LAWFARE
SOFTWAREING
RESILIENCE
INTO THE
NETWORK

A REVIEW
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- WHITE AND GREY CELL
- INFORMATION WARFARE
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WE FIRST STARTED talking about network-centric operations over 20 years ago. Certain military organizations, such as Special Forces headquarters and units, appear to have incorporated important aspects of networked functionality into their work. Different regular forces’ headquarters and units in which I served also attempted to revamp their organizational structures around information to be more flexible and responsive. From my perspective, these efforts had at best uneven and modest degrees of success. Perhaps, this was because of the headquarters’ nature, and the lines on their organizational charts—“wire diagrams”—both reflected and reinforced the reality of their inherent rigidity. Perhaps, however, there is a different approach to incorporating this functionality. Maybe we should just accept the hierarchical structure of regular military formations rather than fighting it. Perhaps, we should view networking not as an alternative organizational structure, but as a reinforcement of existing command and staff processes—reinforcement with flexible connections based on cross-cutting operational themes.

I suggest that in light of the current focus within the NATO Alliance on what is called the “hybrid threat”, a decent candidate for this softwiring approach is the notion of “lawfare”; the recognition that rule of law and the role of law have increasingly become aspects of modern warfare.

The hybrid threat is just one aspect of an increasingly complex and interrelated international security environment. U.S. Army Chief of Staff General Mark Milley foresees armed conflicts more likely being “fought in dense urban areas with more robotic weapons and with a large civilian population in the middle of the fighting, a situation that makes the enemy elusive and combines conventional warfare with terrorism and guerilla activities.”

General Sir Rupert Smith has aptly described this as “war amongst the people”; armed conflict in which the civilian population’s will becomes both the object of military
“NATO and the EU agree that among the goals to be achieved in dealing with hybrid threats is the building of resilience.”
operations and the environment in which these operations occur. The mobilizing capabilities of social media and the growth of the Internet are other aspects of this new operational reality, as is, I suggest, the gendered effects of armed conflict and climate change upon populations, and the increasing potential for cyber operations to ripple out of cyber space into the geophysical world. Against this backdrop, in the aftermath of Russia’s invasion of Ukraine and annexation of the Crimea, NATO has increasingly focused on the risks to the Alliance posed by hybrid threats.

There is no NATO doctrinal definition of this sort of threat yet, but NATO and the EU have described it as a “mixture of conventional and unconventional, military and non-military, overt and covert actions that can be used in a coordinated manner by state or non-state actors to achieve specific objectives while remaining below the threshold of formally declared warfare.” NATO Secretary General Jens Stoltenberg has come up with what actually may be the most useful definition for NATO purposes from a lawfare perspective: “Hybrid is the dark reflection of our Comprehensive Approach. We use a combination of military and non-military means to stabilize countries. Others use it to destabilize them.”

NATO and the EU agree that among the goals to be achieved in dealing with hybrid threats is the “building of resilience,” that is, addressing potential strategic and critical sectors such as cyber security, critical infrastructures (Energy, Transport, Space), protection of the financial system from illicit use, protection of public health, and supporting efforts to counter violent extremism and radicalisation. Related goals include “raising awareness” of hybrid threats, and “stepping up the cooperation and coordination between the EU and NATO as well as other partner organisations, in shared efforts to counter hybrid threats.” Importantly, the recent creation of the European Centre of Excellence for Countering Hybrid Threats in Finland, with Finland, France, Germany, Latvia, Lithuania, Poland, Sweden, the United Kingdom and the United States as its founding participants, provides a locus for research, coordination, training and exercises addressing hybrid tactics and techniques.

The Hybrid Threat and Lawfare

In his cogent article published in this journal’s January 2017 edition, Lieutenant Colonel John Moore provided an important perspective into the relationship between “hybrid war” and “lawfare”. For Lieutenant Colonel Moore, lawfare, defined by Professor Charles J. Dunlap, Jr. as “the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective” is a subset of hybrid warfare. Locating lawfare under the umbrella of hybrid warfare is an important first step in figuring out how to meaningfully assess the operational significance of law in addressing this sort of conflict. As concrete steps forward in this effort, Lieutenant Colonel Moore urges the development of doctrine that includes the role of lawfare, the study of Russian writings on hybrid warfare by planners and LEGADs, and the provision of official NATO guidance to planners and exercise developers on how to incorporate the reality of hybrid warfare into their work. These steps would no doubt be valuable, and would help foster increased resilience in NATO’s ability to effectively respond to hybrid threats or even conflict.

However, based on my research on the evolution of international law since the time of Carl von Clausewitz’s writing of *On War* and on the now-discarded Effects Based Approach to Operations (EBAO), as well as my experiences as an Allied Command Transformation (ACT) and Joint Warfare Centre (JWC) Observer/Trainer and an International Security Assistance Force (ISAF) Chief LEGAD, I suggest a slightly different, but complementary approach.

First, I will describe how working as a trainer taught me that the role of law in operations has both an external and an internal component. Next, I will exhume the bones of my failed effort to effectively use EBAO to assess the development of rule of law in Afghani-
ABOVE: Organized by the NATO Cooperative Cyber Defence Centre of Excellence in Tallinn, the LOCKED SHIELDS is the largest and most advanced international technical live-fire cyber defence exercise in the world. This year, the exercise involved 900 participants from 25 nations. While the team from Czech Republic “won” the simulation exercise, NATO’s Computer Incident Response Capability (NCIRC) scored the highest in the legal game of the exercise, the German team came out on top of forensic challenges, and the team from the United Kingdom achieved the highest scores in handling the Strategic Communication challenges. (Source and for more information, please visit ccdcoe.org)

Photo by NATO Cooperative Cyber Defence Centre of Excellence

stan, and explain the difficulties of effectively gathering, analyzing and measuring the large amount of data that would be needed to generate actionable Intelligence and fully implement lawfare as an operational capacity.

Finally, I will suggest an approach to identify areas in which I believe lawfare has a role to play in making operations in the current complex international security environment more effective and consistent with the democratic values shared by the NATO Partners. I am not advocating “building” resilience in NATO regarding lawfare; this sounds too much like more of the same inflexibility with which we are all familiar. Rather, to be resilient, lawfare needs to be elastic—softwired into the quiet network of functionality that exists side by side with organizational hierarchy in modern operational units.

The Importance & Limitations of Ordinary Training

Serving at ACT and then at the JWC, I worked in the pre-deployment training of both the large-scale ISAF Headquarters as well as the smaller regional command headquarters. I learned what the operational issues appeared to be and how the different headquarters’ Standard Operating Procedures (SOPs) were supposed to work. I also watched them evolve over a fairly short period of time. Importantly, we LEGAD trainers were included across the breadth of the different training development and execution cells. I grew to appreciate the extensive scope of not just training and educating the ISAF Training Audiences in the operational implementation of legal principles, but of accomplishing these tasks among our fellow trainers as well.

The last point should not have surprised me. I had worked in the Implementation Force (IFOR) Headquarters in Sarajevo in 1996 as the Operational Claims Chief. I had come to realize that different Troop Contributing Nations had their own distinct approaches to handling claims, and that this was a reflection of their own domestic legal authorities and policies. What I had not realized at that time, however, was that these differences would often be amplified in operations where the use of actual force was an everyday occurrence. Further, these differences were largely hardwired—education and training programs had been created, troops had been taught and trained, and significant amounts of money had been invested in implementing the different national legal and policy perspectives.

A LEGAD Struggles Through “ON WAR”

Becoming aware of these different understandings and usages of law caused me to re-engage in my research on von Clausewitz’s position on the operational significance of law. As a student at the U.S. Army Command and General Staff College, I had read for the first time On War as part of our military history lessons. The re-theorizing surrounding von Clausewitz’s writing did not seem particularly useful to me, with the exception of Professor Alan Beyerchen’s analysis of On War from the perspective of chaos theory. It was this analysis that led me to an understanding of von Clausewitz’s work with which I was comfortable.
Perhaps it is too simple, but this is what I concluded were the main points von Clausewitz was driving at. War does not exist other than as an expression of political decisions. War is messy, and inherently unpredictable. The unpredictability of war cannot be tamed, but it can be mitigated through an understanding of history and realistic training. In war, nothing is easy, and human nature and emotion are as much to blame for operational plans failing to unfold in an orderly fashion as is the weather. Commanders must make decisions based on imperfect information, and the lack of Intelligence causes them to be cautious in the deployment of their forces and to rely on their biases and intuition.

As a LEGAD though, I continued to struggle with von Clausewitz’s assessment of the operational irrelevance of law in armed conflict. “War is thus an act of force to compel the enemy to do our will,” von Clausewitz wrote, and “[a]ttached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, for they scarcely weaken it.”

Accordingly, “[f]orce—that is physical force, for moral force has no existence save as expressed in the state and law—is thus the means of war, to impose our will on the enemy is its object.”

When I examined the understanding of international law during von Clausewitz’s lifetime, I came to appreciate that although his views were blunt, they were not inaccurate. Even the most progressive writers on international law of the time, such as the Swiss diplomat Emmerich de Vattel, recognized the right of sovereign nations to make harsh exceptions to the rules of general humanitarian conduct when necessary to safeguard their interests. Now, nearly 200 years after von Clausewitz wrote On War, international law has become more like the “real” law that he likely had in mind when he stated his assessment.

First, the nations of the world decided to limit their sovereignty by agreeing to enduring treaties that restricted the means and methods of warfare. Second, the growth in treaty law led to more states accepting that they were bound by the customary international law that developed because of consistent state practice in these matters. Third, the creation of lasting international and regional organizations, such as the UN and the EU, has led to the development of new laws in this area. Fourth, the advocacy efforts of international organizations, such as the International Committee of the Red Cross (ICRC) and non-governmental organizations, facilitated by the explosive growth of the news media, have resulted in important developments in international law regarding the use of armed force, as evidenced by the Ottawa Convention banning landmines, for example.

Photo by Daniel Nordby, Forsvarets Ingeniørhøgskole
In our new paradigm, which I call ‘war amongst the people’, you seek to change the intentions or capture the will of your opponent and the people amongst which you operate, to win the clash of wills and thereby win the trial of strength. The essential difference is that military force is no longer used to decide the political dispute, but rather to create a condition in which a strategic result is achieved.”

— General Sir Rupert Smith

International Review of the Red Cross Magazine

Importantly, this growth in binding law resulted from affirmative political decisions by the states involved, in a manner consistent with von Clausewitz’s assessment of the primacy of politics in war.16

The Effects Based Approach to Operations (EBAO)

Once I had concluded that the operational significance of law had changed markedly since von Clausewitz’s time, and that he would likely have been forthright in acknowledging that if he were alive today, I returned to his point about the lack of accurate and timely Intelligence being available to commanders in their decision-making. While serving at ACT in 2005, I had become aware of a new concept that was gaining traction in the U.S. and NATO training and doctrine circles, the “Effects Based Approach to Operations” or EBAO.

The purpose of EBAO was to enhance military planning, the execution of operations, and the assessment of those operations through a more holistic picture of the theater of operations.17 Ideally, it would allow for synchronization of military efforts with those of governmental, international and non-governmental organizations so that the overall effort could be more effective and more efficient.18 The function of EBAO was to create “effects” among the different actors in a theater of operations, which were defined as “changes to perceptions, behavior, and capabilities”.19 Effects were created by “actions”, which were defined as the use of “any [NATO] instrument at any level”, and which at the tactical level would be conducted as specific tasks and activities.20 Aggregations of effects would lead to achieving the objectives set out by NATO’s political leadership.21

For example, NATO could decide that establishing the rule of law was one of its objectives in a host nation into which its forces were deployed. A desired effect of this objective could be an end to support of terrorist organizations by the nation. To assess whether this effect was being created, two types of criteria would be used, “Measures of Performance” and “Measures of Effectiveness”. Measures of Performance assessed whether the actions designed to create the effects were being accomplished. Measures of Effectiveness assessed whether the actions were being done correctly. So, for example, an action could be NATO personnel bringing up the importance of addressing counter-terrorism in meetings with host nation officials. A measure of performance could be the number of such meetings in which the topic was raised. A measure of effectiveness could be an increased number of public statements by host nation officials that supported counter-terrorism efforts.22

EBAO and The Rule of Law

As a NATO LEGAD, the ideas behind EBAO appealed to me immediately. Here was a methodology that held the promise of gathering data, analyzing it, and then acting upon it in a way that could minimize injury or death to civilians, and collateral damage to their property. It provided connection points to civilian efforts in theaters of operation, and suggested that although full synchronization with these efforts might be out of reach, complementing civilian efforts with military initiatives to achieve efficiencies in operations was possible. Further, EBAO did not appear to require significant re-organization or re-equipping of existing units or infrastructure—it was an approach, an operational mindset, to achieving a comprehensive analysis picture of an operational theater. By the time I became the ISAF Chief LEGAD in the summer of 2008, ISAF had already begun using a version of EBAO, and the development of the rule of law in Afghanistan was designated as one of the lines of effort to be tracked by the headquarters. I saw a chance to really engage effectively with EBAO in this important area, primarily because tra-
ditional military command and staff processes seemed particularly unsuited to such work. Now, my research and study of von Clausewitz told me that he would have found the notion of EBAO, as I understood it, to be folly. As to the impact of the lack of accurate Intelligence upon military decision-making, he had observed that “even if we did know all the circumstances, their implications and complexities would not permit us to take the necessary steps to deal with them.”

I was not convinced. Surely, I thought, just as the operational significance of law had changed since von Clausewitz’s time, the modern military headquarters infrastructure, with all of its data feeds and analysts, its computers and reach-back capabilities, and its educated, trained and experienced officers, could burn through the “fog of war.” Surely, it could create an accurate, real-time picture of the operational environment that would lead to more efficient and effective military efforts across the spectrum of military activity.

I should have listened to the Prussian.

Courts, Corrections and EBAO

Over the course of several months, our Rule of Law LEGAD and I developed Measures of Performance for the Afghan judicial system and the prison system. We did not address the police, the third pillar of the basic “Cops, Courts, Corrections” rule of law structure, because the police were being trained and assessed by the Combined Security Transition Command—Afghanistan, a U.S.-led coalition effort outside of NATO.

Developing these measures was not easy. First, although we received advice from rule of law advisors who had worked in Iraq after the U.S. invasion on developing these sorts of metrics, their metrics were keyed to a country that had had a sophisticated justice system that was present and effective in its own way throughout much of the country, and whose population was largely literate and educated. As an example, for one Iraq-based matrix, if the courts in a particular area had between zero and 25 per cent of their assigned personnel actually working there, they were categorized as “red” for being largely ineffective. Between 26 and 50 per cent, their assessment was “orange”; between 51 per cent and 75 per cent, their assessment was “yellow” and between 76 and 100 per cent, their assessment was “green” for largely effective. In contrast, just getting a single Kabul-assigned judge present in a local court in many areas of Afghanistan often represented a significant investment in resources and no small triumph under the circumstances. Under the Iraq-based matrix, however, this would only represent a negligible blip in the “red” category.

Second, we consulted widely with different international and non-governmental organizations present in Afghanistan and Afghan rule of law stakeholders as to the types of Measures of Performance they thought would be most useful to capture the most important trends in rule of law development. Unfortunately, we were not able to get much consensus as to what they should be, nor rigorous advice on how to measure them.

So, for example, we reluctantly started using inexact proxies for actual Measures of Performance, such as the square meters of space available per prisoner in correctional facilities instead of detailed studies. We did this despite knowing from our site visits to different Afghan prisons that not only were the figures reported in the most detailed and rigorous open-source assessments likely very approximate, but that the actual conditions in the facilities and the sociology of the very communal Afghan people led to different performance results than had Western prisons been assessed.

The definition of Rule of Law we were given to work with was, “The Government of the Islamic Republic of Afghanistan develops and maintains a justice system that is perceived as fair by the Afghan people, ensures equality before the law, prevents official arbitrariness and is in accordance with international law.” The definition tracked with the approach set out in the Afghanistan National Development Strategy.

Figure 1 is a diagram of the overall scheme that we came up with to both gather rule of law data from subordinate ISAF units and to push back down to them our analysis of the data for their use in operations. The development of this effect would support the high level objective set...
out by the Afghanistan National Development Strategy of establishing good governance, rule of law, and human rights in Afghanistan.\textsuperscript{25}

As set out in Figure 1, for both the judiciary and the corrections system, there were three categories of Measures of Effectiveness that would be assessed: Personnel, Infrastructure, and Performance. Supporting the analysis developed in the Measures of Effectiveness were similarly organized Measures of Performance, or “Indicators” as we called them. By exploring the relationships between the judiciary Measures of Effectiveness and the corrections system Measures of Effectiveness, we expected to develop actionable analysis of whether progress in the rule of law was actually being made. The Indicators were to be populated by data received from the regional commands, which in turn collected data on tactical-level rule of law tasks and activities from the task force and provincial reconstruction team level.

As an example, Figure 2 (on page 14), shows the Measures of Effectiveness we developed for assessing the performance of Afghan courts. They were a mixture of external polling data, statistics related to training of individuals on substantive law and record keeping systems, statistics on trials of a particularly vulnerable population cohort (women) because of the pervasive inequality they experienced in Afghan society, and information relating to Taliban judges.

Based on our consultations with rule of law stakeholders in Afghanistan, we believed these to be most useful categories against which to collect data and develop analysis—the Measures of Effectiveness most likely to yield the most relevant information. By classifying the scheme as non-sensitive and releasable to the public, we expected to distribute the methodology widely among the different rule of law stakeholders to assist us in collecting data.

First, however, we needed to present proof of concept to the very patient Dutch Admiral who was overseeing our work, to give him a snapshot of what this system would generate once implemented.

Data Collection Failure

With a data collection plan in hand, we began searching for useful and reliable data. Our first visit was to the Intelligence shop in ISAF Headquarters itself. We learned that the Headquarters’ Intelligence operation was not focused on collecting and analyzing the sort of information we were looking for. Their focus was geared toward collecting data that had been determined to be useful for the conduct of kinetic operations primarily. I pointed out that development in the rule of law was an effect that the headquarters was tracking, but this did not lead to any commitment to change the existing collection processes.

particularly telling were our efforts to gather information on Measure of Effectiveness \textit{SC.14}, Districts with Shadow Governments, and Measure of Effectiveness \textit{SC.15}, Shadow Governments Exercising Judicial Capacity. This sort of information was simply not available from the Headquarters’ Intelligence staff. This led us to conduct an extensive open source search on the Internet to hunt...
down traces of Taliban judges. We found a fair amount of information, mostly press reports, but could only estimate its reliability. Ironically, when we synthesized the information we had developed, it presented a troubling picture of Taliban judges seizing justice market-share in many areas throughout the country—to the degree that we then felt compelled to classify it secret.

Our efforts at pulling data from other sources were at best modestly successful. Assembling the information we could find, and images that would help paint a picture of the challenges that the development of the rule of law faced in Afghanistan, we were still not able to provide the Admiral with a snapshot. Rather, it was more like an unfinished impressionist painting. Importantly though, it highlighted the vast scope of the challenges that rule of law stakeholders faced in Afghanistan, and identified the data gaps that needed to be fixed before the data collection scheme would work. It was sufficient to receive the Admiral’s approval of our draft SOP for the data collection, and to then distribute it to the subordinate ISAF commands.

Unfortunately, by the time I left Afghanistan in the summer of 2009, we had yet to receive a single report back that we could use in this effects based approach to rule of law operations. Perhaps it was just as well. By the time we distributed the Rule of Law Standard Operating Procedure, I had realized that our small office would likely be overwhelmed with data corroboration and analysis if we were successful. Further, the ISAF mission was simply not wired to provide us the support that would be necessary to turn the data and any analysis into actionable Intelligence. Finally, despite the promise that EBAO showed in taking a complex process like rule of law and allowing it to be recognized for its operational value, EBAO was not mature enough to deal with a complicated and devastated rule of law situation such as that presented by Afghanistan.²⁴
A Network and Unexpected Target Audiences

While working at ACT and JWC as a trainer, I had become aware that there were certain ISAF Headquarters functions that were recognized as very important and which did receive the legal services they deserved, such as the Dynamic Targeting Cell. Others were also very important in a “war amongst the people” but were not necessarily represented fully in the pre-deployment training we conducted. Once I arrived in Kabul, I sought out opportunities to engage with units and staff sections that I believed to be underserved with legal advice, or whose missions needed to be better publicized so that others in ISAF would understand the important role they played in such a complex and sprawling stability operation.

The ISAF Spokesman’s office was very receptive to discussing how legal advice could be useful in helping best formulate command communications, as was the Public Affairs Office (PAO). Buried in the operations and planning shops we found the more junior action officers who were responsible for drafting changes to SOPs, and provided them assistance in stating what they really wanted to accomplish in a way that made legal sense in their first draft. We worked with the Civilian Casualty Cell, to find ways to gather more accurate information about civilian losses, and to find ways to minimize them. We also worked with the Institute for International Humanitarian Law at San Remo to sponsor an Afghan humanitarian law course, as well as presenting his work in Afghanistan with the rule of law.

Over time, my daily routine of visiting different offices took a path very unlike the one I was accustomed to in a national setting. I would go weeks sometimes without talking to the ISAF Commander, and I worked infrequently with the major staff section heads or their deputies. I realized that I had developed a functional network that bore no resemblance to the Headquarters’ wire diagram, but one that actually allowed me to focus on providing legal advice to its best advantage.

Part of my functional network was the Combined Joint Psychological Operations Task Force (CJPOTF), which was an ISAF unit located at the far end of the Headquarters compound. German-led and internationally staffed, it created print, television and radio messages published to Afghan audiences on themes that supported Afghan efforts to build its security forces, to suppress poppy cultivation, and to promote licit livelihoods. The CJPOTF Commander convened boards to review draft and final versions of these products and to provide feedback, and was completely willing to have a LEGAD participate.

Over time, I assisted in different CJPOTF projects, such as providing a different English-speaking voice for the English-language voiceovers of Afghan language messages. I was surprised that such things were necessary, but the Commander explained to me that these voiceovers were useful to demonstrate to NATO audiences that the messages were appropriate and well made.

Perhaps the most interesting CJPOTF project I assisted on was its ambitious plan to further rule of law development in Afghanistan through engaging with Afghan audiences on the provisions of the Afghan constitution. The Special Forces project officer secured a budget to print several hundred copies in both Dari and Pashtu, and to have comment collection boxes made. Copies of the constitution were placed with the comment boxes and comment slips in public places in Afghan communities, and people were encouraged to submit their anonymous comments about the constitution and the rule of law. The concept seemed promising as well as inexpensive, and I volunteered to brief it, comment box in hand, at the next command update for the commander and the staff. The briefing was uneventful, but upon returning to my office and opening my e-mail, I found several messages from staff officers whom I did not know personally, but who thanked me for the presentation.

In sum, they were reassured to hear that in the midst of the focus on kinetic operations, we were concretely working towards goals that were consistent with our values. Unexpectedly, although they were not our intended target audiences, at least our rule of law efforts were having an effect on somebody. I re-learned the lesson I had first experienced while serving at ACT and the JWC—it is counterproductive to ignore our internal audiences.

Hardwiring Lawfare

Consistent with Secretary General Stoltenberg’s definition of lawfare, generating effects on the perceptions and attitudes of internal NATO audiences is a proper use of lawfare in a manner consistent with our shared democratic values. Further, as Professor Dunlap has noted, “[a]ssuring troops of the legal and moral validity of their actions adds to combat power.”27

Similarly, Professor Dunlap notes that...
“[i]ntegral to defensive lawfare operations is the education of the host nation population, and in effect, the enemy themselves.”

Professor Joel Trachtman has observed of the current international security environment that “[n]ot only is it a law-rich environment, but it is also a surveillance-rich environment in which information about possible violations and evidence of possible violations are much more readily available than in the past.” Accordingly, Professor Dunlap believes that “commanders should aim not to have a [LEGAD] at the elbow of every rifleman, but rather to imbue troops with the right behaviors so they instinctively do the right thing on the battlefield.”

How might we best make this happen?

A review of the literature on lawfare suggests a number of important steps and measures that could be implemented to meet this requirement. As noted above, Lieutenant Colonel Moore advocates the development of doctrine to allow trainers and planners to begin incorporating lawfare into their work with Training Audiences. Professor Dunlap has recommended the establishment of “Operational Verification Teams” composed of “legal, operational, Intelligence and PA specialists, organized, trained and equipped to rapidly investigate allegations of incidents of high collateral damage.”

With an eye towards the reality of lawfare, Major James Burkart has done superb work explaining the U.S. joint targeting cycle and breaking it down into its legal components so that LEGADs can see where they are supposed to be adding value to the process and in what fashion.

Professor Trachtman argues cogently for an actual lawfare “command” that would be tasked specifically with integrating lawfare considerations into operations.

These recommendations are worthy of serious consideration. On its face, Lieutenant Colonel Moore’s suggestion to develop new lawfare doctrine might appear to be relatively basic and practicable. However, having experienced in Afghanistan the role that different national caveats to operations play in multinational efforts and how they reflect domestic legal and policy concerns, both published and unpublished, I am not optimistic that effective NATO lawfare doctrine could be developed quickly, if at all. The creation of new teams or commands in the NATO context would presuppose a common operational basis, and would require a dedication of resources that might strike some as unnecessarily expensive. Further, these possibilities all have one thing in common that would work to frustrate the efficiencies they sought to achieve—they are hardwired solutions to a novel cross-cutting operational theme, within the ordinary hierarchical framework of military organizations.

Softwiring the Network

I am mindful of the inevitability of hardwiring in regular military organizations, and grudgingly appreciative of the rigor and predictability that it brings in a headquarters’ regular work. On the other hand, my operational and training experiences in NATO have persuaded me of the value of also taking a functionally-networked path in determining how to best implement lawfare consistent with the Alliance’s Comprehensive Approach.
As a first step, I do not recommend viewing "lawfare implementation" as just another task to be finely ground and sifted through the typical military staffing process, or so unusual a task that it needs to be handled through some sort of EBAO-like process. Instead, I recommend stepping back, and analyzing NATO headquarters, units and offices, and associated organizations and activities, to first determine what role they might play in lawfare. How do they reflect our shared democratic values and the foundation of the rule of law in what they do?

For example, I am not particularly interested in the operations shop in general. However, I would be most interested to know whether it has a dedicated Rules of Engagement (RoE) officer who is truly working across different staff sections, rather than just serving as the custodian of the caveats. I know that RoE have a formal NATO definition which is quite broad, but I also know that the most important rules are largely the implementations of international humanitarian law.

What sort of working relationship does the RoE officer have with the LEGAD? Or, with the officer responsible for traffic control SOPs? Does the officer responsible for claims understand that well-trained and effective RoE mean that there will likely be fewer traffic accidents resulting in claims for injury and damage by local civilians? Does the RoE officer work with the Gender Advisor (GENAD)? Has the RoE officer taken the time to explain the RoE to the personnel in Strategic Communications? What contact does the RoE officer have with the staff officer who would be responsible for monitoring whether any opposing combatants were taken into custody by NATO forces? Does the Information Operations section understand the RoE, and why messages to local civilians need to be phrased in particular ways? These staff sections and individuals are all nodes in a functional network based on the cross-cutting theme of law and the operationalization of legal principles. The connections between them are not likely reflected in any wiring diagram, nor do the different nodes necessarily train and work together as a matter of practice.

Imagine a headquarters staff exercise the purpose of which was not just to train on the hybrid threat, but to also gather data on how realistic events that could occur in hybrid-threat environments actually flow within and are acted upon by the Training Audience from a lawfare perspective. Rather than driving lawfare solutions from the top down, let us first understand how we handle lawfare organically—let us experiment and ensure that whatever doctrine we develop is actually responsive to the way lawfare actually works. Importantly, let us also leverage in this exercise the expertise of the different Centers of Excellence whose work would impact most directly upon this, such as the Cooperative Cyber Defence Centre in Estonia, the Strategic Communications Centre in Latvia, the Civil-Military Cooperation Centre in the Netherlands, and of course the new counter hybrid-threat center in Finland. Only then will we be able to develop educational and training curricula that will better prepare our troops to react to misuses of lawfare in the manner Professor Dunlap envisions.
Conclusion

Importantly, lawfare is nothing new. For example, despite his dismissive assessment of international law, von Clausewitz himself was willing to use it to further military ends.

In 1831, von Clausewitz wrote an anonymous letter to a German newspaper defending the “unofficial” support nominally neutral Prussia gave to Russia during the Polish Uprising that had begun in 1830. Refuting claims by a senior Polish military official that Russia had been supplied with Prussian food and materiel, and that Prussian soldiers were serving with Russian units, von Clausewitz argued that neutrality as understood in international law had been complied with by the Prussian state, since only private Prussian merchants had sold the items to the Russians. At the same time, he pointed out that many European powers had chosen to ignore French assistance being provided to both Polish and Belgian rebels in violation of the law of neutrality.40

Lawfare can be both a sword and a shield. The establishment of the European Centre of Excellence for Countering Hybrid Threats in Helsinki is a very positive step forward in resolving some of the hardwiring challenges facing the effective and consistent implementation of lawfare into NATO operations, and it cannot come soon enough.

In his article on NATO’s forward presence in the Baltic partners, Dr. Martin Zapfe describes the potential challenges these forces might already face in dealing with hybrid threats, including the need for handling the information aspects of potential accidents with local national drivers, unfriendly civilian protesters within ethnic Russian populations, inconsistent NATO partner approaches to situations based on national caveats, and ethnically motivated terrorist violence.41

Polish municipalities that have hosted U.S. troops as part of the forward deployment of NATO forces have already suffered cyber-attacks on their websites by unidentified hackers who apparently included pro-Russian content in their efforts.42

Given the importance of lawfare as an aspect of NATO’s Comprehensive Approach, the Joint Warfare Centre would be well positioned to begin exploring a softwiring approach to developing resilience in NATO formations to the misuse of law and understandings of democratic values by potential adversaries. Its ability to test this with various training audiences could provide useful data for the researchers and writers at the European counter hybrid-threat centre, and for national counter hybrid-threat efforts as well.43

Legal Advisor’s from JWC and 1GNC during TRIDENT JAGUAR 2017. Photo by JWC PAO

Col. Jody M. Prescott retired from the U.S. Army Judge Advocate General’s Corps in 2011 after 25 years of active duty service, and now works as an associate legal advisor for U.S. Immigration & Customs Enforcement. In addition to his NATO tours, Prescott served two tours in Germany and two tours in Alaska. He also served as an assistant professor at the U.S. Army Command & General Staff College and West Point. Prescott is now a lecturer at the University of Vermont, where he instructs on environmental law, energy law and climate change, cybersecurity, and cyber conflict. His research and writing focus areas are the operational relevance of gender, cyber conflict, climate change, and ethics and leadership.

KEY NATO CENTRES OF EXCELLENCE

* Cooperative Cyber Defence Centre in Estonia
  www.ccccoe.org/

* Strategic Communications Centre in Latvia
  www.stratcomcoe.org/

* Civil-Military Cooperation Centre in the Netherlands
  www.cimic-coe.org/
An extract from the Speech by Mr Timo Soini, Finland’s Minister of Foreign Affairs, at the signing of the Memorandum of Understanding establishing the European Centre of Excellence for Countering Hybrid Threats, 11 April 2017

"Finland will be proud to host, here, in Helsinki, the European Centre of Excellence for Countering Hybrid Threats. We are proud, in particular, for two reasons. Firstly, the Centre represents a concrete step in building resilience to hybrid threats in the EU Member States and NATO Allies. Second, the Centre is a real boost for the cooperation between the EU and NATO, facing the challenge of hybrid threats hand in hand.

"Countering hybrid threats is a European priority. Resilience is one of the pillars of the EU’s Global Strategy. Since the Joint Framework in 2016, the EU has created an EU Hybrid Fusion Cell to analyze information on hybrid threats. The Union has also taken steps in Strategic Communication, protection of critical infrastructure, energy security and other fields, relevant to enhancing our resilience. The next step is the establishment of this European Centre of Excellence. It will have a major role in promoting strategic level understanding of hybrid influencing and developing our policies.

"The use of hybrid strategies puts the internal cohesion and resilience of our societies to the test. It seeks to turn our strengths into weaknesses by using as a weapon against us what is best in our societies—democracy, openness, the free flow of information and freedom of speech, and economic freedom. What is needed in response is not only state, but societal resilience, a comprehensive approach to security. Countering hybrid threats is largely a matter of national competence. Vulnerabilities to hybrid threats, however, do not limit themselves to national boundaries. We believe that hybrid threats need a coordinated response also at EU and NATO levels. Cooperation based on lessons learned and sharing expertise will contribute to aligning national policies, doctrines and concepts.

"In dealing with this challenge, we rely on our national strength: the Finnish model of comprehensive security, which is a whole-of-government approach. Our preparedness is based on inter-agency cooperation, and on co-operation between the government, the business community and the civil society.

"We continue to build on a model that has been developed ever since the Second World War. Resilience is at the heart of our national approach in safeguarding functions that are vital to our society in all situations."

The full transcript of the speech given by Mr Timo Soini can be found at formin.finland.fi

RECOMMENDED READING

Edited by Professors Corn, van Landingham and Reeves; Chapter 8, "Tactical Implementation of Rules of Engagement in a Multinational Force Reality"—U.S. MILITARY OPERATIONS: LAW, POLICY AND PRACTICE is described on the Amazon website as follows: "Subject matter experts offer a unique insiders’ perspective on how the law is actually implemented in a wide swath of military activities, such as how the law of war applies in the context of multi-state coalition forces, and whether non-governmental organizations involved in quasi-military operations are subject to the same law. The book goes on to consider whether U.S. Constitutional 4th Amendment protections apply to the military’s cyber-defense measures, [and] how the law guides targeting decisions." (https://www.amazon.com/U-Military-Operations-Policy-Practice/dp/0190456639)
END NOTES:


14 Id. at 75.


18 Prescott, supra note 16, at 127.

19 Id.

20 Id. at 134.

21 Id.

22 Id. at 135.

23 On War, supra note 13, at 153.


27 Dunlap, supra note 9, at 38.

28 Id.


30 Dunlap, supra note 9, at 38.

31 Id. at 37-38.

32 Major James A. Burkart, Deadly Advice: Judge Advocates and Joint Targeting, The Army Lawyer 10 (June 2016).

33 Trachtman, supra note 29, at 281.


40 Peter Paret, Clausewitz and the State: The Man, His Theories, and His Times 419 (citing Staats und GelehrtZeitung des Hamburgischen Unparteiischen Correspondanten (Hamburg), July 26, 1831, at 3).

41 Martin Zapfe, “Hybrid” Threats and NATO’s Forward Presence, 4 Policy Perspectives 1, 2-4 (September 2016).


Flashback: The JWC Office of the LEGAD, 2007, Ms Lone Kjelgaard and Colonel Jody Prescott. Photograph JWC PAO