

ON LEGAL SUBTERFUGE AND THE SO-CALLED “LAWFARE” DEBATE

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The term “lawfare” is a contentious and ideologically charged concept as evidenced in its contemporary, popular usage. There are many nuances to the term, though lawfare is generally defined as a tactic of war where the use of law replaces the use of weapons in the pursuit of a military objective. Lawfare proponents increasingly claim that adversaries of the United States are manipulating the rule of law to undermine democracy and national security. The term “lawfare” is applied to contexts as varying as habeas corpus petitions of Guantanamo detainees, lawsuits by individuals subjected to torture or extraordinary rendition, universal jurisdiction, hate speech litigation, and the Goldstone Report. This essay explores some preliminary etymological background on the term to explain its current use and misuse. It argues that lawfare is an unhelpful term that has no real fixed meaning. Lawfare is a concept that may be catchy in media communications, but its distorted usage has substituted careful analysis and discourse with a fruitless—and even dangerous—rhetorical debate. The notion that terrorists are using the rules of humanitarian law, domestic law and human rights law to gain improper advantages over the United States undermines general respect for the rule of law. Alternatively, equal application of domestic and international legal rules and legal processes to both rich and poor, powerful and weak, creates a better ordered community rooted in peace and stability. Ultimately, this essay concludes with some concrete suggestions on how to move forward from the usage of this singularly unhelpful term.

I. INTRODUCTION

In 2001, Major General Charles Dunlap popularized the term “lawfare” to describe a phenomenon that he associated with the use by “adversaries” of “America” to attack the United States and gain so-called “opera-

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tional objective[s].”¹ Dunlap himself subsequently nuanced his use of the term in an article published in the *Yale Journal of International Affairs* admitting that lawfare can be used like any other tool or weapon of warfare, depending upon “who is wielding it, how they do it, and why.”² Unfortunately, having—perhaps inadvertently—popularized the notion that terrorists were using the rules of humanitarian law, domestic law, and human rights law to gain improper advantages over the United States, others have since occupied the field and redefined the term in a highly contentious manner to suggest that any use of the law by a so-called “adversary of America” (or Israel) is improper and a form of “lawfare.” That would presumably include the habeas corpus petitions of Guantanamo detainees³ and lawsuits by individuals subjected to torture or extraordinary rendition.⁴ The founding directors of “The Lawfare Project” have even listed examples such as the case brought to the International Court of Justice on the legality of Israel’s security barrier, human rights litigation sponsored abroad by “terrorist entities” such as Hamas (regardless of the merits of the case), cases involving universal jurisdiction, and other forms of legal action as threats that hinder the ability of democracies to defend themselves against terrorism.⁵ These arguments echo the 2002 National Security Strategy and its 2005 National Defense Strategy, which predicted that: “Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism.”⁶

This strange conflation of the word “terrorism” with the words “judicial processes” and “international fora” is worrisome. Since when is filing a lawsuit the same as mounting violent and bloody attacks on civilians and civilian objects? Moreover, the irony behind the theories and contentions of “The Lawfare Project” is not lost upon anyone familiar with the

¹ See generally Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* (Carr Center for Human Rights, John F. Kennedy School of Government, Harvard University, Working Paper, 2001), available at <http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>; (questioning whether lawfare undercuts military effectiveness); see also Charles J. Dunlap, Jr., *Lawfare Amid Warfare*, WASH. TIMES, Aug. 3, 2007, at A19; Charles J. Dunlap, Jr., *It Ain't No TV Show: JAGs and Modern Military Operations*, 4 CHI. J. INT'L L. 479, 480 (2003) (“America’s adversaries are using legal weapons.”).

² Maj. Gen. Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT'L AFFAIRS 146, 148 (2008).

³ See, e.g., David Luban, *Lawfare and Legal Ethics in Guantanamo*, 60 STAN. L. REV. 1981, 2020–21 (2007–2008).

⁴ Leila Nadya Sadat, *Shattering the Nuremberg Consensus: U.S. Rendition Policy and International Criminal Law*, 3 YALE J. INT'L AFFAIRS 65, 72 (2008).

⁵ See generally, examples of lawfare cited by The Lawfare Project, <http://www.thelawfareproject.org> (last visited Nov. 6, 2010).

⁶ U.S. Dep't of Def., *The National Defense Strategy of the United States of America 5* (2005), <http://www.defense.gov/news/Mar2005/d20050318nds2.pdf>.

approach to international law and human rights articulated by the Justice Department and White House Counsel during the administration of former President George W. Bush. From 2001 to 2006, and even beyond, as Professor Sadat has written in earlier articles on this topic, government lawyers “sought to redefine legal norms in ways that [were] neither particularly plausible nor persuasive.”⁷ Indeed, it is hard not to see the current emphasis on the illegitimacy of terrorist “lawfare” as part and partial of the frontal assault on the constraints imposed by international human rights law, humanitarian law, and constitutional law on U.S. freedom to engage in activities that clearly violate those norms. The only difference perhaps being that the argument has shifted from attempts to redefine the law using legal subterfuge to efforts to attack the end users of those norms. As David Luban noted in an essay penned in 2007, advocates of the lawfare theory have targeted not only “terrorist adversaries” of America, but also the lawyers representing them.⁸

This short essay will explore some preliminary etymological background on the term “lawfare,” explain its current use (and misuse), and finally conclude with some concrete suggestions on how to move forward from this singularly unhelpful term and this fruitless—and even dangerous—rhetorical debate. There are undoubtedly lawsuits brought by seemingly undeserving individuals that tax the patience of the public and courts, and many cases that involve difficult questions of politics that reasonably minded individuals could contest. However, one of the most enduring strengths of the United States, and one of its greatest contributions to world civilization, has been respect for the rule of law, legal processes, and legal outcomes. Attacking terrorists by attacking our most cherished values, as lawfare advocates do, provides neither physical safety nor moral surety to Americans attempting to navigate a dangerous world.

⁷ Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200, 1205–6 (2007).

⁸ David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 STAN. L. REV. 1981, 1984, 2021 (2008) (discussing how within the legal system, taking out the attorneys silences the other side); see also Top Pentagon Official Calls for Boycott of Law Firms Representing Guantanamo Prisoners, DEMOCRACY NOW (Jan. 17, 2007), <http://www.democracynow.org/2007/1/17/toppentagonofficialcallsforboycott> (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).

II. ETYMOLOGICAL BACKGROUND

The use of the term “lawfare” has significantly increased in the last decade.⁹ A search of the term using the search engine Google returns over 60,000 results.¹⁰ Wikipedia defines “lawfare” as “a form of asymmetric warfare. Lawfare is waged via the use of domestic or international law with the intention of damaging an opponent.”¹¹ Where there was previously no entry, Dictionary.com now describes “lawfare” as “the use of the law by a country against its enemies, esp[ecially] by challenging the legality of military or foreign policy.”¹² Yet, a search for the etymology of the term produces no results in the Oxford English Dictionary.¹³ Perhaps that is because it has no real meaning at all. Analyzing the term reveals that “law” is defined as “a rule of conduct imposed by authority” while “fare” is an Old English, now archaic, word meaning a voyage or expedition.¹⁴ Thus, “herring-fare” would be an obsolete way of referring to a “voyage to catch herrings.”¹⁵ In the same vein, “warfare” means “going to war . . . the action of carrying on, or engaging in, war.”¹⁶ Using this method, “lawfare” would indicate a voyage into the law. However, the term is probably more accurately described as a play on the word “warfare.”

In late 2001, Major General Charles Dunlap first used the term “lawfare” in its present incarnation.¹⁷ In *Law and Military Interventions*, Dunlap explained:

⁹ See *infra* notes 10–13, 20–31 (accompanying text discussing the use of lawfare in various contexts from news updates to law review articles).

¹⁰ Google Search for “lawfare,” GOOGLE, <http://www.google.com> (search “lawfare”) (last visited Nov. 6, 2010) (retrieving over 62,300 results for “lawfare.”).

¹¹ See Wikipedia, *Lawfare*, <http://en.wikipedia.org/wiki/Lawfare> (describing origin of the term and examples of lawfare) (as of Nov. 15, 2010).

¹² Search for “lawfare,” DICTIONARY.COM, <http://dictionary.reference.com/> (search “lawfare”) (last visited Nov. 6, 2010). When first visited on July 22, 2010, there was no entry for “lawfare.”

¹³ Search for “lawfare,” OXFORD ENGLISH DICTIONARY, <http://www.oed.com> (search “lawfare”) (last visited Nov. 6, 2010).

¹⁴ *Law*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com> (last visited Nov. 6, 2010) (“law, *n.* I. A rule of conduct imposed by authority. . . 1. a. The body of rules, whether proceeding from formal enactment or from custom, which a particular state or community recognizes as binding on its members or subjects.”). *Fare*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com> (last visited Nov. 6, 2010) (“fare, *n.* I. 1. a. A going, journeying; course, passage, way; voyage. *Obs.* b. An expedition. herring-fare: a voyage to catch herrings. *Obs.*”) [hereinafter OED].

¹⁵ *Id.* at *Law*; *id.* at *Fare*.

¹⁶ *Id.*

¹⁷ Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* (Carr Center for Human Rights, John F. Kennedy Sch. of Gov’t, Harvard U., Working Paper, 2001), available at <http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>.

Lawfare describes a method of warfare where law is used as a means of realizing a military objective . . . There are many dimensions to lawfare, but the one [increasingly] embraced by U.S. opponents is a cynical manipulation of the rule of law and the humanitarian values it represents. Rather [than] seeking battlefield victories, *per se*, challengers try to destroy the will to fight by undermining the public support that is indispensable when democracies like the U.S. conduct military interventions.¹⁸

Although Dunlap did not coin the term, he popularized its use as a substitute for the word “warfare” in which the conflict is with words as opposed to swords.¹⁹

A search for the term “lawfare” in the HeinOnline Law Journal Library database generated 149 results ranging in time from 1957 to the present.²⁰ The earliest instance of lawfare appears in a 1957 article regarding divorce, which states that “[t]he canton, clearly reduced in status, still is a state with standing in court to wage some lawfare on behalf of its folk, and with liability for some behavior of its folk.”²¹ The next result was a 1983 book review referencing a courtroom advocacy tactic labeled as “guerilla lawfare.”²² From 1990 to 1999, all ten references to lawfare were used in advertisements for discounted airfares for lawyers.²³ In early 2001, anthropologist John Comaroff used the term “lawfare” to describe a coercive legal tactic used to dominate a colonized people.²⁴

¹⁸ *Id.* at 11.

¹⁹ *Id.* at 38 n.5 (noting “lawfare” may have first appeared in John Carlson & Neville Yeomans, *Whither Goeth the Law—Humanity or Barbarity*, in *THE WAY OUT—RADICAL ALTERNATIVES IN AUSTRALIA* (M. Smith & D. Crossley eds., 1975), available at <http://www.laceweb.org.au/whi.htm> (asserting that “lawfare replaces warfare and the duel is with words rather than swords”).

²⁰ Search for Lawfare, HEIN ONLINE, <http://www.heinonline.org> (follow “Subscribers Click Here to Enter” hyperlink; then follow “Law Journal Library” hyperlink; then follow “Advanced Search” hyperlink; then search “Search For” for “Lawfare”; then follow “Search” hyperlink).

²¹ John W. Davies & Brinsley D. Inglis, *Divorce, The Royal Commission, and the Conflict of Laws*, 6 AM. J. COMP. L. 215, 253 (1957).

²² Jeremy G. Epstein, *The Prince of the Podium: Reflections on the Best Defense*, 1983 WIS. L. REV. 167, 177 (1983) (reviewing ALAN M. DERSHOWITZ, *THE BEST DEFENSE* (1982)) (“Dershowitz describes this tactic as ‘guerilla lawfare’ and acknowledges that ‘[w]e knew that we were skirting near the edge of permissible advocacy, but we were confident that our tactic was justified.’”).

²³ See, e.g., 14 L.A. LAW. 4 (1991) (“‘Reduce travel costs, improve service and keep the attorneys happy?’ LAWFARE CUTS UP TO 50% OFF FULL FARES! NOW YOU CAN REDUCE THE HIGH COST OF TRAVEL WITHOUT INCONVENIENCE TO YOUR ATTORNEYS. SIMPLY USE LAWFARE FROM THE LAWYERS’ TRAVEL SERVICE.’”).

²⁴ John L. Comaroff, *Colonialism, Culture, and the Law: A Foreword*, 26 LAW & SOC. INQUIRY 305, 306 (2001) (“That ‘mode of warfare’—or rather *lawfare*, the effort to conquer

Without a doubt, use of the term has multiplied in recent years. Of the total 149 results for “lawfare” on Hein Online, 122 of them are dated from 2006 to 2010, with nearly 82% of the total results ranging from 1957 to the present.²⁵ The term is most commonly used in the military and international law context.²⁶ The results for “lawfare” on Hein Online are further categorized into subject areas with thirty-six results in Military Law, thirty-six in International Law, and nine results in Comparative Law.²⁷ The law journal titles that most commonly cite the term “lawfare” are mainly military in nature.²⁸ The country of most frequent publication of the term is the United States, with 113 out of 149 results—nearly 76%.²⁹ The next country is Canada with four results.³⁰

While previous usages of the term “lawfare” addressed airfare discounts and colonialism, most uses from 2006 and onward are military ones.³¹ The military dimension of the term is evidenced by the existence of such organizations as “The Lawfare Project,” which recently held a conference on March 11, 2010 on the topic.³² “The Lawfare Project” defines “lawfare” as “the use of the law as a weapon of war, or more specifically,

and control indigenous people by the coercive use of legal means—had many theaters, many dramatic personae, many scripts.”)

²⁵ More specifically, of the 122 articles from 2006 to 2010 referencing “lawfare,” eleven are from 2010, fifty-three in 2009, fifty results from 2008, thirty-four from 2007, and twenty-five from 2006 based on a search run on July 22, 2010. HEIN ONLINE, *supra* note 20.

²⁶ *Id.*

²⁷ Based on a search of the term “lawfare” run on July 22, 2010, articles were broken down into the following subjects: General (50); International Law (36); Military Law (14); and Comparative Law (9). *Id.*

²⁸ Based on a search of the term “lawfare” run on July 22, 2010, the categories for article titles included: International Law Studies Series. US Naval War College (9); CBA Record (7); South Texas Law Review (5); and Air Force Law Review (3). *Id.*

²⁹ *Id.*

³⁰ Based on a search of the term “lawfare” run on July 22, 2010, the countries of publication that were listed included: United States (113); Canada (4); New Zealand (3); and Australia (2). *Id.*

³¹ The HEIN ONLINE search conducted on July 22, 2010 produced the following sample: John W. Bellflower, *The Influence of Law on Command of Space*, 65 A.F. L. REV. 107 (2010); Brooke Goldstein & Aaron Eitan Meyer, *Legal Jihad: How Islamist Lawfare Tactics are Targeting Free Speech*, 15 ILSA J. INT'L & COMP. L. 395 (2008–2009); *Lawfare: Terrorism & the Courts*, 33 WM. MITCHELL L. REV. 1667 (2006–2007); Erika Myers, *Conquering Peace: Military Commissions as a Lawfare Strategy in the Mexican War*, 35 AM. J. CRIM. L. 201 (2007–2008); Christopher Waters, *Beyond Lawfare: Juridical Oversight of Western Militaries*, 46 ALTA. L. REV. 885 (2008–2009); Kelly D. Wheaton, *Strategic Lawyering: Realizing the Potential of Military Lawyers at the Strategic Level*, 2006 ARMY LAW. 1 (2006); Tung Yin, *Boumediene and Lawfare*, 43 U. RICH. L. REV. 865 (2008–2009). HEIN ONLINE, *supra* note 20.

³² Conference on Lawfare (March 11, 2010), The Lawfare Project, *available at* <http://www.thelawfareproject.org/about/program/> (last visited Jul. 23, 2010).

the abuse of the law and legal systems for strategic political or military ends.”³³ It describes “lawfare” as a threat and tactic waged by the enemies of Israel and the United States as a way to undermine democracy and the rule of law.³⁴ Its two principal directors, Brooke Goldstein and Aaron Eitan Meyer, use the term “legal jihad” as a synonym for “Islamist lawfare tactics,” and indeed, the comments of many lawfare proponents have a decidedly anti-Muslim sentiment as their subtext. Even the brochure for “The Lawfare Project” conference identifies the *Goldstone Report* as a problem, while ignoring the actual human suffering inflicted by Operation Cast Lead, to which it was a response.³⁵

Arguably, such controversial interpretations of the term “lawfare” are distorting Dunlap’s ideas. In *Lawfare Today: A Perspective*, Dunlap expressed concern about lawfare’s misuse, explaining:

Lawfare is a concept that is ever more frequently discussed in government, academic, and media circles. Regrettably, that discussion is not as informed as it might be. . . . It is a mistake, however, to reduce “lawfare” to a mere component of a glorified propaganda campaign. In truth, it is a richer and far more complex concept—and one, lamentably, subject to misunderstanding.³⁶

A LexisNexis search of the term “lawfare” in both newspapers and law review articles reveals that the term is applied to contexts as varied as the Mexican drug war, Israel and the Goldstone Report, Guantanamo Bay, hate speech litigation, and so on.³⁷

III. CONCLUSION

In all societies, a tension exists between the human rights of individuals, and the needs of public security. This is as true for international law as it is for domestic law, and the architects of international humanitarian law and international human rights law must be aware of and balance those tensions, just as the legislature and the courts attempt to strike that balance in municipal law. Thus, while it is perfectly appropriate to challenge a particular legal provision, and suggest amendments of modifications thereto, suggesting that use of the law itself is improper is problematic. The image of the brochure for this Lawfare! conference has a picture of soldiers aiming their guns at a courthouse that looks much like the United States Supreme

³³ *What is Lawfare?* The Lawfare Project, available at <http://www.thelawfareproject.org/> (last visited Jul. 22, 2010).

³⁴ Conference on Lawfare, *supra* note 32.

³⁵ *Id.*

³⁶ Dunlap, *supra* note 2, at 148.

³⁷ LexisNexis, <http://www.lexisnexis.com/> (last visited Nov. 6, 2010) (access by searching the term “lawfare” in all newspapers and all law review articles).

Court.³⁸ This image suggests to us what “lawfare” —as currently used—is really all about. It is an effort to attack and dismantle legal norms —and even some legal or international institutions—in order to promote the efforts of America’s (or Israel’s) military. In that sense, it is not really a legal argument at all, but is a crude policy argument that poses a frontal challenge to our constitutional system, as well as the specific rules of war, international human rights law, the international legal system, and even U.S. constitutional rights, such as the right to habeas corpus. The notion of lawfare may make for good television sound bites, or catchy conference titles, but it substitutes those sound bites for careful and reasoned analysis. Through innuendo and sleight of hand, lawfare advocates equate judicial processes with terrorists, thoughtful and probing investigative reports like the *Goldstone Report* with attacks on state security, and petitions for habeas corpus with war. As Charlie Dunlap himself has written in his contribution to this symposium, isn’t using law better than firing bullets when resolving international disputes?³⁹

Dunlap himself did not necessarily advocate for this distortion, but since the term has no real fixed meaning, as our survey shows, it was both easy and perhaps predictable that his popularization of the term in the military context would have this result. For even his own discussion of lawfare has a tendency to see individuals fighting the United States as inherently less deserving of legal protections than U.S. citizens and residents. He suggests, as do more extreme proponents of lawfare ideology, that the United States and Israel are suffering from military disadvantages because of the application of humanitarian law to a particular conflict or the invocation of human rights norms to protect individuals somehow caught up in that conflict. The remedy to these disadvantages proposed is either to change the law or remove those individuals from its protections, while keeping protection for U.S. and Israeli nationals. The latter solution runs into serious moral objections, given the inherent sanctity, dignity, and equality of all human life, and thus it is unsurprising that this approach garners little favor with most states and international lawyers.

Lawfare advocates appear to be waging a public relations campaign, not really making legal arguments, which makes the topic for this Lawfare! conference a puzzling one. (Are we supposed to develop a theory of lawfare? Lawfare rules? Propose amendments to the Geneva Conventions to exclude certain individuals? The purpose is unclear). Lawfare advocates are attempting to portray strong parties (the U.S. and Israeli governments, for example) as “victims” suffering at the hands of weaker par-

³⁸ The Lawfare! brochure is on file with the Case Western Reserve Journal of International Law.

³⁹ See Charles J. Dunlap, Jr., *Does Lawfare Need an Apologia?*, 43 CASE W. RES. J. INT’L L. 121 (2010).

ties, and particularly in the ugly theatre of Middle East politics, hope that employing the term “lawfare” will win them public sympathy. But at what cost? Arguing that the law and those that use the law are the enemy has a dangerous ring to it, and corrodes respect for the rule of law more generally. Lawyers are often a most unpopular class of individuals, and rules of law can annoy as much as protect. Yet a society—even an international society—without law and lawyers is a chaotic and poor place, one even more prone to disorder and violence than the one we inhabit today. Aristotle wrote in the Fourth Century before the birth of Christ that the only stable state is one in which all men are equal before the law. This is true of the international legal system as well. Formulating international legal rules so that they apply equally to both rich and poor, powerful and weak, creates a better ordered community in which peace and stability may not just be the imaginings of a utopist future, but the features of a real present.