traps and Trickery*, NEW YORK TIMES, Jan. 11, 2009, available at <http://www.nytimes.com/2009/01/11/world/middleeast/11hamas.html>.

75. See generally, *Targeting of Civilian Areas in the 2006 Lebanon War*, WIKIPEDIA, Jan. 12, 2009, available at http://en.wikipedia.org/wiki/Targeting_of_civilian_areas_in_the_2006_Lebanon_War.

lawyers “huddling in war rooms.”⁷⁶ 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.”⁷⁷

Perhaps of most interest is the implementation of a concept called “operational verification.”⁷⁸ According to *Defense News*, almost every army unit has specially-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.⁷⁹

Despite these efforts, scholar Anthony Cordesman reports that although he believes that Israel did not violate the law of war⁸⁰ and made a “systematic effort to limit collateral damage,”⁸¹ there was, nevertheless, “almost constant negative coverage of Israel in the Arab and Islamic world, as well as in much of Europe.”⁸² Consequently, as the German newspaper *Der Spiegel* reports, Israeli officials are “gearing up for a wave of lawsuits from around the world” claiming violations of the law of war.⁸³ Other news agencies advise that the Israeli government is vowing to defend its soldiers against legal attack.⁸⁴ Interestingly, *Der Spiegel* characterized the expected legal action in lawfare terms by describing them in paraphrased Clausewitzian language as a “continuation of the war with legal means.”⁸⁵

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 casts the law as a villain.⁸⁶ 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.⁸⁷

76. Barbara Opall-Rome, *Israelis Document Everything to Justify Strikes*, DEFENSE NEWS, Jan. 12, 2009, at 8.

77. Anthony H. Cordesman, *The “Gaza War”, A Strategic Analysis*, Center for Strategic and International Studies, Feb. 2, 2009, at 17, available at http://www.csis.org/media/csis/pubs/090202_gaza_war.pdf.

78. Opall-Rome, *supra*, note 76.

79. *Id.*

80. Cordesman, *supra*, note 77, at ii.

81. *Id.* at 17.

82. *Id.* at 70.

83. Thomas Darnstadt and Christopher Schult, *Did Israel Commit War Crimes in Gaza?*, SPIEGEL ONLINE INTERNATIONAL, Jan. 26, 2009, available at <http://www.spiegel.de/international/world/0,1518,603508,00.html>.

84. *Israel Prepares Legal Defense of Soldiers*, CNN.COM, Jan. 26, 2009, available at <http://www.cnn.com/2009/WORLD/meast/01/25/gaza.legal.defense/index.html>.

85. See Darnstadt and Schult, *supra*, note 83.

86. For example, although he does not use the term “lawfare,” pundit Michael Barone complained that the “overlawyering of [the current] war” will “hamper the efforts” of the American leaders to prosecute it. See, e.g., Michael Barone, *The Overlawyered War*, U.S. NEWS & WORLD REPORT, Sept. 16, 2007, available at <http://www.usnews.com/articles/opinion/mbarone/2007/09/16/the-criminalizing-of-warfare-has-brought-the-overlawyered-war.html>.

87. Nathaniel Burney, *International Law Primer*, 2007, available at http://www.burneylawfirm.com/international_law_primer.htm#lawfare.

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 the law reflects are more likely to succeed. Scholar Victor Davis Hanson points out that the basis for the enormous success of the Western militaries is their adherence to constitutional government, respect for individual freedoms, as well as constant external audit and oversight of their strategy and tactics.⁸⁸ 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.⁸⁹ 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 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.”⁹⁰

Although intensive training and strong leadership may mitigate such attitudes, experts doubt such efforts can wholly prevent incidents from occurring.⁹¹ Furthermore, Stephen Ambrose observed that it is a “universal aspect of war” that when you put young troops “in a foreign country with weapons in their hands, sometimes terrible things happen that you wish had never happened.”⁹² More ground troops may mean more lawfare-exploitable events with adverse strategic consequences.

This could suggest that the best way to avoid incidents is to limit the number of troops on the ground. Supporting this 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*.”⁹³ Thus, small-footprint operations can limit the risk to civilians.

Legal preparation of the battlespace also requires robust efforts to educate the media as to what the law does and does not require. As already noted,⁹⁴ adversaries today are very clever in their relations with the global media, and U.S. forces must be able to respond quickly (and, ideally, before inquiries are made) and as transparently as possible to lawfare-related incidents. Relationships with the media must be built in advance as once an

88. Victor Davis Hanson, *CARNAGE AND CULTURE* (2001), at 450–51.

89. Caleb Carr, *THE LESSONS OF TERROR* (2002), at 11.

90. Department of Defense, *DOD News Briefing with Assistant Secretary Casscells from the Pentagon*, May 4, 2007 (news transcript) available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3958>.

91. “The extreme nature of warfare, with its inherent fear and chaos, will contribute to acts of inhuman violence against combatants and noncombatants alike. Intensive training and, perhaps more so, leadership can minimize *though not wholly prevent such acts from occurring amid the savagery of combat*.” (emphasis added). See William Thomas Allison, *MILITARY JUSTICE IN VIETNAM: THE RULE OF LAW IN AMERICAN WAR* (2007), at 92.

92. Stephen Ambrose, *AMERICANS AT WAR* (1997), at 152.

93. “*Troops in Contact*” *Airstrikes and Civilian Deaths in Afghanistan*, Human Rights Watch, Sept. 2008, at 4, available at <http://hrw.org/reports/2008/afghanistan0908/afghanistan0908web.pdf> (italics added).

94. See note 65, *supra*.

incident occurs, it is difficult to explain legal complexities or to demonstrate the efforts that are made 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, 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 such teams can gather indicates 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 to be schooled not just in the law, but also in the characteristics of the weapons, 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 them 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, Professor Richard Schragger of the University of Virginia Law School points out that:

Instead of seeing law as a barrier to the exercise of the client’s power, [military lawyers] understand 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.*⁹⁵

That said, commanders should aim not to have a judge advocate at the elbow of every rifleman; rather, the goal should be to imbue troops with the right behaviors so that they instinctively do the right thing on the battlefield. The most effective way of doing so is to carefully explain the enemy’s lawfare strategies, and to 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 to enhance the security and safety of fellow soldiers. Making the connection between adherence to law and that end 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 to be 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

95. Richard C. Schragger, *Cooler Heads: The Difference between the President’s Lawyers and the Military’s*, SLATE.COM, Sept. 20, 2006, available at <http://www.slate.com/id/2150050/?nav/navo4> (emphasis added).

fight according to your rules? No. War has rules, but those rules are set by the West . . . if you use those rules, then weak countries have no chance.”⁹⁶

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 which matched key provisions of the Geneva Convention “with bits of traditional Arab and Islamic wisdom.”⁹⁷ Such innovations ought to be re-examined, 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 fits with 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 delegitimizes this kind of behavior, openly, loudly and consistently, it is more important than metal detectors or extra police.⁹⁸

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.⁹⁹

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.”¹⁰⁰ Though there are those who object to the way the courts have been used by some litigants,¹⁰¹ it is legally and morally wrong to paint anyone legitimately using legal processes as the “enemy.”

Indeed, the courageous use of the courts on behalf of unpopular clients, along with the insistence that even our most vile 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;

96. John Pomfret, *China Ponders New Rules of ‘Unrestricted War,’* WASHINGTON POST, Aug. 8, 1999, at A-1.

97. Michael Ignatieff, *THE WARRIOR’S HONOR* (1997) at 149.

98. Thomas L. Friedman, *No Way, No How, Not Here*, NEW YORK TIMES, Feb. 17, 2009, available at <http://www.nytimes.com/2009/02/18/opinion/18friedman.html>.

99. See, e.g., Andrew Woods, *The Business End*, FINANCIAL TIMES, Jun. 27, 2008, available at <http://www.ft.com/cms/s/2/71c42ec0-40ca-11dd-bd48-0000779fd2ac.html>.

100. Scott Horton, *State of exception: Bush’s war on the rule of law*, HARPERS MAG, July 2007, available at <http://www.harpers.org/archive/2007/07/0081595>.

101. David B. Rivkin, Jr. and Lee A. Casey, *Lawfare*, WSJ.COM (Feb. 23, 2007), <http://online.wsj.com/article/SB117220137149816987.html>. Cf., *The NGO Front in the Gaza War: Lawfare Against Israel*, NGO MONITOR, Feb. 2, 2009, available at http://www.ngo-monitor.org/article/the_ngo_front_in_the_gaza_war_lawfare_against_israel.

if there are abuses, the courts are well-equipped to deal with them.¹⁰² 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 L. Jones, the nation's new national security advisor, observed several years ago that the nature of war had changed. "It's become very legalistic and very complex," he said, adding that now "you have to have a lawyer or a dozen."¹⁰³ 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 Eckhart maintains, that adherence to the rule of law is a "center of gravity" for democratic societies like 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.¹⁰⁴ 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.

Question for Discussion

On April 1, 2015 the reputed State of Palestine joined the International Criminal Court (ICC). Under ICC rules, Palestinian membership would allow the court to exercise jurisdiction over war crimes committed by anyone on Palestinian territory, without a referral from the UN Security Council. Israel, like the United States, is not a party to the ICC, but its citizens could be tried for actions taken on Palestinian land. Is this a form of lawfare? How should Israel and the U.S. respond?

102. See, e.g., Phillip Carter, *Legal Combat*, SLATE (Apr. 4. 2005), <http://www.slate.com/id/2116169>.

103. Lyric Wallwork Winik, *A Marine's Toughest Mission (Gen. James L. Jones)*, PARADE MAG., Jan. 19, 2003, available at <http://www.leatherneck.com/forums/archive/index.php/t-3618.html>.

104. See note 51, *supra*, and accompanying text.