

LAWFARE OR STRATEGIC COMMUNICATIONS?

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This essay attempts to trace the evolution of the term “Lawfare.” Major General Dunlap inserted lawfare into our legal lexicon over a decade ago as a tool to communicate themes to military commanders. However, since that time it has primarily taken two divergent paths. One as Dunlap intended—as a discussion of applying legal pressure on the other side of a conflict, and the other as a derogatory term with an ideological goal. This essay also addresses lawfare and its potential relationship to “Strategic Communications” with an extensive discussion regarding this umbrella term and all it encompasses. Finally, this essay poses the question of whether there is a legitimate versus illegitimate—or put another way—a legal versus illegal—lawfare construct. Ultimately, lawfare provides for the use and understanding of the law and especially the need to emphasize the pragmatic utility of the law to military commanders in an ideologically neutral way.

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|--|----|
| I. DUNLAP’S LAWFARE..... | 74 |
| II. LAWFARE’S EVOLUTION | 75 |
| III. THE RULE OF LAW | 77 |
| IV. STRATEGIC COMMUNICATIONS..... | 79 |
| V. ARE THERE LEGITIMATE / LEGAL AND ILLEGITIMATE / ILLEGAL FORMS OF LAWFARE?..... | 83 |
| VI. CONCLUSION | 85 |

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I. DUNLAP'S LAWFARE

Lawfare, as originally conceived in the late 1990s by retired Major General Charles J. Dunlap, Jr., of the U.S. Air Force, was an ideological neutral term describing an *effects-based* operation “where the effect created is the focus, *not* necessarily the means of obtaining it.”¹ In other words, lawfare was a way to apply legal pressure on the other side of a conflict, often times, but not always, in conjunction with military operations, which then potentially forced the enemy to defend themselves in multiple arenas. The concept was designed for an initial audience of military commanders so that they could better understand the role and potential contribution of the military lawyers (judge advocates—commonly referred to as JAGs).² Major General Dunlap provides numerous examples of lawfare. Chief among them is the U.S. Government’s legal purchase of all the relevant commercial imagery prior to military operations in Afghanistan in 2001 in order to deprive actual and potential enemies from obtaining and using such information.³ Major General Dunlap also cites sanctions as the single most important weapon in debilitating the Iraqi air force and the choking off of financial support of terrorist networks and insurgencies as effective lawfare.⁴

However, sometimes an effort to use lawfare can backfire. As used against the United States and our allies in Afghanistan it had great effect when our military leadership made public the very restrictive rules of engagement in an effort to win the hearts and minds of the Afghan people.⁵ In

¹ Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT’L. AFF. 146, 147 (2008).

² *Id.* at 149–50. Dunlap explains that “[k]nowing the military client’s ‘business,’ so to speak, is *essential* for lawfare practitioners.” (emphasis in original).

³ See Robert K. Ackerman, *Commercial Imagery Aids Afghanistan Operations*, SIGNAL MAGAZINE, Dec. 2001, http://www.afcea.org/signal/articles/templates/SIGNAL_Article_Template.asp?articleid=298&zoneid=84 (The U.S. National Imagery and Mapping Agency purchased exclusive use agreements of all imagery of the Afghanistan region from Space Imaging). See also Theresa Hitchens, Vice President, Center for Defense Information, Presentation to a Space Security Conference: *U.S. Space Operations in the International Context* (Feb. 24, 2004), <http://www.cdi.org/friendlyversion/printversion.cfm?documentID=2111> (explaining that the reason NIMA bought exclusive rights to all images over Afghanistan was primarily to “keep pictures of the operations out of the hands of the news media” and to find ways to “block transfer of commercial imagery to enemies during wartime”).

⁴ See Charles J. Dunlap, Jr., *Lawfare: A Decisive Element of 21st—Century Conflicts?*, 54 JOINT FORCE QUARTERLY 34, 36 (2009), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA515192&Location=U2&doc=GetTRDoc.pdf> (describing sanctions as a method to “isolate insurgencies from the external support many experts believe is essential to victory”).

⁵ Kristi Keck, *U.S. Must Win Afghan Hearts and Minds, Commander Says*, CNN (Sept. 28, 2009), http://articles.cnn.com/2009-09-28/politics/afghanistan.obama_1_new-strategy-

order to demonstrate how serious the coalition was in their desire to end civilian casualties in Afghanistan, the leadership on the ground made it clear that the United States would not drop any ordnance if there were a single civilian present.⁶ The unintended consequence of this self-inflicted lawfare included civilians being taken hostage, used as human shields, and or murdered by the Taliban, as well as more coalition deaths, and the ultimately perverse effect of eroding support.⁷

Major General Dunlap stated a refined lawfare definition in his 2009 Joint Forces Quarterly article as “the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective.”⁸ With that said, Major General Dunlap encourages the use of the courts and views them as a healthy facet of lawfare. He firmly believes that court challenges to U.S. policy make us “better and sharper” and that the United States should never be afraid of litigation.⁹

II. LAWFARE’S EVOLUTION

The question now is whether “Dunlap’s Lawfare” has evolved into something more than he envisioned. The term lawfare has become a catchy term when describing a bitterly contested divorce as a “war” or child custody “battle,” whereby the lawyers are cast as “warriors.”¹⁰ The term has also been employed by the political far right deriding any legal forums and or

additional-forces-afghan?_s=PM:POLITICS (last visited Dec. 2, 2010) (noting that the campaign in Afghanistan cannot be won without the support of the Afghan people which means the United States cannot risk killing innocent civilians which would create more insurgents).

⁶ See Charles J. Dunlap, *Collateral Damage and Counterinsurgency Doctrine*, Small Wars Journal (Aug. 13, 2007, 4:52 PM), <http://smallwarsjournal.com/blog/2007/08/collateral-damage-and-counteri-1/> (“NATO would not fire on positions if it knew there were civilians nearby”). See also Hans de Vreij, *NATO Plan to Reduce Afghan Casualties*, Radio Nederland Wereldomroep (July 30, 2007) <http://static.rnw.nl/migratie/www.radionetherlands.nl/currentaffairs/nat070730mc-redirected> (last visited Dec. 2, 2010) (noting NATO Secretary General Jaap De Hoop Scheffer, announced, “new measures intended to reduce the number of innocent victims in Aghanistan as much as possible.”).

⁷ *Bombing Afghanistan: Afghan President Tells 60 Minutes That Too Many Civilians Are Being Killed*, CBS News (Aug. 31, 2008), <http://www.cbsnews.com/stories/2007/10/25/60minutes/main3411230.shtml>. Human Rights Watch military analyst Marc Garlasco stated that while United States estimates the civilian casualties before acting, the Taliban is also “targeting civilians” and “shielding in people’s homes.” *Id.*

⁸ Dunlap, Charles J. “Lawfare: A Decisive Element of 21st-Century Conflicts?” *Joint Forces Quarterly*, issue 54, 3rd quarter 2009, at 35.

⁹ *Id.* at 39 (explaining that “[R]ecourse to the courts and other legal processes is to be encouraged.”).

¹⁰ Alex Kapetanakis, *Lawyers: The Courtroom Warriors*, Helium.com, <http://www.helium.com/items/213045-lawyers-the-courtroom-warriors> (last visited Dec. 2, 2010) (discussing trial lawyers at war in the courtroom).

procedures that they disagree with.¹¹ In particular, this faction's two main objectives are to discredit international law and delegitimize their opponents—policy or otherwise—who use legal institutions as a tool.¹²

First, their attack on international law is relentless as they deride international tribunals and treaties. For example, several conservatives oppose U.S. ratification of the United Nations Convention on the Law of the Sea (UNCLOS), despite the support of every President since Ronald Reagan, the Department of Defense (DoD) and the U.S. Navy, to name just a few.¹³ Their efforts are not merely honest disagreements, and can only be considered disingenuous fear mongering as they continually misrepresent what UNCLOS ratification will mean to the United States.¹⁴ One of the loudest arguments that defies reality is that the United States will surrender our sovereignty to the United Nations. In fact, it has been argued by many who understand UNCLOS in the United States that ratification would result in essentially a “U.S. land grab” that would expand U.S. sovereignty and rights throughout the U.S.'s maritime territory.¹⁵

Second, the conservatives on the far right attempted the demonization and de-legitimization of lawyers who either oppose policy positions or directly represent individuals that they determine are not worthy of representation—particularly those involved in Guantanamo Bay (GTMO) deten-

¹¹ See, e.g., Scott Horton, *State of Exception: Bush's War on the Rule of Law*, HARPER'S MAG., Sept. 2007, at 75, available at <http://www.harpers.org/archive/2007/07/0081595> (last visited Dec. 2, 2010) (arguing that the Bush Administration's policy of attacking writ of habeas corpus lawyers of Guantanamo Bay detainees was a type of lawfare by Conservatives).

¹² See, e.g., Brooke Goldstein, Adjunct Fellow at Hudson Institute, *International And Domestic Legal Recourses: Responding to Lawfare and the Goldstone Report* (Apr. 27, 2010), available at <http://www.thelawfareproject.org/144/speech-delivered-by-brooke-goldstein-at-fordham> (noting in a speech delivered at Fordham Law School on Lawfare and Combating the Goldstone Report the need to “directly attack the credibility of the major players behind lawfare and call into question the authority these parties have been allocated to make and apply international human rights law.”).

¹³ Presidents Reagan, George H.W. Bush, and Clinton accepted UNCLOS as customary international law with the exception of Part XI relating to “deep sea mining.” The objectionable Part XI was fixed with an additional agreement in 1994; Hearing on the United Nations Convention on the Law of the Sea Before the S. Comm. on Foreign Relations, 103rd Cong. (2003) (statement of Vice Admiral Roger T. Rufe, Jr., USCG (Ret.)).

¹⁴ See Frank J. Gaffney Jr., *U.N.'s Larger Role in UNCLOS is Bad for American Interests*, 12 TEX. REV. L. & POL. 469, 473, 475–6 (2007–08) (noting Conservatives should be concerned that with the UNCLOS the United Nations will be less accountable than it currently is and that the United Nations will usurp U.S. sovereignty).

¹⁵ See Benjamin Friedman & Daniel Friedman, *Bipartisan Sec. Grp., HOW THE LAW OF THE SEA CONVENTION BENEFITS THE UNITED STATES* 1, 5 (2004). The UNCLOS would help the United States protect marine resources, the environment, and shipping lines while expanding U.S. Continental Shelf claims by 290,000 square miles. See also George V. Galdorisi, *Treaty at a Crossroads*, U.S. NAVAL INST PROCEEDINGS, July 2007, at 52.

tion issues. A prime example is in 2007, when the then Deputy Assistant Secretary of Defense for Detainee Affairs, Charles “Cully” Stimson, made statements questioning who was funding the lawyers for GTMO detainees—implying some nefarious financial backing—as well as calling out CEOs to make law firms choose between representing their company or terrorists.¹⁶

Is this lawfare? No, because this is essentially a war against law and not the use of law to achieve an objective. In this context, the term lawfare has become “code”; mere mention of the term connotes an entire argument for conservatives (Neo-Cons in particular) for all things international law and those who represent alleged terrorists. The use of code words in politics is not new and examples include terms such as “activist judges,” “Obama-care,” and “mainstream media.”¹⁷ Lawfare cannot be allowed to become the new “judicial activism,” whereby where you sit is where you stand. After all, those who cry “activist judge” the loudest are those who disagree with the decision in the same way the victors extol the judges’ wisdom and fidelity to the Constitution.

The bottom line is that the conservative lawfare argument is in actuality a public relations campaign and not a legal argument. The far right faction is making a policy argument that challenges the Constitution. Alternatively, conservative lawfare advocates vilify the courts and lawyers who stand for unpopular positions. David Frakt refers to it as “lawfear” whereby the entire phenomenon is invented in order to scare people.¹⁸

III. THE RULE OF LAW

Nearly every nation on earth employs lawyers to aggressively practice international law in order to further national interests. A legitimate question is whether lawfare has become a term of art for any attempt to achieve one’s national interests through a legal avenue. In other words, is it

¹⁶ See *Top Pentagon Official Calls for Boycott of Law Firms Representing Guantanamo Prisoners*, DEMOCRACY NOW (Jan. 17, 2007), http://www.democracynow.org/2007/1/17/top_pentagon_official_calls_for_boycott (quoting a transcript of a Federal News Radio 1500 AM broadcast where Charles Stimson, then Deputy Assistant Secretary of Defense for Detainee affairs, suggested that prominent law firms had to choose between “representing terrorists or representing reputable firms”, Stimson noted that he was “shock[ed]” that the major law firms in the United States were involved in the representation of Guantanamo detainees.).

¹⁷ See generally, Robert E. Goodin & Michael Saward, *Dog Whistles and Democratic Mandates*, THE POLITICAL QUARTERLY, Dec. 21, 2005, at 471, 471, available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-923X.2005.00708.x/pdf> (arguing dog whistle politics merely resurrects a common practice that sends divergent code messages to different audiences).

¹⁸ Lt. Col. David Frakt is a law professor and former military defense attorney who handled a writ of habeas corpus claim for a former Guantanamo prisoner. See *About Us*, David-Frakt.com, <http://davidfrakt.com/aboutus.aspx> (last visited Dec. 2, 2010).

all just the normal application of international law, but as soon as it is misused, or used against your interests, does it then become lawfare?

From the U.S.'s perspective, the rule of law offers a powerful mechanism to end violence and the U.S. cites what it considers positive examples, such as the use of law in an attempt to solve issues in Kosovo, Cyprus, and Northern Ireland.¹⁹ The United States hails bringing the murderer Charles Taylor to justice in the Special Court for Sierra Leone and considers the announcement of his indictment, as prosecutor David Crane plainly puts it, as the use of law as a weapon system.²⁰ The United States led the charge in establishing the international tribunals for Yugoslavia (ICTY) and Rwanda (ICTR), whereby major powers were using the "blunt instrument of the law" to force lesser powers to toe the line.²¹ But is any of the aforementioned lawfare? Lawfare cannot simply consist of any effort to enforce international law generally and international criminal law specifically.

On the other side of the ledger, one could argue that negative examples of the use of law exist when nations cynically use the international community's desire for the establishment of the rule of law as a way to advance their own standing in the court of world opinion. Examples include Cambodia's manipulation of the international community while negotiating the establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Burmese junta's new constitution, and Sudan's fragile North-South Comprehensive Peace Agreement as a means of quieting criticism about the genocide in Darfur. Are these aforementioned examples of lawfare because in each case the nations have manipulated or exploited the international legal system in order to supplement military and political objectives? Lawfare cannot be, nor was it intended to be, a subjectively negative endeavor.

¹⁹ Hillary Clinton, Sec'y of State, U.S. Congratulates Northern Ireland on Progress Toward "Lasting Peace", FOREIGN POLICY BULLETIN, May 17, 2010, at 107, available at <http://journals.cambridge.org/action/displayFulltext?type=1&fid=7744764&jid=FPB&volumeId=20&issueId=02&aid=7744756>.

²⁰ David Crane, *The Take Down: Case Studies regarding "Lawfare" in International Criminal Justice: The West African Experience*, 43 CASE W. RES. J. INT'L L. 201, 206 (May 2010).

²¹ Interview by Harold Hongju Koh, Legal Advisor U.S. Dep't of State with Stephen J. Rapp, Ambassador-at-Large for War Crimes Issues (June 15, 2010), available at http://www.state.gov/s/wci/us_releases/remarks/143178.htm (explaining that the International Criminal Tribunal has limited effectiveness because it is expensive to prosecute more than three or four cases in each situation).

IV. STRATEGIC COMMUNICATIONS

Some scholars have expanded the definition of lawfare to include an element of what generically can be termed “strategic communications.” Some of those definitions include Lawfare as:

[A] weapon designed to destroy the enemy by using, misusing, and abusing the legal system and the media in order raise public outcry against the enemy²² . . . [and] the exploitation of real, perceived, or even orchestrated incidents of law of war violations being employed as an unconventional means of confronting a superior military power.²³

Dunlap rejects the notion that lawfare can be reduced to “a mere component of a glorified propaganda campaign” because, although lawfare is often misunderstood, it is “a richer and far more complex concept.”²⁴ He states that “the behavior of militaries is more than simply a public relations problem; it is a legitimate and serious activity that is totally consistent with adherence to the rule of law, democratic values, and – for that matter – lawfare.”²⁵ Despite Dunlap’s protestations, it is worth exploring lawfare in the strategic communications context.

Strategic Communications are the focused U.S. Government processes and efforts to understand and engage key audiences to create, strengthen, or preserve conditions favorable to advance national interests and objectives through the use of coordinated information, themes, plans, programs, and actions synchronized with other elements of national power.²⁶ Strategic Communications relies on the supporting capabilities of Public Affairs, aspects of Information Operations principally Psychological Operations, Military Diplomacy, Defense Support to Public Diplomacy, and Visual Information.²⁷

²² Susan Tiefenbrun, *Semiotic Definition of “Lawfare”*, 43 CASE W. RES. J. INT’L L. 29, 31, (2010).

²³ *Id.* at 52.

²⁴ Dunlap, *supra* note 4, at 148.

²⁵ *Id.*

²⁶ See DEPARTMENT OF DEFENSE, JOINT PUBLICATION 3-13 INFORMATION OPERATIONS I-10 (Feb. 13, 2006), available at http://www.fas.org/irp/doddir/dod/jp3_13.pdf.

²⁷ While not mentioned as a supporting capability of Strategic Communication (SC), the role of Military Deception (MILDEC) should also be understood in relation to PA and SC. See DEPARTMENT OF DEFENSE, 2006 QUADRENNIAL DEFENSE REVIEW (QDR) STRATEGIC COMMUNICATION (SC) EXECUTION ROADMAP 3 [hereinafter “Roadmap”], available at <http://www.defense.gov/pubs/pdfs/QDRRoadmap20060925a.pdf>. MILDEC consists of actions executed to deliberately mislead adversary decision-makers as to friendly military capabilities, intentions, and operations, thereby causing the adversary to arrive at specific false deductions. See also DEPARTMENT OF DEFENSE, Joint Publication 3-13 Information Operations II-2 to II-3 (Feb. 13, 2006) [hereinafter “JP 3-13”], available at http://www.fas.org/irp/doddir/dod/jp3_13.pdf.

Public Affairs (PA) includes public information, command information, and community relations activities directed toward both the external and internal publics with interest in the DoD.²⁸ Whereas Information Operations (IO) are the integrated employment of the core capabilities of electronic warfare, computer network operations, psychological operations, military deception, and operations security in concert with specific supporting and related capabilities to influence, disrupt, corrupt, or usurp adversarial human and automated decision-making while protecting our own.²⁹ Psychological Operations (PSYOPs) are the “planned operations to convey selected *truthful* information and indicators to foreign audiences to influence their emotions, motives, objective reasoning, and ultimately the behavior of foreign governments, organizations, groups, and individuals. The purpose of PSYOPs is to induce or reinforce foreign attitudes and behavior favorable to the originator’s objectives.”³⁰ PSYOPs may be directed only at foreign audiences. Public Diplomacy includes overt international public information activities of the U.S. Government designed to promote U.S. foreign policy objectives by seeking to understand, inform, and influence foreign audiences and opinion makers, and by broadening the dialogue between American citizens and institutions and their counterparts abroad.³¹ Defense Support to Public Diplomacy are coordinated interagency activities and measures taken by DoD components, not solely in the area of IO, to support and facilitate public diplomacy efforts of the U.S. Government.³² Military Diplomacy includes the activities and measures U.S. military leaders take to engage military, defense, and government officials of another country to communicate U.S. Government policies and messages and build defense and coalition relationships.³³ Finally, Visual Information refers to the use of one or more of the various visual media with or without sound, principally Combat Camera.³⁴

²⁸ See DEPARTMENT OF DEFENSE, JOINT PUBLICATION 3-61 PUBLIC AFFAIRS GL-5 (May 9, 2005), available at http://www.fas.org/irp/doddir/dod/jp3_61.pdf (citing DEPARTMENT OF DEFENSE, JOINT PUBLICATION 1-02 DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS (Apr. 12, 2001 amended through Aug. 19, 2009) [hereinafter “JP 3-61”], available at http://www.fas.org/irp/doddir/dod/jp1_02.pdf).

²⁹ JP 3-13, *supra* note 26, at GL-9.

³⁰ *Id.* at II-1 (emphasis added).

³¹ *Id.* at GL-11 (citing JP1-02, *supra* note 26).

³² *Id.* at II-10.

³³ See DEP’T OF DEF., QDR EXECUTION ROADMAP FOR STRATEGIC COMMUNICATION 3 (2006).

³⁴ *Id.*

Joint Staff Policy directs that PA and IO activities must remain separate while remaining aware of each other's activities for maximum effect.³⁵ To that end, organizational constructs that integrate PA and IO offices may compromise the commander's credibility with the media and public and should be avoided. PA Officers should work directly for the Commander.³⁶ Specifically, "there must be close cooperation and coordination between PSYOP and PA staffs in order to maintain credibility with their respective audiences," however, their activities and products must remain separate and distinct.³⁷ Additionally, while PA should not be involved in the provision of false information, it must be aware of the intent and purpose of MILDEC in order not to inadvertently compromise it.³⁸ Deception and disinformation, while part of larger IOs through MILDEC, play no role and are not a part of DoD strategic communication efforts.³⁹ Strategic Communication implementation measures must be cognizant of these established, separate lanes of responsibility between PA and IO; however, these lanes should not be seen as impediments to effective Strategic Communications.

In the U.S. context, Strategic Communications must be legal and truthful. For example, it is legal to broadcast that "Saddam is a tyrant and a murderer who does not want what is best for Iraq and Iraqis." Whereas, it would be illegal to broadcast that "Saddam will eat your children!"

A prime example of strategic communications has been displayed in the Philippines. For the past several years, the United States has assisted the Philippine military in the southern islands of the Philippines in their campaign against terrorists.⁴⁰ When a terrorist bombing took place at a market that killed civilians, the Philippine and U.S. allies sent out a text message to thousands of mobile phones informing them of the fact that it was a terrorist attack that caused the deaths and provided a warning of other potential threats.⁴¹

³⁵ Memorandum from Richard B. Myers, Chairman of the Joint Chiefs of Staff to the Chief of Staff of the U.S. Army et al. 1-2 (Sept. 27, 2004), available at http://www.defenseimagery.mil/default/learning/vipolicy/misc/articleParagraphs/0/content_files/file/CJCS%20PA_IO.pdf.

³⁶ *Id.*; see also JP 3-61, *supra* note 27, at III-20.

³⁷ JP 3-13, *supra* note 26, at II-2; see also JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-53: DOCTRINE FOR JOINT PSYCHOLOGICAL OPERATIONS I-9 (2003) [hereinafter JP 3-53].

³⁸ JP 3-13, *supra* note 26, at II-3.

³⁹ Compare JP 3-61, *supra* note 27 (describing strategic communications that will not involve deception and disinformation), with JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-13.4: MILITARY DECEPTION (2006) (outlining the policy of military deception) [hereinafter JP 3-13.4].

⁴⁰ See *Operation Enduring Freedom – Philippines*, GLOBAL SECURITY.ORG (Apr. 27, 2005), <http://www.globalsecurity.org/military/ops/enduring-freedom-philippines.htm>.

⁴¹ Interview on file with author.

Does lawfare include the misuse of legal terminology? For example, filming an Israeli Defense Force (IDF) boarding of a Gaza bound blockade runner in the dark and stating that the IDF are violating international law.⁴² Often times a film like this is replayed without legal analysis and becomes akin to the news cycle in politics of half-truths, rumors, and outright lies. Once it is put into play, it becomes reality and when the truth emerges at a later time, it is barely a story because the news organizations are embarrassed that they did not do prior due diligence. With that said, lawfare should be reserved for the use of law and not simply the propaganda value of saying that “they are violating law” or “we are following the law.”

Let us examine a step-by-step process of an effective strategic communications or lawfare operation:

1. The Set-Up. Firing upon US troops in Fallujah from the minarets of mosques. A clear International Humanitarian Law (IHL) violation.
2. The Bait. The U.S. may return fire in a proportional manner in accordance with IHL.
3. Record it. Several conspirators are positioned to digitally record and preserve the response.
4. Strategic communications. Distribute the recording via the internet, news, recruiting DVDs.
5. Lawfare. Take the recorded “evidence” to a judicial forum under false pretenses.

Both steps four and five could erode the necessary domestic support that any conflict requires. Vanderbilt Law Professor Michael Newton discusses such a phenomenon in an article reconsidering reprisals.⁴³ However, his analysis is on point here as well:

At worst, the current legal uncertainty emboldens terrorists because, while humanitarian law belongs to the armed forces of the world and imposes an inalterable professional obligation, the legal lacunae permit terrorist information operations to make it into a media tool to be manipulated and sensationalized. The incoherence in explaining sovereign responses to terrorist acts permits the legal structure to be portrayed as nothing more than a mass of indeterminate subjectivity that is nothing more than another weapon in the moral domain of conflict at the behest of the side with the best cameras, biggest microphones, and most compliant media accomplices. There is a very real danger that terrorist video tapes and leaked statements can create manipulation of an all too willing international media and therefore mask genuine violations of the law with spurious allegations and misrepresentations of the actual state of the law. Failure to articulate the correct state of the law in turn feeds into an undercurrent of suspicion and politicization that erodes the very foundations of humanitarian law. At the

⁴² See Marc Champion & Margaret Coker, *Turkish Charity Says Its Dead Are Martyrs*, WALL ST. J., June 4, 2010, at A8; Colum Lynch, *Israel's Flotilla Raid Revives Questions of International Law*, WASH. POST, June 1, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/01/AR2010060102934.html>; Brian Stelter, *After Sea Raid, Dueling Videos Carry on Fight*, N.Y. TIMES, June 2, 2010, at A1.

⁴³ Michael A. Newton, *Reconsidering Reprisals*, 20 DUKE J. COMP. & INT'L L. 361 (2010).

very least, the current legal framework allows terrorist organizations and their sympathizers to portray state responses as legally questionable.⁴⁴

Ultimately however, there is a difference between using the law in a lawfare context and using the media—defined broadly to include all kinds of electronic forms—to paint your enemies in a negative light.

V. ARE THERE LEGITIMATE / LEGAL AND ILLEGITIMATE / ILLEGAL FORMS OF LAWFARE?

Step five in the process above involves taking the recorded “evidence” to a judicial forum under false pretenses. Is there a legitimate or legal lawfare that is permitted versus an illegitimate or illegal lawfare that is an un-permitted construct? An example of legitimate or legal lawfare comes in the form of excessive coastal state maritime and airspace claims and it results in a lawfare response by the United States with Freedom of Navigation Operations (FON Ops).⁴⁵ Excessive maritime claims are an attempt to claim more national territory and to grow customary international law over time in favor of one’s national interests. There are scores of excessive maritime claims worldwide, including Vietnam’s excessive straight baselines, Peru’s two hundred nautical mile territorial sea, and China’s placing of soldiers on rocks in the South China Sea to make sovereignty claims, turn those rocks into “islands,” and claim the resulting additional water rights that comes with an island designation.⁴⁶ The United States conducts FON Ops against friend and foe alike, whereby U.S. Naval vessels conduct operational assertions challenging the claims in order to act as a persistent objector and ensure freedom of navigation for the international community. But do the recipients of such FON Ops agree that they are legitimate or legal and if not, does it matter? Who defines what are illegitimate or illegal forms of lawfare? And if it is deemed illegitimate or illegal does it maintain the term lawfare?

Could this be operationalized as a “ruse” versus “perfidy” concept?⁴⁷ If so, it should be in accordance with the IHL because any attempt

⁴⁴ *Id.* at 367–68.

⁴⁵ See *Military Operational Issues*, U.S. DEP’T OF STATE, www.state.gov/t/pm/iso/c21539.htm (last updated Oct. 31, 2010).

⁴⁶ See BUREAU OF OCEANS AND INT’L ENVTL. AND SCIENTIFIC AFFAIRS, UNITED STATES DEP’T OF STATE, PUB. NO. 112, LIMITS IN THE SEAS: UNITED STATES RESPONSES TO EXCESSIVE NATIONAL MARITIME CLAIMS 13–14, 35 (1992); see also Mark Landler, *Offering to Aid Talks, U.S. Challenges China on Disputed Islands*, N.Y. TIMES, (July 24, 2010) at A4.

⁴⁷ Ruses are lawful and include the use of camouflage, decoys, mock operations and misinformation. Whereas, perfidy is unlawful and in accordance with Additional Protocol I of the Geneva Convention.

to construct something outside of existing IHL could potentially have the debilitating effect of diluting the effectiveness of IHL. The following examples are illegal and are clear violations of IHL and therefore, in this author's opinion, should not be considered lawfare. The Taliban have killed civilians and dumped their bodies at Allied strike sites, especially in places, such as Pakistan, where it is hard to insert U.S. verification teams in an effort to blame the United States for civilian casualties. The Iraqi leadership in the first Gulf War placed two fighter jets next to the Temple Ur in the hopes of an attack that would damage the mosque for public relations purposes in order to continue to play the "West is attacking Islam" card. In the second Gulf War, hundreds of mosque minarets were used by gunmen in order to attempt to achieve the same public relations effect.

But what about the infamous al-Qaeda "Manchester" manual that encourages terrorists to claim torture and mistreatment at the hands of the government? Or the numerous reports about Taliban detainees that immediately claimed they were tortured in an effort to slow down the process and drain manpower. Finally, where does the "Forced Cell Extraction" that may be required due to a detainee's refusal to leave his cell for a health or safety inspection fit in.⁴⁸ After all, it is an attempt to gain an advantage at some time in the future. The guards videotape all such extractions in order to keep a record but the event has been orchestrated by the detainee to get it on video so that it may potentially be taken out of context later. Where would these scenarios fit in the legal or illegal construct? Dunlap, in his 2008 Yale article, seems to recognize that all of the aforementioned scenarios, including the IHL violations, are lawfare—albeit a negative form of lawfare—and reflect the facts of modern war.⁴⁹ He does not posit a legal versus illegal construct but instead uses this information as yet another reason why the

Acts inviting the confidence of an adversary to lead him to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence shall constitute perfidy. The following acts are examples of perfidy: (a) The feigning of an intent to negotiate under a flag of truce or of a surrender; (b) The feigning of an incapacitation by wounds or sickness; (c) The feigning of civilian, non-combatant status; and (d) The feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1979 U.N.T.S. 3, 21.

⁴⁸ See, e.g., *Prisoner's Case Reveals Force-Feeding Tactics at Guantánamo Bay*, DALLAS NEWS (Oct. 25, 2008), http://www.dallasnews.com/sharedcontent/dws/news/world/stories/DN-striker_25int.ART.State.Edition1.4ad63d0.html.

⁴⁹ Dunlap, *supra* note 1, at 148–50.

military judge advocates are “an indispensable part of the commander’s war fighting team.”⁵⁰

VI. CONCLUSION

Lawfare is here to stay and is worth fighting for as a useful concept. Lawfare allows for using the courts but perhaps a cumulative approach to the legal system as a matter of practice as opposed to a matter of merit (e.g. false detainee abuse claims or frivolous lawsuits). In theory, this distinction should be examined as falling outside of lawfare and not simply as a “negative form” of lawfare. However, in practice that would be nearly impossible to police and although there are real and important harms that can be caused by those who abuse the law and have no interest in justice—the harm would be greater if access to the courts is limited. In tandem with that thought is the fact that there always must be push back against those who demonize lawyers and the courts. After all, as Major General Dunlap clearly states, lawyers, particularly JAGs, are trying to advocate the use and understanding of the law and especially need to emphasize the pragmatic utility of the law to military commanders in an ideologically neutral way.

⁵⁰ *Id.*