

LAWFARE AND THE INTERNATIONAL CRIMINAL COURT: QUESTIONS & ANSWERS

What are the origins of “lawfare”?

The concept of “International Law Warfare” was discussed in the 1999 book “Unrestricted Warfare” written in 1999 by two colonels in China’s People’s Liberation Army. The term “lawfare” first appeared in the 1975 article “Whither Goeth the Law - Humanity or Barbarity” by John Carlson and Neville Yeomans in reference to the peaceful resolution of conflicts. The idea of lawfare has been developed and explored by US Air Force Colonel Charles J. Dunlap, Jr., including in his landmark 2001 paper “Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts” for the Carr Center for Human Rights Policy at Harvard University.

What is lawfare?

Commentators have described lawfare as the use of law and judicial processes as an instrument of warfare. It is a strategy of using (or misusing) the law in place of or in addition to traditional military strategies to achieve military objectives. Although discussion of the concept of lawfare is often subjective, some US commentators have distinguished between negative and positive aspects of lawfare. They suggest that “positive lawfare” could be seen as the legitimate use of law to achieve military objectives, in a way which is in keeping with the spirit of the rule of law. “Negative lawfare” could be defined as the misuse of the law to achieve military objectives. It is the practice of manipulating judicial processes to undercut military objectives of other states, and may include any use of law to prevent or hinder a nation or non-state actor from carrying out legitimate military operations.

Aggressive legal maneuvers alone are not enough to constitute lawfare. The use or misuse of law is only lawfare where it seeks to achieve military objectives; strategic legal moves employed to gain a political, not military, advantage are therefore not lawfare. Those engaged in lawfare should also have the requisite intent to achieve military objectives, above and beyond the intent of those using of judicial processes for civil or criminal accountability. This intention does not have to be primary, however; it may still be lawfare where prosecutions are carried out to provide justice and accountability for atrocities, but also have a secondary objective of gaining a military advantage of some kind.

What are some examples of lawfare?

Examples of “positive lawfare” could include legitimate prosecutions of terrorist leaders or heads of state responsible for horrific atrocities provided the action is also aimed at achieving a military objective. “Negative lawfare”, on the other hand, could be waged by filing of frivolous lawsuits with the aim of harassing and distracting a military opponent and uncovering an opponent’s military strategy through legal proceedings. Another form of “negative lawfare” would be for armed combatants anticipating US military operations to conceal themselves and their weapons among civilian and thus possibly cause US military forces to violate the Law of Armed Combat. The images and reports of civilian casualties from these attacks could then be used against the US in the court of world opinion.

Why do some US commentators and government officials fear lawfare?

US military strength and global presence means that the US military is a major actor in armed conflicts, and therefore may be a target for lawfare. Some observers allege that nations and non-state actors unable to



challenge the US on the battlefield will try to undercut American military objectives through non-conventional military tactics such as lawfare. Although not a symmetrical threat, lawfare could be a potent weapon for a group or state seeking to undermine US military strategy.

Does lawfare have anything to do with the US not joining the ICC?

Yes. Some US commentators and government officials believe the ICC could be used as an instrument of lawfare to illegitimately target US leaders and servicemembers, and undermine American military operations and objectives. They argue that the ICC Prosecutor could exercise the Court's jurisdiction to conduct frivolous investigations and prosecutions or examine situations submitted to the Court by a State Party to harass and distract US military and political officials and personnel.

Could the ICC be used as an instrument of “negative lawfare” to target US nationals?

Although in extreme circumstances any institution could be perverted to contradict its principles, the safeguards and checks and balances in the Rome Statute nearly ensure that the Court could not be used as an instrument of “negative lawfare”. The jurisdiction of the ICC, as set out by the Rome Statute, is limited to the prosecution of the most serious cases of the crime of genocide, crimes against humanity and war crimes. Before the Court can investigate or prosecute alleged crimes, a State Party or the Security Council must refer the situation to the Court, or a case may be initiated by the Prosecutor subject to authorization by the Court’s Pre-Trial Chamber. Finally, under the principle of complementarity, the ICC is required to defer to domestic courts unless those courts are unwilling or unable to act. Use of the Court for “negative lawfare” would involve the connivance of large numbers of people and the abuse of Court procedure in ways that would be almost impossible to conceal for long.

Should the US engage in lawfare?

Some observers urge that the US engage in lawfare. Lawfare has created a secondary battlefield in the war on terror. They argue therefore that the US would be strategically disadvantaged if it did not expand and develop its military planning and doctrine so as to act on this specialized and unconventional form of war. Some commentators have also suggested that the US already participates in lawfare; they cite the US involvement in developing a legal system to try Saddam Hussein as an example of this.

Could the ICC be used as an instrument of “positive lawfare”?

The ICC could be a particularly powerful weapon for the US in the war on terror. While it is certain that the ICC cannot be manipulated purely for military strategy, it is possible to use the legitimate prosecutions at the Court to contribute to achieving military objectives. For example, the US could bring to the attention of the ICC a situation (or refer a situation as a State Party) of terrorist crimes which are sufficiently grave to fall within the Court’s jurisdiction. Although the primary goal in this respect must be justice, such prosecutions may indirectly bring about military advantages by undermining and destabilizing enemy regimes or terrorist organizations. The ICC could be particularly useful to the US in this respect as previous efforts to bring terrorists to justice have frequently led to delays and sharp controversies over extradition, venue and the appropriate law to be applied. While the ICC gives priority to domestic courts, in controversial cases the ICC, supported by over 100 nations and a majority of US allies, would give the US an additional, legitimate and reliable option for prosecution.





Could the US use the ICC as a weapon to combat the use of “negative lawfare” by other nations?

Yes. Lawfare could be used to promote a negative image of the US and its military in the court of world opinion and the ICC is a potent weapon against such use. By supporting the ICC, the US could demonstrate its commitment to multilateralism and reinforce its commitment to democracy, freedom and the rule of law. There is wide agreement among American experts on the ICC that such cooperation could show that the US is willing to interact with other nations to address issues of international concern.

Furthermore, if terrorists and enemy nations are attempting to exploit international law and institutions, it is important for the US to participate in the development of ICC rules, policies and application rather than be absent. By participating in the ICC, the US could secure more influence over Court policies, and obtain a substantial strategic advantage. US engagement as an observer or as a State Party in working with the Court would demonstrate to existing States Parties and others a willingness to support and assist the ICC on the part of the US, thus giving greater weight to its suggestions and opinions and supporting its objectives, including those on lawfare.

*Researched and drafted by Harriette Hill
Updated January 14, 2008*

