

Lawfare During Information Operations

Law is a weapon of war
by Capt Charles J. Demmer

As the Marine Corps rapidly develops information operations (IO) capabilities, leaders at all levels require the means to compete in the information environment. “Lawfare,” the use of law as a weapon in war, presents both an emergent risk and an opportunity in this endeavor. MajGen Charles J. Dunlap, USAF (Ret) defined lawfare as “the strategy of using—or misusing—law as a substitute for traditional military means to achieve a warfighting objective.”¹ As a synchronized component of IO, lawfare provides a powerful means for the Marine Corps to achieve effects in the information environment. This article will explore dynamics of “gray zone” conflict which necessitate the development of lawfare capabilities, how lawfare could be employed as a component of IO, and the value of utilizing judge advocates as IO practitioners.

Gray zone conflict occurs between traditional notions of war and peace and requires the integrated employment of all elements of national power.² The inherent ambiguity, coupled with an increasingly close interaction between military and non-military organizations, necessitates the development of new methods to achieve effects through means short of force. The military dimension of gray zone conflict occurs concurrently with routine civilian life, in a paradigm described as “war amongst the people,” where the ability to navigate societal circumstances is vital to mission accomplishment.³ Research demonstrates that civilian

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populations globally are affected by megatrends driving most aspects of future life ... rapid population growth, accelerating urbanization, littoralization (the tendency for things to cluster on coastlines), and increasing connect- edness.⁴

We can thus anticipate that future Marine Corps operations will take place in densely populated and resource constrained urban littorals, where

small numbers of troops will be vastly overshadowed by a highly networked local population. Our success in such environments is contingent on the ability to identify and affect the complex decision-making processes of an inter-connected population.

IO allows the Marine Corps to achieve measurable effects through non-kinetic means, providing immense utility in gray zone conflict. *MCWP 3-32* presently defines IO as

the integration, coordination, and synchronization of all actions taken in the information environment to affect a relevant decision maker in order to create an operational advantage for the commander.⁵



We must integrate all elements of national power. (Photo by Cpl Benjamin Larsen.)

The information environment consists of “the aggregate of individuals, organizations, and systems that collect, process, disseminate, or act on information.”⁶ Effects in the information environment are achieved through the employment of information related capabilities (IRCs), expansively defined as “any element used to intentionally and directly impact the content and/or flow of information.”⁷ This broad definition of IRC allows for creativity on the part of IO planners, who may explore novel means to affect decision making. Authorities and responsibilities for IO reside at the strategic level and are delegated through the combatant commands so as to synchronize efforts and prevent information fratricide. IO are often associated with military deception, psychological operations, or communications strategy; however, capabilities as diverse as physical attack and operations security may be considered IRCs when employed to affect decision-making processes. As the Marine Corps seeks to rapidly expand its ability to conduct IO, it is worth exploring how all capabilities organic to the Marine Corps may contribute.

Lawfare as an Information Related Capability

Considering lawfare an IRC and utilizing judge advocates as IO practitioners would expand the range of options available for the Marine Corps to strike adversary legitimacy, induce internal friction, and disrupt operations. For an action to be considered lawfare, it must meet two tests:

- the actor uses the law to create the same or similar effects as those traditionally sought from conventional military action—including impacting the key armed force decision making and capabilities of the target; and
- one of the actor’s motivations is to weaken or destroy an adversary against which the lawfare is being deployed.⁸ Employed in this capacity, lawfare would rightly be considered an IRC as it influences decision-making processes in order to realize an operational advantage for the commander.

Both pacing-threat nations and non-state actors have recognized the poten-

tial for lawfare to affect the information environment, and actively leverage the law as a means to gain advantage in conflict. The People’s Republic of China (PRC), for instance, formally recognizes *falü zhan*, or “legal warfare,” among its Three Warfares doctrine.⁹ A wide variety of non-state armed groups likewise openly acknowledge their use of lawfare to gain asymmetric advantage over more powerful opponents.¹⁰ The increased prevalence of lawfare as a dimension of gray zone conflict requires the detailed attention of military planners and an enhanced capability for the Marine Corps to compete in this contested space.

Lawfare generally takes two forms:

- instrumental lawfare, which is the use of legal mechanisms to achieve effects typically sought through conventional military action, and
- “compliance leverage disparity” lawfare, which seeks to gain an advantage through the greater influence that a given law holds over an adversary.¹¹

Both forms are currently employed by state and non-state actors, and either form could be readily integrated with IO.

Instrumental lawfare. Parallel examples of Israeli and British instrumental lawfare against adversary maritime shipping demonstrate how lawfare can be employed to achieve effects sought through conventional operations. In 2010, Israel faced severe international criticism following a controversial raid against a flotilla bound for Gaza, prompting Israeli attorneys to seek non-kinetic alternatives to prevent a repeat of those events when a similar flotilla formed in 2011. Through legal action, the Israeli attorneys were able to revoke maritime insurance policies and commercial satellite communication contracts required for the ships to set sail, preventing the flotilla from leaving port. The British government undertook similar actions in 2012, coordinating with the maritime insurance provider Standard Club to prevent the shipment of helicopter gunships from Russia to Syria.¹² These examples demonstrate how instrumental lawfare can be used as an alternative to conventional military action, such as joint interdiction

operations in the maritime domain, to divert, disrupt, or delay access to both state and non-state actors. Marine Corps commanders would benefit from such options to counter malign gray zone activity in contested littorals.

Compliance leverage disparity lawfare.

Compliance leverage disparity lawfare is a key enabler of gray zone conflict. Insurgents positioning military equipment near civilian objects to complicate our targeting process is a classic example of compliance leverage disparity. Both positioning military assets near civilian objects and causing collateral damage to such objects in excess of the military advantage gained are violations of the Law of Armed Conflict. Insurgents employ this technique because they believe the United States will suffer greater consequences for causing collateral damage, even when a strike is lawful, than the insurgents would face for exploiting civilian property. However, compliance leverage disparity lawfare is not limited to non-state actors. For instance, the PRC routinely enters into international agreements to bind its competitors and then surreptitiously violates those agreements to advance its strategic interest. The PRC calculates that competitors will be comparatively less willing to violate such agreements, and thus deliberately enters into agreements as a means of obtaining leverage. The People’s Liberation Army international law handbook goes so far as to instruct officers to abide by laws beneficial to China while evading those detrimental to Chinese interests.¹³ Compliance leverage disparity is notoriously difficult to counteract, and a persistent area of concern in the gray zone. While it would be averse to United States strategic policy to employ compliance leverage disparity techniques against international laws and norms, the Marine Corps could employ compliance leverage disparity techniques to exploit legal constraints and restraints which adversaries place on their own operations.

Potential Lawfare Targets

Gray zone conflict presents a target rich environment for lawfare techniques. National governments and their unrecognized proxies, independent non-

state groups, and individual actors all participate in gray zone activities. While their means and motives may vary, all these actors are susceptible to lawfare action. Lawfare provides a means to deter participation in gray zone conflict, deny critical requirements, and defend U.S. interests from adversary lawfare action.

Nation States. Adversary governments present lucrative targets for lawfare, especially when our objective is to counteract the malign activities frequently employed in gray zone conflict. Highlighting malign activities, for instance when governments violate international law through unrecognized proxies, provides a powerful means to undermine adversary legitimacy. Coordinated interagency lawfare can further counteract malign activities through targeted financial or criminal penalties. Famously, U.S. attorneys employed lawfare to seize over \$2 billion in Iranian assets to compensate victims of the 1983 bombing of the Marine barracks in Beirut.¹⁴ More recently, Russia suffered robust international sanctions following the use of gray zone techniques to seize Crimea.¹⁵ Sanctions enable follow-on lawfare actions, including asset seizure or arrest, as was the case when Canada arrested a prominent Chinese executive on behalf of the U.S. Government following alleged violations of the Iran nuclear sanctions.¹⁶ While other Government agencies retain primary responsibility for such actions, whole-of-government lawfare expands our ability to shape adversary decision making during IO.

Nonstate Armed Groups and Violent Extremist Organizations. Lawfare techniques can also be utilized to attack the legitimacy and degrade the decision-making processes of nonstate armed groups. When governments fail to provide adequate social structure for a population, the population will turn to alternative systems to resolve disputes. Violent extremist organizations (VEOs) thrive in such environments where local support more often derives from these groups' ability to provide social structure and services rather than a belief in their ideology. Well known VEOs such as Hezbollah and the Taliban initially gained popularity by providing dispute resolution systems perceived as more

just than the local government. Their popular support is thus predicated on a perceived sense of legitimacy. In addition to militant activities, Hezbollah now participates in elected government, civil administration, law enforcement, dispute resolution, healthcare, education, construction, and social activities. Likewise, "the Taliban justice system ... attracts people with the promise of fair dispute resolution, just and enforceable mediation, and the prevention and punishment of crime and corruption."¹⁷ Local populations typically find VEO justice systems to be a harsh but preferable alternative to anarchy or inept governance, resulting in the parallel operation of licit and illicit governing

often do not amount to the types of traditional military activities which could be considered "directly participating in hostilities" for the purposes of kinetic targeting. Offensive lawfare provides an alternate means to deter individual actors or deny critical requirements for their efforts, and defensive lawfare will be vital to outmaneuver adversary lawfare actions against us.

Judge Advocates as IO Practitioners

While lawfare is an effective tool in its own right, IO require the synchronized employment of multiple IRCs to achieve mutually reinforcing or amplifying effects. Lawfare can be readily integrated into the broader IO

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structures targetable through lawfare enabled IO. Highlighting VEO corruption can undermine local confidence in VEOs, deplete resources available for militant activities, and encourage local support for preferable alternatives.

Private organizations and individual actors. Lawfare can counteract the malign use of civilian assets and activities during gray zone conflict. While significant attention has been paid to the appropriation of civilian technology for military purposes, administrative action, including legal action, will likewise be used to impede our mission accomplishment:

Because of heavier urbanization and greater connectedness—[adversaries] will be increasingly able to draw on the technical skills of urban populations whose access to and familiarity with advanced technologies greatly enhance their military potential.¹⁸

Such technologies include legal research tools and platforms to fabricate evidence, which technically skilled individuals could use to wage lawfare or IO against the United States. These contributions to the gray zone effort, however,

concept of support, and appropriately trained Judge Advocates can utilize their particular skills to assist other IO practitioners in product development. Judge advocates can apply traditional legal skills to IO planning, enable lawfare integration with other IRCs, and assist IO planners navigate the complex approval processes required for IRC employment.

A variety of legal skills are directly applicable to IO. For example, inform and influence operations are analogous to courtroom advocacy, where the abilities to weigh evidence, establish credibility, and make compelling arguments are essential to success. Judge Advocates are also trained to analyze the mechanics of governance, and to identify the bureaucratic or administrative processes which drive decision making. This skill is valuable during target development, where legal insights can help isolate the "how" and "why" of organizational decision making. Judge advocates may identify additional vulnerabilities during target development to cue other IRCs or interagency lawfare efforts.

Judge Advocates can also aid IO planners integrate legal considerations to maximize the effects of other IRCs. For instance, lawfare could be combined with communications strategy and military information support operations to systematically degrade legitimacy and support for adversary organizations. As previously discussed, many activities in the gray zone violate international laws or norms, yet many organizations competing in the gray zone require the perception of legitimacy to enable their operations. Judge Advocates can assist other IO practitioners highlight adversary corruption, noncompliance with internal or international standards, or specific consequences for engaging in illicit activities. Forcing adversaries to account for these considerations will induce organizational infighting and degrade effectiveness. Such efforts would be particularly effective when coupled with actions to publicize the harm adversaries' malign activities cause

civilian populations, thereby degrading both internal and external support for adversary operations.

Finally, judge advocates can assist IO planners navigate the complex approval processes required for IRC employment. Many IO effects must be requested from external agencies, where they are subject to additional legal review. Various laws restrict the employment of capabilities, the production of effects, or the use of certain capabilities to achieve otherwise lawful effects. IO are highly nuanced, and doctrinal terminology often differs from that used to legally or colloquially describe a concept. The use of words such as “target,” “collect,” and “influence” further vary between IRC communities, complicating efforts to clearly define IO efforts. Failure to articulate the difference between lawful and unlawful activities may result in legal objections to an otherwise permissible operation. In order to preempt legal objection, IO planners must clearly

describe the intended operation and expressly differentiate the operation from potentially unlawful alternatives. (For instance, clearly describing why electronic warfare support differs from signals intelligence collection, despite both activities employing similar assets.) Collaboration with judge advocates will facilitate early identification of legal restrictions, improve concept of operations detail, and preempt the possible objections of non-military lawyers—thereby raising the probability of IO concept of operations approval by external agencies.

Developing Lawfare Capabilities

Presently, the U.S. Government does not systematically employ lawfare to project national power.¹⁹ DOD lawfare activities reflect the absence of a national lawfare doctrine. They are ill-defined, unsystematic, and largely defensive. Judge advocates primarily focus on preserving legitimacy and minimizing



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liability by facilitating compliance with national and international law, rather than analyzing how legal mechanisms may be employed to gain an operational advantage. The Treasury and State Departments lead what little offensive legal action the U.S. Government undertakes, with minimal attention paid to military considerations.²⁰ The PRC, by contrast, is able to out-maneuver opponents because primary responsibility for lawfare resides with the People's Liberation Army, which allows for tighter coordination with military operations. Lawfare will persist as a dimension of gray zone conflict, and the DOD will need to rapidly expand its lawfare capabilities to compete.

Through judge advocate participation in IO, the Marine Corps could lead DOD lawfare innovation. Marine Corps judge advocates are unique among the Armed Services in that they are trained as unrestricted line officers. The resultant martial credibility and comfort integrating with military planning is essential to synchronizing lawfare with other operations. Future operating concepts emphasizing distributed operations demand such attributes. *Littoral Operations in a Contested Environment*²¹ and *Expeditionary Advanced Base Operations*,²² for instance, place small Marine forces ashore where they will have sustained contact with the local population. Because of this proximity, Marines can expect to be a primary conduit for facilitating joint IO in their areas of operation. Marine Corps judge advocates are eager to operate in such austere and non-permissive environments, and capable of bringing the requisite skills to any clime or place.

To operationalize this vision, the Marine Corps should cross train select judge advocates as 0510 Basic Information Operations Staff Officers and prioritize additional training in national security law. The two-week MOS producing Intermediate Information Operations Practitioner Course (IM-IOPC) is a low cost and high reward training opportunity, comparable in length to many legal training courses, and drastically expands the versatility of judge advocates by enabling them to perform IO duties. Multi-mission

capable judge advocates would be especially valuable during distributed gray zone operations, given the need for close interaction with the local population and a minimal footprint. An increased number of IO trained judge advocates would improve Marine Corps IO efforts overall, and facilitate the development of new lawfare tactics, techniques, and procedures.

Conclusion

Lawfare, when operationalized as an IRC, would drastically expand the Marine Corps' ability to conduct gray zone operations. This effort would integrate readily with our present focus on expanding IO capabilities, and the Marine Corps has the requisite assets to genuinely innovate in this field. Formally recognizing the importance of legal effects during IO would enable an expansion of the judge advocate community's focus to include disrupting or exploiting adversary action through legal means and enhance the Marine Corps' ability to compete in gray zone conflict.

Notes

1. Charles J. Dunlap, Jr., "Lawfare Today ... and Tomorrow," *International Law and the Changing Character of War*, (Newport, RI: U.S. Naval War College International Law Studies, 2011).
2. Report on Gray Zone Conflict, International Security Advisory Board, 3 January 2017. See also David Barno and Nora Bensahel, "Fighting and Winning in the Gray Zone," *War on the Rocks*, (May 2015), available at <https://warontherocks.com>.
3. Rupert Smith, *The Utility of Force: The Art of War in the Modern World*, (New York, NY: Vintage Books, 2008).
4. David Kilcullen, *Out of the Mountains: The Coming Age of the Urban Guerrilla*, (Oxford, UK: Oxford University Press, 2015).
5. Headquarters Marine Corps, *MCWP 3-32, Marine Air-Ground Task Force Information Operations*, (Washington, DC: May 2016).
6. Joint Staff, *Joint Publication 1-02 (JP 1-02), Department of Defense Dictionary of Military and Associated Terms*, (Washington, DC: November 2010).

7. Expeditionary Warfare Training Group Atlantic, *Information Operations Planners Handbook for Navy and Marine Corps*, (Norfolk, VA: 2014).

8. Orde Kittrie, *Lawfare: Law as a Weapon of War*, (Oxford, UK: Oxford University Press, 2016).

9. Central Military Commission, "People's Liberation Army of China Regulation on Political Work," (Beijing, ROC: December 2008).

10. Mahmoud Abbas, "The Long Overdue Palestinian State," *The New York Times*, (May 2011), available at <http://www.nytimes.com>.

11. *Lawfare*.

12. Richard Spencer, Adrian Blomfield and David Millward, "Britain Stops Russian Ship Carrying Attack Helicopters For Syria," *The Telegraph*, (June 2012), available at <https://www.telegraph.co.uk>.

13. "Basics of International Law for Modern Soldiers 3," (Zhao Peiying ed., 1996).

14. *Lawfare*.

15. The White House, "Executive Order—Blocking Property of Certain Persons Contributing to the Situation in Ukraine," (Washington, DC: March 2014).

16. Daisuke Wakabayashi and Alan Rappeport, "Huawei C.F.O. Is Arrested in Canada for Extradition to the U.S.," *The New York Times*, (December 2018), available at <https://www.nytimes.com>.

17. *Out of the Mountains*.

18. *Ibid*.

19. *Lawfare*.

20. *Ibid*.

21. Headquarters Marine Corps, *Littoral Operations in a Contested Environment*, (Washington, DC: 2017).

22. Headquarters Marine Corps, *Expeditionary Advanced Base Operations*, (Washington, DC: 2019).

