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War Is Too Important to be Left to the Lawyers

By

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A paper submitted to the Faculty of the Naval War College in partial satisfaction of the requirements of the Department of Joint Military Operations.

The contents of this paper reflect my own personal views are not necessarily endorsed by the Naval War College or the Department of the Navy.

Signature: _____

29 October 2008

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Abstract

This paper examines the rising phenomenon of law as a weapon capable of producing military advantages or disadvantages on the 21st century battlefield. Specifically, it explores how legal differences between the U.S. and coalition partners have adversely impacted the theater commander's military operations in Kosovo during ALLIED FORCE and in Iraq and Afghanistan during counter-insurgency operations. Finally, the paper offers suggestions for who should be responsible for improving legal interoperability, where they should engage, and what tools they currently have available for identifying, minimizing, or at least ameliorating, legal differences between U.S. and coalition partners in the future.

INTRODUCTION

At the turn of the last century, when military technology was fused with industrial production on a massive scale, French Prime Minister George Clemenceau reportedly said, “War is too important to be left to the Generals.”¹ 50 years later when the sheer number and destructive power of nuclear weapons seemed incomprehensible, fictional character Colonel Jack Ripper, USAF, from the dark comedy Dr. Strangelove, said “War is too important to be left to the politicians.”² This paper will propose another shift in thinking; that the nexus of globalization, the blurring of humanitarian and human rights law, and the nearly instantaneous flow of information from one corner of the globe to the other has caused War too become too important to be left to the lawyers.³

This essay will explore three themes for consideration: 1) Loosely defined, law is becoming a military capability; 2) As a military capability, U.S. law must be interoperable with that of our allies and potential coalition partners; and finally, 3) As the tasked commander for advancing interoperability, Geographic Combatant Commanders have a vested interest and a responsibility for improving legal interoperability between the United States and countries within his Area of Responsibility (AOR).

BACKGROUND

Law is a Weapon

The law is becoming a weapon on the 21st century battlefield. The idea that international, human rights, and domestic law can be used as a military capability is a common theme among military authors, international lawyers, academic scholars, U.S.

national policy, as well as, non-western military theorists. It has become such a widely accepted concept that it has earned its own terminology: Lawfare.⁴

As one of the first to write about this growing phenomenon, Major General Charles J. Dunlap, United States Air Force, defined lawfare as “a method of warfare where law is used as a means of realizing military objectives.”⁵ In his ground breaking article “Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts,” then-Colonel Dunlap said that instead of using international law to limit the destructiveness of warfare, as had normally been the case throughout history, lawfare uses international law to gain military advantage and “has a firm basis in Clausewitzian analysis.”⁶

A former Army officer, with combat time in Iraq, also believes lawfare is best understood within a Clausewitzian construct. Philip Carter, in his article “Legal Combat: Are Enemies Waging War In Our Courts” argues that lawfare “represents one of the most interesting recent developments in military theory,” and is best understood by turning Karl von Clausewitz’s definition of war, the continuation of politics by other means, on its head.⁷ Carter asks his readers to think of lawfare as the continuation of warfare by legal means. In other words, instead of using war to impose your political will on the enemy, lawfare, is using law to impose your military will on the enemy.⁸

Taking lawfare from the theoretical to the practical, the Council on Foreign Relations described two possible lawfare strategies.⁹ In their first example, a strategy they term lawfare decapitation, a belligerent encourages civilians to file human rights complaints against an enemy’s military leaders in a court of law.¹⁰ Then, regardless of their validity, as the enemy commanders use their time and money to fight the groundless lawsuits they are mentally and or physically removed from the battlefield for potentially weeks or months at a

time.¹¹ In their second example, arguably being played out in the towns and villages of Afghanistan, an enemy conceals weaponry or themselves among civilians in order to encourage attacks that can then be used as propaganda against the attacker in their attempt to gain legitimacy and sympathy at home and abroad.¹² As the Council points out, these types of lawfare strategies can have a significant effect, “making commanders reticent to attack targets and dragging out the conflict.”¹³

The 2005 National Defense Strategy (NDS) also acknowledges the existence and potency of lawfare. In describing America’s military vulnerabilities the NDS states: “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.”¹⁴ However, if U.S. policy only considers lawfare a vulnerability and weapon of the weak and amoral, visionary Chinese military theorists and the People’s Republic of China view it as just another weapon in the state’s military arsenal.¹⁵

As early as 1999, Chinese military theorists recognized the potential of lawfare as a military capability. In the publicized treatise, Unrestricted Warfare, Qiao Liang and Wang Xiangsue argued that using law as a military capability was comparable to using Psychological Warfare and Media Warfare to gain military advantage.¹⁶ This recognition made it into official Chinese policy and doctrine when in 2003 the Chinese Communist Party Central Committee and the Chinese Military Community (the two highest-level decision making bodies in China) both approved the concept of “Three Warfares;” the concept that Psychological, Media, and Legal warfare must be developed for use with other military capabilities.¹⁷

The Importance of Interoperability

In today's world of coalition warfare, the importance of military interoperability has become almost axiomatic. The idea that military capabilities of one coalition partners should be fused, synchronized and work seamlessly with those of other coalition members across a wide spectrum of military operations is prominent in the National Defense Strategy (NDS), the National Military Strategy (NMS) and Joint Doctrine.

Under the subtitle Strengthening Alliance and Partnership, the NDS states that the U.S. must “work with longstanding friends and allies to transform their [military] capabilities” and that the key to transformation and interoperability is “training, education and where appropriate, the transfer of defense articles to build partner capacity.”¹⁸ The NMS is more direct when it states that the Department of Defense's future warfighting vision, Full Spectrum Dominance (FSD), “recognizes the importance of military interoperability with allies and other partners and the criticality of transforming in stride.”¹⁹

Similarly, Joint Publication 3-16, Multinational Operations, is almost entirely dedicated to the concept and importance of interoperability. As one of only sixty-five Joint Publications in the Joint Staff's doctrine library, it mentions interoperability forty-four times in 121 pages. It defines interoperability succinctly as “the ability to operate in synergy in the execution of assigned tasks,” and then states that “interoperability is an essential requirement for multinational operations.”²⁰ It goes on to explain that interoperability is more than just technology, it applies to doctrine; tactics techniques and procedures; communications; and logistics.²¹ Interestingly, JP 3-16 does not mention legal interoperability specifically, even though that has been a serious point of friction between the U.S. and coalition partners in recent conflicts.

Kosovo: Operations ALLIED FORCE

NATO's Operation ALLIED FORCE (OAF) is probably the most documented example of interoperability difficulties impacting a coalition's capability to synchronize and operate in synergy. A much publicized after-action report from RAND stated that even after "fifty years of standardization efforts, NATO forces still exhibited significant interoperability issues."²² For example, differences between the nineteen coalition members over what constituted a legal and legitimate target impacted unity of effort, lengthened NATO's military decision cycle, and adversely affected the efficiency and morale of tactical-level units.²³

Unity of effort was extremely difficult during OAF because lawyers, and in some cases national leaders, reviewed every target NATO struck to make sure its destruction was in accordance with that nation's law and policy.²⁴ French President Jacques Chirac told reporters after the conflict that he curbed all targets in the Yugoslav Republic of Montenegro and had 100% veto power over all NATO targets.²⁵ Similarly, lawyers in Britain reviewed every target their forces hit for acceptability even after they had been approved by NATO lawyers and national representatives at the Combined Air Operations Center.²⁶ And finally, Defense Secretary Cohen told reporters after the war that President Clinton vetted all NATO targets and vetoed several during the operation.²⁷ It's not hard to imagine that the list of approved targets that came out of this multi-level and multi-national approval process were disjointed and lacked synergy. In the Christian Science Monitor, Francine Kiefer opined that NATO's air campaign was "so watered down by political consideration" that it potentially lacked the level of effort required to win."²⁸

NATO's decision cycle was also lengthened by legal disagreements and misunderstandings over what constituted a legal target.²⁹ Days after the war ended, NATO's Air Commander, Lieutenant General Michael Short said, "I felt that on the first night, the power should have gone off, and major bridges around Belgrade should have gone into the Danube, and the water should be cut off."³⁰ However, legal disagreements between the NATO members caused day, week, and sometimes even month-long delays between target selection and target approval at the national level.³¹ Even though Lieutenant General Short's boss, General Wesley Clark, had been asking for permission to hit electricity, bridges and other controversial targets for months, it took nine days after the war started to get permission to strike bridges over the Danube and an additional 27 days to get permission to strike electricity and communication targets in Belgrade.³² Lieutenant General Short lamented after the war, "We need to understand going in the limitations that our coalition partners will place upon themselves and upon us...there are nations that do not share with us a definition of what is a valid military target, and we need to know that up front."³³ Colonel Michael Kelly was less diplomatic when he attributed Lieutenant General Short's comments to "Americans increasingly chafed at the legal restrictions that other [NATO] members considered applicable" to determining a target's validity.³⁴

These legal interoperability difficulties also impacted efficiency and morale at the tactical level. Since almost every target was reviewed and approved at the national-political level, any failure or mistake associated with striking the target was also scrutinized and analyzed in minute detail.³⁵ Dana Priest, who wrote extensively on the conflict for the *Washington Post*, observed that "Colonels who were supposed to be directing daily missions found themselves reconstructing cockpit video and audio tapes, looking for errors in

judgment.”³⁶ She went on to note that NATO pilots had become “demoralized” because of the “nonstop demands for detailed information about each mishap” and that this atmosphere was the reason for a “battle cry” she saw scrolled across a white easel board in a NATO headquarters that read “We Are The Good Guys.”³⁷

Legal interoperability difficulties can result from differences in domestic law, treaty obligations, or interpretations of treaty obligations; NATO’s difficulties during OAF exclusively centered on differing interpretations of common treaty obligations.³⁸ More specifically, they centered on differing interpretations of Article 52 (2) of Protocol I of the Geneva Convention. Article 52 (2) states:

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military of advantage.³⁹

Most European NATO countries, such as the United Kingdom, Germany, and France, draw a distinct line between military and civilian targets and take a more restrictive view of the words “effective contribution to military action” and “offers a definite military advantage” and contend that targets that have both a civilian and military use are seldom, if ever, a legal target.⁴⁰ The U.S., on the other hand, takes a more liberal view of the same ten words and believes that so called dual-use targets, targets that have both a civilian and military use, are legal, as long as their destruction meets other Geneva Convention restrictions.⁴¹ In the end, as the RAND after-action report summarized, these legal, as well as other interoperability issues, “caused confusion, probably made the operation less effective than it could have been, and possibly delayed victory.”⁴²

Iraq and Afghanistan: Counter-insurgency

A more recent but perhaps less publicized example of legal disagreements adversely affecting military operations is counter-insurgency operations currently going on in Iraq and Afghanistan. In both operations, disagreements over what constitute legal detainee operations is impacting the operational-level commander's ability to standardize and synchronize population control and intelligence gathering operations, two cornerstones of any successful counter-insurgency campaign.⁴³

In Iraq, for example, whether an individual is detained, held, or questioned for intelligence value is haphazard and depends more on the nationality of the unit involved than it does the operational or tactical imperative of the situation.⁴⁴ In their legal manual, *Forged in Fire: Legal Lessons Learned During Military Operations 1994-2006*, the Center for Law and Military Operations (CLAMO), points out that after 2003 in Iraq, "United States forces would readily detain individuals whereas the UK forces would detain individuals only if really necessary and they would try to transfer them to the Iraqi Police service (IPS). The Italian approach mirrored the British while the Dutch stopped detaining people after the Iraqi Interim Government surprisingly reintroduced the death penalty."⁴⁵

In Afghanistan the situation is similar but compounded by the sheer number of different coalition members involved. The recent and contrasting experiences of Danish and Canadian soldiers in Afghanistan highlights the confusion and disagreement surrounding detainee operations. In 2006, a case was filed in a Danish court against Danish Forces operating in Afghanistan on the grounds that turning suspected Afghan insurgents over to U.S. forces, even though Danish forces had no detention facility of their own, violated the native Afghan's human rights under Danish law.⁴⁶ Conversely, in 2007 another case was

filed, this time in a Canadian court of law, against Canadian Forces operating in Afghanistan on the grounds that turning Afghan insurgents over to Afghan security forces in their own country violated their human rights under Canadian law.⁴⁷

This catch-22 situation for NATO forces has had a chilling effect on detainee operations throughout the country. The *Washington Post* reported that this legal non-man's land had caused many NATO countries to essentially "opt out of the detainee business" and forfeit "the intelligence benefits that can come with real-time interrogations."⁴⁸ A top Canadian military commander took this view one step further when he stated in a sworn affidavit that Canadian troops would have to stop fighting and pull out of Afghanistan if they were not permitted to hold or transfer detainees. Brigadier-General Andre Deschamps told his government, "insurgents could attack us with impunity knowing that if they fail to win an engagement they would simply have to surrender and wait for release to resume operations."⁴⁹

Unlike OAF, legal interoperability difficulties in Iraq and Afghanistan are not centered on a disagreement over the interpretation of a common treaty, but are centered on a disagreement over which law applies.⁵⁰ U.S. policy still categorizes both operations as armed conflicts, and hence ruled by applicable Law of Armed Conflict.⁵¹ Most NATO and coalition partners, on the other hand, categorize both as security and stabilization operations which they argue puts operations under host nation or their own domestic and international human rights law.⁵² This later viewpoint was officially imposed on U.K. forces (and by implication all European forces) in June 2007 when the House of Lords ruled that the European Convention on Human Rights, and not the Geneva Convention (LOAC), governed U.K. operations in Iraq, and by implication Afghanistan.⁵³ The impact these legal differences

have on military effectiveness was highlighted by the Danish Ministry of Foreign Affairs when their legal advisor stated that this confusion causes, “soldiers to either hesitate or make mistakes. Both seriously hamper the efficiency of our military efforts. And thus may prevent us from reaching the goals that we set out to reach.”⁵⁴

DISCUSSION

However, as the adage goes, admitting that the U.S. has a legal interoperability problem with its allies and coalition partners is only half of the solution. The other half is deciding who is responsible for improving it, where do they engage and what tools do they have available?

Who is Responsible?

According to the Secretary of Defense’s Guidance for Employment of the Forces (GEF), Geographic Combatant Commander’s (GCC) are responsible for interoperability between U.S. and partner forces.⁵⁵ Specifically, the GEF directs GCC to write and submit for approval an overarching theater campaign plan that “focuses on the command’s steady-state activities, which include ongoing operations, security cooperation and other shaping or preventive activities”⁵⁶ Within this overarching campaign plan, the GEF directs the GCCs to write a theater cooperation plan. The theater cooperation plan details who, how, when, and where the GCC will engage with other nation’s militaries and for what objectives.⁵⁷ Finally, the GEF breaks that security cooperation plan into eight security cooperation priorities, one of which is military interoperability.⁵⁸ The GEF states that interoperability “focuses on developing command and control, operational and technical capabilities;

doctrine; and tactics, techniques and procedures with partner nations so that the United States and partner forces can operate effectively and interchangeably in designated combined operations.”⁵⁹ Even though legal interoperability isn’t specifically included, it clearly seems to fall within the GEF’s intent and guidance.

Where to Engage:

The next step is deciding where to direct the GCC’s effort. This is obviously AOR-unique, but there are probably two questions that GCCs and their staff could use to point them in the right direction. First, where are laws formed within the AOR? Domestic courts are an obvious answer, but depending on the region, there may be one or more courts within the AOR which have jurisdiction over multiple counties. The European Court of Human Rights, which has law making authority over the 47 member countries of the European Council, is an example of this kind of legal forum, and for example, would be a very likely point of engagement for the European Command Commander and his staff.⁶⁰

The second question would be where are laws interpreted with the AOR? Again, there are some obvious answers like military staffs and domestic and international courts, but depending on the region there may be one or more non-governmental or international organizations that interpret law and have considerable influence on the legal proceedings of courts and governments within an AOR. Examples of these types of forums or organizations might be the International Committee of the Red Cross (ICRC), Human Rights Watch or Amnesty International. Even though these organizations can’t formulate or “legally” interpret law, they do have significant influence over how lawyers, courts, and governments interpret

international law and again, could be very likely points of engagements for GCCs and their staffs.

How to Engage:

Deciding how to engage these institutions is the next step in improving legal interoperability. Besides the traditional methods of improving military interoperability, GCC's and their staff might have a few other options that are unique to legal interoperability.

Multinational exercises are probably the most traditional military method for improving interoperability that could be modified to improve legal interoperability. GCCs and their staffs could organize and execute multinational exercises that seek to uncover new, or work around known, legal disagreements between participants. The design of the exercise could require all participants to operate from a common set of Rules of Engagement (ROE). This would require each participating nation to become familiar with the laws and legal interpretations of coalition partners. Additionally, the exercise could be executed with senior coalition officers in key operational-level billets. Since senior officers usually have a firm grasp on their nation's laws and policy their decisions during an exercise could uncover or highlight possible differences and teach the participants how to operate effectively within these differences.⁶¹

Training, education programs, and exchanges could also improve legal interoperability. Instead of an exercise, where coalition partners come together for only a few days, training, education programs and exchanges offer a long term immersion in a coalition member's military and civilian culture. CLAMO recognized the value of these longer term methods when they said "coalition officers need a basic awareness of each others' history,

constitution, force levels and structure, as well as cultural differences and need to anticipate how these factors will impact decisions, interpretation and conduct.”⁶² These longer term exchanges have the added benefit of not only discovering legal differences, but also forging the long term interpersonal relationships that can minimize or even overcome them in future operations.

Another traditional method for improving interoperability is hosting or attending workshops, conferences, seminars and symposiums. Unlike exercises or longer term exchanges, these forums can be highly controlled, finitely focused and one of the best methods for engaging civilian legal expertise. For example, a GCC could host a legal workshop for countries within the AOR that have signed the Ottawa Treaty banning the use of landmines in order to gauge how each country interpretation of that treaty might limit coalition operations. Another example might be a GCC pursuing an invitation for his Judge Advocates to attend or even speak at a civilian Humanitarian Law symposium. Both examples would allow civilian and military interaction, increase the probably of discovering potential problem areas before a real-world operation, and perhaps, even influence the legal opinions of prominent legal scholars within the AOR.

A less traditional method of improving legal interoperability, but one with a long-standing legal tradition, would be GCCs providing legal support to either a court of law, or to one or more parties before a court of law within his AOR. If a court within a GCC’s AOR was hearing a case whose outcome could adversely impact legal interoperability between U.S. forces and the forces under that court’s jurisdiction, a GCC has several options for influencing that court’s decision. The most common option would be submitting an *amicus curiae* brief to the court; which translated from Latin means “friend of court” brief.⁶³ *Amicus*

curiae briefs are submitted to a court by interested third parties in the hope of influencing the court's decision. The court is not obliged to use the briefings in making its decision, but it is an accepted and time honored method for parties not directly involved in a dispute to influence a court when they believe they have a vested interest in the court's decision.⁶⁴

Legal support could also take the form of legal services, expert witnesses, evidence collection or logistical support. A simple example of this might start with a legal dispute before the European Court of Human Right where soldiers from country X, operating in country Y, are accused of human right abuses by civilians from country Y. If the GCC believed it was in the best interest of legal interoperability for the European Court of Human Rights to rule in favor of the soldiers from country X he could provide them legal assistance in a number of different ways. GCC could possibly provide or procure the soldiers legal council from either his own staff or from the private sector. Second, through his military connections in country Y, the GCC could possibly facilitate the collection of evidence that supports the soldiers' case. Third, perhaps the GCC could provide expert witnesses, again, from either his own staff or from the civilian sector. Or finally, the GCC could possibly provide logistical support to litigators, witnesses, or anybody else whose movement would facilitate the soldiers' defense.

Coordinating these legal support activities with other U.S. governmental agencies would improve effectiveness and maximize unity of effort. Even though GCCs are best positioned to determine when legal disputes are relevant to military interoperability, other U.S. agencies, such as the Department of State and Justice, have a much longer history of involvement in foreign domestic and international courts. GCCs and their staff could

leverage this legal expertise and experience by coordinating and consulting with these other governmental agencies during any legal support processes.

Counterargument:

Even if one accepts that GCC's have a responsibility to improve legal interoperability, an argument can be made that any branch of the U.S. government getting involved in the legal processes of foreign and international courts, is at best inappropriate and at worst unethical. But that is simply not the case in today's international legal system. If any government or non-governmental organization believes a domestic or international court decision can adversely impact their interests they have a recognized right to get involved in that judicial process. A recent case before the U.S. Supreme Court is a prime example of a national court accepting third party legal support. Even though the legal issue before the court was state's rights; foreign governments, international organizations, non-governmental organizations, and even interested individuals all provided legal support to one or both sides of the case.⁶⁵

The original case involved a Mexican national that was convicted in a Texas state court for the gang rape and murder of two teenage girls in Houston, Texas.⁶⁶ The Mexican national appealed the conviction on the grounds that he was not given the right to contact his consulate at the time of his arrest as guaranteed by article 36 of the Vienna Convention, of which the United State, but not the state of Texas, was a party.⁶⁷ However, once the case arrived at the US Supreme Court it was no longer over a Mexican national's right to contact his consulate, it was whether or not a treaty signed by the United States government applied to the state of Texas.⁶⁸ It might seem like a nuance, but the case before the Supreme Court

was over the relative power of the federal government with respect to state government, not whether the Mexican national had been denied his right to contact his consulate.⁶⁹ Officially, and in legal language, the issue before the court was “Federalism and Federal Preemption of State Jurisdiction.”⁷⁰

However, even though the case was between the U.S. federal government and the state government of Texas, fourteen foreign governmental organizations, including the European Union, six foreign and domestic non-governmental organizations, and several interested third parties all provided legal support in the form of *amicus curiae* briefs to one side of the case or the other.⁷¹ Whether the briefs impacted the court’s decision will probably never be known, but the Court accepted every one of the briefs for consideration before giving their final ruling. For our purposes how the court ruled is less important than the fact that the U.S. Supreme Court readily accepted legal support from third parties including foreign governments.

International courts also have a long tradition of accepting third party legal support. In a recent case involving the government of Bosnia-Herzegovina and several Bosnian nationals held at the U.S. military prison at Guantanamo Bay, the European Court of Human Rights accepted a *amicus curiae* brief from a New York based humanitarian rights group, even though the legal issue before the court involved the European Treaty on Human Rights, of which the U.S. is not a party.⁷² The U.N. High Commissioner for Human Rights recognized this long-standing legal tradition when she praised the ECHR for their dramatic expansion in accepting third-party legal support “which put before the Court broader views and other legal approaches.”⁷³ In other words, providing or accepting third-party legal support is a neither inappropriate nor unethical.

CONCLUSION

The global trends that have given international and domestic law the status of a military capability are not going away. Lawfare will increasingly be used by weaker state and non-state actors to gain asymmetric military advantage over their stronger adversaries. As the perceived global hegemon, America and its allies and coalition partners are the most likely targets of lawfare centered strategies and must take a proactive approach to minimizing vulnerabilities to these strategies. This proactive approach should be an integral part of Geographic Combatant Commander's Theater Campaign Plan and must leverage the actions GCCs already take to improve other areas of military interoperability such as doctrine, training, technology, and command and control to name just a few. In today's world, lawfare must be treated as a military capability and not ignored or treated as the sole purview of scholars, judges and lawyers.

END NOTES

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