



Law in the Gray Zone: Lawfare and Legal Challenges in Responding to Hybrid Threats:

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Overview

- The Gray Zone – what law applies?
 - Why is this important?
 - What is an armed conflict?
 - State responses to gray zone threats
 - Closing the gaps
 - Lawfare
 - History and definitions
 - Lawfare typology
 - Law and the Operational Environment – why it matters
 - The legalization of warfare – law and the operational environment
 - Law and legitimacy
 - Challenges
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What Law Applies?

- Traditional view – which legal regime applies determined by whether state is at peace or at war (armed conflict), binary approach
 - Status quo is peacetime – domestic law; international law, including human rights law applies
 - During armed conflict – *jus in bello* – IAC/NIAC distinction
 - Hague and Geneva Conventions, other international treaties
 - Customary international law
 - When/how a state transitions to war – *jus ad bellum* – or when a state may use force
 - Chapter VII of the UN Charter – UN Security Council Resolution
 - Self-defense, Article 51 of the UN Charter
 - Determining when a state is in an armed conflict
 - Common Article 2 of the 1949 Geneva Conventions – IAC
 - *Tadic* factors – NIAC
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What Law Applies?

- Why is this important?
 - Application and analysis of law is fact dependent
 - What is taking place? – subject matter jurisdiction
 - Where is it taking place? – territorial jurisdiction
 - Who is involved? – personal jurisdiction
 - How is the individual involved? – culpability
 - The use of surrogates and other gray zone tactics obfuscate the factual situation and make this analysis more difficult.
 - Also creates likelihood of different opinions, allows parties to cite facts most favorable to their position and to advocate for their desired outcome.
 - Actions must be perceived as being lawful in order to gain legitimacy – *lawfare*.
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What is an Armed Conflict?

- International Armed Conflict – Common Article 2 of the Geneva Conventions
 - All cases of declared war or of any other armed conflict which may arise between two or more [states], even if not recognized by one of them
 - Non-international Armed Conflict *Tadic* factors
 - Organized armed group
 - Violence of sufficient duration and intensity
 - *Jus in bello* – law of armed conflict (LOAC) – 4 basic principles
 - Military necessity, distinction, proportionality, unnecessary suffering
 - Challenge – NIAC and armed conflict
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State Responses to Threats

A state may do whatever is not otherwise prohibited in international law – the *Lotus* principle

- Article 2(4) of the UN Charter prohibits the threat or use of force against the territorial integrity or political independence of any state
 - Use of force allowed only in response to an armed attack or when authorized pursuant to Chapter VII of the UN Charter
 - Majority, international view is that a use of force \neq armed attack
 - Nicaragua v. U.S., International Court of Justice
 - The Article 2(4) – Article 51 “gap”
 - So, how may a state respond when it is the victim of a use of force?
 - *Jus extra bellum* – the state’s rights outside of armed conflict, “manifested in a historic pattern of state conduct based on a sense of international legal freedom and pursuant to domestic law and obligations” (Adams)
 - Retorsion, Diplomatic and economic measures, use of domestic legal measures
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Law: Closing the Gaps

- Gray zone – State and non-State actors using gaps created by the evolution of international law in its relationship to international organizations and individuals.
 - Non-State actors pose ever greater security threats to States.
 - State actors use non-State surrogates to mask attribution of their activities.
 - State sovereignty, international human rights law, and other international laws limit a State's ability to take action against threats by non-State actors, particularly outside of armed conflicts.
 - Use of domestic laws – both own as well as those of partner nations – one approach in dealing with this threat.
 - Foreign Agent Registration, Material Support to Terrorism, Committee on Foreign Investment in the U.S. (CFIUS)
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Lawfare: History and Definitions



History of Lawfare

- 1609 - Hugo Grotius and the Dutch East India Company
 - *Mare Liberum* (1609): the seas are common to all, natural law right to freedom of navigation; legal theory to support Dutch efforts to counter Portuguese control of the Indian Ocean.
 - 1996 – PRC President Jiang Zemin
 - “China must be adept at using international law as a weapon.”
 - 1999 – *Unrestricted Warfare* – legal warfare concept – example:
 - “establishing international laws that primarily benefit a certain country.”
 - 2000 – Rivkin and Casey – attempts by international organizations, human rights activists, and states working to transform international law constitute a real and immediate threat to U.S. national interests, but can also be used to advance those interests.
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Lawfare: Definitions

- November 2001 – Charlie Dunlap article in response to Rivkin and Casey
 - The use of law as a weapon of war.
 - 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.
 - “[T]here is disturbing evidence that the rule of law is being hijacked into just another way of fighting (lawfare), to the detriment of humanitarian values as well as the law itself.”
 - Later defined it as “the strategy of using or misusing the law as a substitute for traditional military means to achieve a military objective.”
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Lawfare: Definitions

- While Dunlap's definition is the most widely used, no universal definition.
 - Many view it in purely negative terms.
 - The Lawfare Project (<http://thelawfareproject.org/>)
 - "Lawfare means the use of the law as a weapon of war. It denotes the abuse of Western laws and judicial systems to achieve strategic military or political ends. Lawfare is inherently negative. It is not a good thing. It is the opposite of pursuing justice. It is filing frivolous lawsuits and misusing legal processes to intimidate and frustrate opponents in the theatre of war. Lawfare is the new legal battlefield.
 - 2005 National Defense Strategy: "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."
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Lawfare: Definitions

- 2016 – Orde Kittrie, *Lawfare: Law as a Weapon of War*
 - To qualify as lawfare, must meet two tests:
 - (1) The actor uses law to create the same or similar effects as those traditionally sought from conventional kinetic military action – including impacting the key armed force decision-making and capabilities of the target;
 - (2) One of the actor's motivations is to weaken or destroy an adversary against which the lawfare is being deployed.
 - Analysis focuses on both effect and intent.
 - Neutral connotation.
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Lawfare Typology

- Lawfare typology described by Kittrie in *Lawfare*
 - Type I: Instrumental lawfare – the instrumental use of legal tools to achieve the same or similar effects as those traditionally sought from conventional kinetic military action.
 - Revoking shipping insurance to prevent resupply;
 - Criminal prosecution of organizations funding terrorist groups – Holy Land Foundation;
 - Universal jurisdiction prosecutions for alleged war crimes.
 - Type II: Compliance-leverage disparity lawfare – actions designed to gain advantage from the greater influence that law, typically LOAC, and its processes exerts over an adversary.
 - Conducting attacks from, or placing military objects within, civilian populations knowing that the U.S. will be limited in its response and/or will face criticism for causing civilian casualties.
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Law and the Operational Environment: Why it Matters



Dunlap on Lawfare

- *Lawfare: the strategy of using or misusing law as a substitute for traditional military means to achieve a military objective.* (Dunlap)
 - Lawfare was meant to impress upon military audiences and other non-lawyers that law is more than just a legal and moral imperative; it is a practical and pragmatic imperative intimately associated with mission success.
 - Lawfare “was (and is) an effort to find a resonating “bumper sticker” to help to explain to a very unique client base – military personnel and, especially, their leaders – how and (equally important) why the law needs to be incorporated into their thinking and planning.
 - In military terms, lawfare represents a form of effects-based operations. It was never meant to describe every possible relations between law and warfare.
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Law and the Operational Environment

- The growing breadth and depth of the law applicable to all activity, including military operations, coupled with modern technology and expectations of greater transparency over governmental action, has increased the influence of the law on all governmental activities.
 - The law – international and domestic – is yet another area where States compete against each other, as well as against international organizations, NGOs, and individuals, in pursuit of their national interests.
 - Law can be used to directly achieve objectives as well as to shape and influence the operational environment.
 - States are increasingly pursuing their interests in the “gray zone,” e.g., below the level of armed conflict – potential adversaries are increasingly leveraging the law in pursuit of their national objectives and to limit US operations
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Law and Legitimacy

- “[L]aw has become a mark of legitimacy – and legitimacy has become the currency of power.” (Kennedy, *Of War and Law*)
 - In order to build and maintain international and domestic support, military operations and other government actions must be perceived as being legitimate.
 - Operations/actions are legitimate only when perceived as lawful.
 - Information shapes opinions of individuals, organizations, and governments which, in turn, affects support to and for US operations.
 - The law has not been fully incorporated as an integral component of the narrative/strategic messaging.
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Challenges



Challenges

- The term lawfare has a negative connotation and implies that it is both an unique activity and one limited to armed conflict. It also does not capture the nature or extent of the law and its effects on military operations or other activities in pursuit of national interests.
- We do not currently fully understand, recognize, or integrate legal effects on the pursuit of national and military objectives.
- Need to recognize the role of law in modern society and international relations.
- Use of the law in pursuit of national objectives to date have been *ad hoc*.
- Authorities lay largely outside of DoD, requires interagency planning, coordination, and execution as well as coordination with partner nations, international organizations, and private individuals.



Challenges

- Currently, no existing policy, doctrine, or infrastructure.
- Type III lawfare: the role of law in shaping the operational environment?
- Need to identify the laws and legal processes that could be used in pursuit of national objectives and how those can be used to affect the operational environment – a legal common operating picture – reduce the gray zone “gaps” that are exploited by State and non-State actors.
- Possible test case – Foreign Criminal Law Analytical Capability
 - Leveraging foreign criminal law to defeat threats to U.S. security outside of armed conflict.
 - Giving analysts, planners, and commanders a better understanding of applicable legal authorities/tools.
 - Use against transnational threat networks – terrorists, WMD proliferation networks.



Questions?



Resources/Cites

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