

LAWFARE: A WAR WORTH FIGHTING

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Good morning. It is a great honor to be at Case Western Reserve University School of Law to discuss the topic of lawfare. I have titled my speech, “*Lawfare: A War Worth Fighting*,” because I firmly believe that lawfare exists and is used every day by both those seeking to achieve legitimate ends and those seeking to achieve illegitimate ends. Lawfare is a war worth fighting; failing to fight lawfare could seriously jeopardize your client’s interests, and, more importantly, it could jeopardize your ability to help bring an end to a violent conflict or prosecute those responsible for crimes committed during a conflict.

I often remind my clients involved in peace negotiations that the gains achieved on the battlefield and the gains achieved at the negotiating table—as they fight for peace—can in fact be lost in the fine print of peace agreements, U.N. Security Council resolutions, and decisions of international tribunals. Just as it is the job of the national army to fight for the territorial integrity of the state, the job of rebels to fight for legitimate self-determination, and the job of peace delegates to fight for a lasting peace at the table, it is certainly the job of lawyers to engage in both defensive and offensive lawfare to protect the interest of their clients.

Let’s begin though with a definition of lawfare. In my view, “lawfare” is conducted when a party uses or misuses law or legal mechanisms with the intent of securing a political or military advantage over the opposing party. Importantly, the ordinary application of international law and the law of armed conflict—international humanitarian law—does not constitute “lawfare”.

This morning, I would like to point out three similarities between legal mechanisms and processes and warfare that I think support the notion that lawfare is a useful concept. The first is that they often pursue the same objectives; the second is that they have a broadly similar approach for accomplishing these objectives—strategic, operational, and tactical; and the third is that lawfare, as part of a conflict resolution approach, is often times

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fought before the hot conflict, during the hot conflict, and after the hot conflict. In fact, we often find much more of a temporal engagement of lawfare than we do warfare in the process of conflict resolution.

Let us turn to the first similarity—that lawfare and warfare often seek to accomplish the same objectives. The articles of Retired General Charles Dunlap and Professor Wouter Werner in this issue details the notion of Carl von Clausewitz that war is simply a continuation of politics by other means. I think that lawfare plays this role in two situations. First, international law and the use of international mechanisms can also easily be used as a continuation of politics by other means. But possibly more importantly, lawfare is also a continuation of the objectives of warfare by other means.

To investigate this point, let us examine the three primary actors in a peace process—the parties to the negotiation, the mediators, and their lawyers—and what they are trying to accomplish. I have been struck in my work in over two dozen peace negotiations in the last decade and a half at the asymmetrical understanding and utilization of lawfare by the parties. Often times it is the international mediation team that is not only most unprepared to engage in lawfare, but oblivious to the fact that one of the parties is effectively conducting lawfare in the arena prepared by the mediators.¹

The reason for the lack of understanding of the nature of lawfare can be traced back to the trend identified by Professor Wouter that mediators—and often parties—are seduced by the notation that law and legal mechanisms are a neutral force, and that only parties have positions of interest. One of the most detrimental things a mediator or a lawyer can do is to assume that the law is neutral, the legal mechanisms are neutral, and that only the parties have positions.

I have seen a number of cases where mediators and parties in a peace process have thought, “Oh, we’ll take our political disagreement, our disagreement over the use of force, and we’ll just put it to a neutral legal mechanism, or just apply neutral legal principle, okay we can take it and put it in a process outside the peace process.” If the other side is actually fighting a very aggressive campaign of lawfare and if your clients see this as neutral and therefore put it to the side and out of the conflict resolution environment, and into the legal environment, and get back to negotiating the more “serious” issues, they will find that there will be a rear guard action that they will have to fight or if they fail to fight, it will be devastating.

I have also been deeply surprised that mediators often times assume that the parties in a conflict, simply because they have come to Geneva,

¹ PAUL WILLIAMS & MICHAEL SCHARF, *PEACE WITH JUSTICE?: WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA* (Rowman & Littlefield 2002) (explaining “the role of justice in building peace in the former Yugoslavia”).

Doha, Rambouillet, or Paris, and because they have momentarily put aside their weapons, have also put aside their objectives that led them into the battlefield in the first place. In fact, the parties bring these objectives into the peace palace; they leave their guns at the door but they bring in their lawfare fighting capability. They may switch their guns for their pens, but they are still engaged in a very aggressive action to accomplish those same political objectives that led them to the battlefield. Most often, when agreeing to a peace process, the parties have not changed their positions but have simply changed the venue of the battle.

With respect to the second similarity, it is relatively straightforward to draw a parallel to the way in which military strategists approach a conflict. They have a strategy, they have an operational plan, and they have a tactical plan. More importantly, their opponents also have a strategic, operational, and tactical approach to their warfare and lawfare.

A prime example of this multi-tiered approach is the lawfare conducted by the Burmese junta. Interestingly, the junta is essentially a melding of the military and the political establishment.² The Burmese junta has a very sophisticated approach to waging lawfare, both against the Burmese opposition and against the international community. They engage in constant lawfare operations against Aung San Suu Kyi through a string of legal cases against her.³ She has spent most of her time since the 1990 election under house arrest or in detention because of these constant lawfare attacks against her.⁴ The Burmese junta has also waged an aggressive lawfare campaign against the largest political party, the National League for Democracy (NLD), which has the most legitimate claim to political authority in Burma.⁵

The Burmese junta has also undertaken very successful tactical operations against the international community. Most recently, they have uti-

² See generally Ardeth Maung Thawngmung, *Preconditions and Prospects for Democratic Transition in Burma/Myanmar*, 43(3) ASIAN SURVEY 443 (2003) (describing the political development of the military junta).

³ Aung San Suu Kyi, the daughter of assassinated nationalist leader Aung San, is a Burmese opposition politician and Nobel Laureate. THE FAR EAST AND AUSTRALASIA 831–32 (41st ed. 2010). In 1988, the Burmese military launched a coup and instituted the State Law and Order Restoration Council, a harsh ruling body that banned demonstrations, instituted a dusk-to-dawn curfew, and killed over 1,000 demonstrators in the span of a few days. *Id.* at 831. When Suu Kyi responded by organizing a protest march through the country's capital, she was placed under house arrest for allegedly attempting to create disunity within the army and nurturing public hatred for the military. *Id.* The Burmese government has detained her in a similar fashion at various points over the years. *Id.*

⁴ Although Aung San Suu Kyi has occasionally been briefly released from house arrest, the Burmese government has repeatedly extended and renewed her confinement over the past twenty years, even in the face of international censure. See G.A. Res. 64/238, ¶ 2, U.N. Doc. A/RES/64/238 (Mar. 26, 2010) (calling for the “immediate and unconditional release” of Suu Kyi from house arrest).

⁵ See generally THE FAR EAST AND AUSTRALASIA, *supra* note 3.

lized the old Trojan horse approach. Last year, the junta announced the proclamation of a new constitution amid claims they intended to return democracy to Burma.⁶ Nearly all independent commentators agree that the new constitution is simply a legal mechanism that will allow the military leaders to exchange their military uniforms for suits and ties.⁷ Somewhat surprisingly, the Trojan horse was eagerly welcomed by the international community, which praised the junta for these democratic efforts, embarked on a period of political engagement, and signaled a strong intent to back off on economic sanctions.⁸ Only recently has the international community come to realize that this was not in fact a genuine movement toward democracy by the junta, but rather a very successful tactic of lawfare to which they fell victim.⁹ Fortunately now, the international community, as professor Michael Scharf mentions in his introduction, is pushing back with a U.N. Commission of Inquiry into possible war crimes committed by the junta.¹⁰ The international community is also slowly moving back to the realization that the junta is more inclined to respond to sanctions than engagement.

The Burmese government in exile, led by the NLD, has also, until recently, only pursued tactical legal strikes against the regime in Burma, such as the UNOCAL case.¹¹ More recently, however, they have developed a lawfare strategy that includes a full court press, challenging the credentials

⁶ See Seth Mydans, Myanmar Constitution Guidelines Ensure Military Power, N.Y. TIMES, Sept. 4, 2007, at A3, available at http://www.nytimes.com/2007/09/04/world/asia/04-myanmar.html?_r=1 (describing the guidelines for the constitutional convention as a “road map to democracy”).

⁷ *Id.* (“Western nations have criticized the process as an undemocratic show devised to produce an undemocratic constitution.”). See also, *New Myanmar Constitution Gives Military Leading Role*, REUTERS, Feb. 19, 2008, <http://www.reuters.com/article/idUSBK10184120080219> (“The United States says the referendum will be a sham.”).

⁸ Compare Kyaw Myint Naing, *New Light of Myanmar: Year 2010 elections and Responsibilities of Citizens*, BURMANET NEWS (July 29, 2010), <http://www.burmanet.org/news/2010/07/29/new-light-of-myanmar-year-2010-elections-and-responsibilities-of-citizens---kyaw-myint-naing/> (stating that “the constitution and 2010 elections are the very first step to Myanmar’s democratization.”), with Rajaram Panda, *Myanmar’s Return to Democracy Seems a Far Cry*, GLOBAL POLITICIAN (May 6, 2010) <http://www.globalpolitician.com/26396-myanmar-burma> (stating that even though there may have been rejoicing at the prospect of fair and free elections, observers see this new election as a “pseudo-democratic exercise.”).

⁹ See generally, *No Sign Burma’s Coming Election Will be Free, Fair*, ManilaTimes (Aug. 7, 2010), <http://www.manilatimes.net/index.php/component/content/article/83-opinion-columnist/23204-no-sign-burmas-coming-election-will-be-free-fair>; United Kingdom Press Association, *Burmese Elections a Disgrace: Clegg*, Independent (Oct. 5, 2010), <http://www.independent.ie/breaking-news/world-news/burmese-elections-a-disgrace-clegg-236618.html>.

¹⁰ Simon Tisdall, *UN Calls for War Crimes Investigation in Burma*, Guardian (Mar. 11, 2010) <http://www.guardian.co.uk/world/2010/mar/11/un-calls-war-crime-investigation-burma>.

¹¹ *Aung San Suu Kyi Launches Legal Battle Over Elections*, BBC (Oct. 5, 2010), <http://www.bbc.co.uk/news/world-asia-pacific-11474823>.

of the Burmese junta at the United Nations, challenging the legitimacy of the constitution, developing their own constitution, and having their own elections in exile to reconstitute the government in exile.¹²

Lawfare can also be offensive and defensive. The recent case by Serbia against Kosovo in the International Court of Justice (ICJ) on the question of the legitimacy of Kosovo's declaration of independence is a prime example of how a party switched to an offensive lawfare tactic after losing on the battle field.¹³ Initially, Serbia sought to protect its sovereignty and territorial integrity by launching a campaign of ethnic aggression against the people of Kosovo.¹⁴ When this was halted by NATO humanitarian intervention, Serbia first turned to the ICJ to file a case against NATO.¹⁵ When Kosovo succeeded in declaring independence and attaining a degree of international recognition, Serbia launched a legal offensive in the ICJ, claiming the declaration of independence was illegitimate.¹⁶ In this case, just as Serbia lost on the battlefield, it too lost in the world court.¹⁷ This is not always the case, and sometimes offensive legal action can succeed where offensive military action failed.

On the other side of the lawfare battlefield, Kosovo was involved in a very substantial effort at defensive lawfare for a period of time. Kosovo spent nearly ten years building up its resistance against what it knew would be a legal siege following the military siege by Serbia. Kosovo, working under the supervision of the international community, developed standards before status, protected human rights, created a court system, and had nu-

¹² See, e.g., Saw Yan Naing, *NLD Seeking to Negotiate 'Democratic Reforms'*, The Irrawaddy (Oct. 7, 2008), http://www.irrawaddy.com/article.php?art_id=14402.

¹³ Accordance With International Law of the Unilateral Declaration of Independence in Respect of Kosovo, (Serbia v. Kosovo), A/65/195 ¶ 5 (Oct. 10), available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=0>.

¹⁴ *Fleeing Ethnic Albanians Tell of Kosovo Offensive*, N.Y. TIMES, June 3, 1998, <http://www.nytimes.com/1998/06/03/world/fleeing-ethnic-albanians-tell-of-kosovo-offensive.html?scp=3&sq=Kosovo+Serbia+ethnic+violence&st=nyt>. See also Seymour Topping and Barnett R. Rubin, Editorial, *Will Kosovo Explode?* N.Y. TIMES, Mar. 11, 1996, http://www.nytimes.com/1996/03/11/opinion/will-kosovo-explode.html?ref=Seymour_topping.

¹⁵ See Application on the Legality of the Use of Force (Yugoslavia v. Canada), 1999 I.C.J. 106 (Apr. 29), available at <http://www.icj-cij.org/docket/files/106/7157.pdf>.

¹⁶ See Accordance with International Law of the Universal Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, Request for Advisory Opinion, 2008 I.C.J. 409 (Oct. 17), available at <http://www.icj-cij.org/docket/files/141/15642.pdf>; see also Written Statement of the Republic of Serbia in response to Kosovar Independence Advisory Opinion Request (Apr. 17, 2009), <http://www.icj-cij.org/docket/files/141/15642.pdf>.

¹⁷ See Accordance with International Law of the Universal Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, Advisory Opinion, 2010 I.C.J. 141 (July 22), available at <http://www.icj-cij.org/docket/files/141/15987.pdf>.

merous elections that met international standards.¹⁸ These actions were Kosovo's version of siege walls and trenches to defend its own right of self-determination against what it knew would be a subsequent attack by Serbia on the legal battlefield.

Finally, turning to the third point or similarity. Lawfare can be conducted before a conflict in order to avoid it; it can be conducted during the conflict; it is often times conducted during a pause in a conflict; and it is conducted after the conflict.

Let's first touch briefly on the use of lawfare to avoid a conflict. In the context of the brewing dispute between Northern and Southern Sudan over the upcoming referendum on independence for the South, the province of Abyei plays a crucial role.¹⁹ Abyei contains a significant portion of the oil of Sudan, and like the South, it too is entitled to a referendum in January 2011 to determine whether it goes with the North or South.²⁰ Approximately two years ago, Northern and Southern Sudanese forces were beginning to face off in Abyei.²¹ As tensions rose, Northern forces burned Abyei town to the ground.²² At this point, with the guidance and intervention of the international community, the parties agreed to put the question of Abyei's boundaries to the Permanent Court of Arbitration.²³ The arbitration process created an opportunity for the parties to pull back their forces and restart political dialogue. The decision of the arbitration panel, largely in favor of Southern Sudan, also created a degree of certainty about the boundaries,

¹⁸ See Jure Vidmar, Note, *International Legal Responses to Kosovo's Declaration of Independence*, 42 VAND. J. TRANSNAT'L L. 779, 792–793 (2009) (discussing how Kosovo drafted documents which sought to establish self-government, democratic principles and NATO peacekeeping).

¹⁹ See John E. Tanagho & John P. Hermina, *The International Community Responds to Darfur: ICC Prosecution Renews Hope for International Justice*, 6 LOY. U. CHI. INT'L L. REV. 367, 374 (2009) (stating that one of the biggest disagreements in the demarcation of Sudan's North-South boundary line revolves around the oil-rich Abyei region).

²⁰ See *id.* (discussing the conflict between the Sudanese government and the Sudan People's Liberation Movement over the withholding of money necessary for the referendum on the succession of the South from Sudan in 2011).

²¹ See Human Rights Watch, *Sudan: Abandoning Abyei: Destruction and Displacement*, at 16–17, 1–56432–364–1 (July 2008) (discussing the buildup of “tensions” between the southern and northern forces in 2008 and the “outbreak of fighting.”).

²² See *id.* (“[Civilians] who were forced to stay . . . [said] that in the followings days [northern forces] extensively looted and destroyed civilian homes and buildings. By May 17th up to half of the buildings in the town had already been burned to the ground.”).

²³ See *id.* at 27 (discussing how under the “Abyei Roadmap” the parties agreed that if they could not come to a compromise on the Abyei boundaries the dispute would be referred to the International Court of Arbitration); see generally *Gov't. of Sudan v. Sudan People's Liberation Movement/Army*, Perm. Ct. Arb. (July 22, 2009), available at <http://www.pca-cpa.org/upload/files/Abyei%20Final%20Award.pdf>.

which will help the parties to conduct a peaceful referendum—if they chose to do so.²⁴

The current negotiations between the North and the South about how to divide the debts, assets, membership in international organizations, can also be seen in the context of lawfare. Given that there is a serious possibility that the referendum may lead to violence, both parties are engaged in intensive negotiations—mediated by the international community—to resolve as many issues and to take away as many conflict drivers as they can before that vote in January.²⁵ Here, there is a fierce mad rush between the parties to conduct lawfare against one other. The goal of these parties is to get enough of what they want out of these negotiations and to set up legal structures addressing debts, assets, citizenship, natural resources, and treaties, so that they can accomplish their political objectives instead of using force.

Lawfare frequently occurs during a pause in the conflict, or during the negotiations designed to bring an end to the conflict. During negotiations in Doha this summer between the Darfur rebels and the government of Sudan, the government attempted to use the negotiation of a ceasefire to weave in provisions on demobilization and demilitarization that would have significantly handicapped the Darfur rebels in the event hostilities resumed.²⁶ Pitching these provisions as standard legal language for a ceasefire, the government of Sudan duped the mediation team into believing that they were legitimate provisions for the ceasefire.²⁷ Fortunately, these attempts were resisted by the Darfur rebel delegation, as they would have significantly tilted the military balance on the battlefield.²⁸ Otherwise, the result would likely have been such an imbalance that the government of Sudan would have found it difficult to resist the temptation to abandon the talks and return to the battlefield.

During the Dayton negotiations on Bosnia, the government of Serbia undertook a very aggressive approach of sprinkling the Dayton constitution and Dayton peace agreement with legal landmines that would continue

²⁴ *Id.* Markus Böckenförde, *The Abyei Award: Fitting a Diplomatic Square Peg into a Legal Round Hole*, 23 LEIDEN J. OF INT'L L. 555–569 (2010).

²⁵ Böckenförde, *supra* note 24.

²⁶ U.N. Secretary-General, High-Level Meeting on Sudan, Communiqué (Sept. 24, 2010), http://www.un.org/en/peacekeeping/missions/unmis/documents/hlm_communique_sudan.pdf.

²⁷ *See* TED DAGNE, CONGRESSIONAL RESEARCH SERVICE, SUDAN: THE CRISIS IN DARFUR AND STATUS OF THE NORTH-SOUTH PEACE AGREEMENT (Oct. 8, 2010), <http://www.fas.org/sgp/crs/row/RL33574.pdf>; *The Darfur Peace Process: Recipe for a Bad Deal?*, ENOUGH (Apr. 5, 2010), <http://www.enoughproject.org/files/publications/Update%20From%20Doha%20V6.pdf>; U.S. DEPARTMENT OF STATE, *Background Note: Sudan* (June 29, 2010), <http://www.state.gov/r/pa/ei/bgn/5424.htm#political>.

²⁸ *Id.*

to handicap the political development of Bosnia for years to come.²⁹ These agreements were also designed to lay the foundation for the potential secession of the Republic of Srpska from Bosnia.³⁰ The secession of the Republic of Srpska was one of the key political objectives of Serbia at the outset of the war, and was the focus of much of its military strategy.³¹ What was not accomplished on the battlefield was nearly accomplished at Dayton through very clever lawyering with which the mediators were highly complicit.³² To this day, Bosnia still suffers under a constitution and a peace package primarily designed to accomplish the political objectives of Slobodan Milosevic.³³

I hope this brief presentation has been helpful in conveying the point that lawfare is a war worth fighting, and that there are significant perils associated with failing to adequately engage in lawfare before, during and after a hot conflict.

²⁹ See Adriana Camisar, Boris Diechtiareff, Bartol Letica Christine Switzer, *An Analysis of The Dayton Negotiations and Peace Accords* (2005), <http://ocw.tufts.edu/data/12/244825.pdf>; U.S. DEPARTMENT OF STATE, *Summary of Dayton Peace Agreement on Bosnia-Herzegovina* (Nov. 30, 1995), http://www.pbs.org/newshour/bb/bosnia/dayton_peace.html; WILLIAM ZARTMAN, VIKTOR ALEKSANDROVICH KREMENYUK, *PEACE VERSUS JUSTICE: NEGOTIATING FORWARD AND BACKWARD-LOOKING OUTCOMES* (2005).

³⁰ See General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, Dec. 14, 1995, 35 I.L.M. 75.

³¹ WILLIAMS & SCHARF, *supra* note 1.

³² *Id.* at 160–161.

³³ *Id.* at 185–187.