

Lawfare: Law as a Weapon of War

Orde F. Kittrie

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*Reviewed by Matthew Welch**

Only rarely does a legal tome serve as a reminder that our conception of the law updates itself along with changing times. Orde F. Kittrie's *Lawfare: Law as a Weapon of War*¹ does just that. Though imperfect, this book provides a coherent cascade of examples of twenty-first century political forces using law as a policy tool to achieve warlike objectives. Legal warfare, represented by the portmanteau "lawfare", goes further than merely supplementing battlefield tactics. Lawfare is a set of tactics that could be applied to all wars: hot or cold, large or small, declared or undeclared, just or unjust. Wielded by both state and non-state actors, the law increasingly replaces the violence that defines warfare of the more traditional, "kinetic" (i.e., physical and blood-soaked) sort. Though this book is not entirely successful in delineating possible lawfare policy options for liberal democratic governments, it may prove to have a lasting value in its development of lawfare as an organizing principle. Where *Lawfare* succeeds best is in showing that the nature of war is evolving away from its traditional kinetic forms, by identifying the legal battlefields that may pervade conflicts well into the future.

The author of *Lawfare* is Professor Orde F. Kittrie, former United States Department of State nuclear non-proliferation negotiator and now a law professor at Arizona State University in Phoenix. Kittrie writes this book to achieve two objectives: (a) to spur further research in the field of warfare; and (b) to issue a call to action to US policy-makers, who Kittrie feels lack a coherent lawfare strategy.² Quite apart from these goals, one of the incidental benefits of this book is that, in describing how the law can be weaponized,

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1. Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford: Oxford University Press, 2016) [*Lawfare*].

2. *Ibid* at 329.

Kittrie also gives a distinct impression as to how warfare itself has evolved. This makes a book meant for specialists—lawyers, policy-makers and the broader national security community—of interest to military historians and current affairs buffs as well.

Lawfare has been part of the academic lexicon since 2001. The term was coined by Charles J. Dunlap Jr, a retired US Air Force major general and current professor at Duke University law school in North Carolina.³ Kittrie admits to being tempted to coin another portmanteau for the purposes of his book, “juriscombat”,⁴ though readers are thankfully spared this creative flourish. Broadly speaking, lawfare, as defined by Dunlap, is simply using “law as a substitute for traditional military means to achieve an operational objective”.⁵ Kittrie further breaks down this concept into two forms: “instrumental lawfare” and “compliance-leverage disparity lawfare”.⁶ Instrumental lawfare is the “instrumental use of legal tools to achieve the same or similar effects as those traditionally sought from conventional kinetic military action”.⁷ Implicitly, instrumental lawfare applies to state actors with the capacity to wage a traditional war. The other form of lawfare, compliance-leverage disparity lawfare, involves actors with relatively limited military capacity and limited inclination to respect the rule of law (e.g, the Taliban, Hamas), paired in a conflict against a more powerful adversary. Often, the more powerful adversary takes actions marked by earnest attempts to abide by the law, especially the law of armed conflict (e.g, the US, Israel). This book may do a more thorough job in explaining instrumental lawfare, but it is the sections on compliance-leverage disparity lawfare that best demonstrate the usefulness of lawfare as a concept. Understanding compliance-leverage disparity lawfare (i.e., lawfare with a David and Goliath dynamic) may yet prove a key conceptual tool to understanding various emerging conflicts in the coming decades.

3. Colonel Charles J Dunlap Jr, “Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts” (Paper delivered at the Humanitarian Challenges in Military Intervention Conference at the Carr Center for Human Rights, Kennedy School of Government, Harvard University, Washington DC, 29 November 2001), online: <people.duke.edu/~pfeaver/dunlap.pdf>.

4. *Lawfare*, *supra* note 1 at 8.

5. *Ibid* at 2, citing Major General Charles J Dunlap Jr, “Lawfare Today: A Perspective” (2008) 3:1 *Yale J Int’l Affairs* 146 at 146.

6. *Lawfare*, *supra* note 1 at 11.

7. *Ibid*.

Lawfare is structured around several case studies involving both state and non-state actors. Though disparate, Kittrie's selection of case studies is not random. Building on Dunlap's definition, Kittrie adds two qualifying criteria, which he uses to determine whether any given activity is lawfare:

(1) [T]he actor uses law to create the same or similar effects as those traditionally sought from convention kinetic military action—including impacting the key armed force decision-making and capabilities of the target; and (2) one of the actor's motivations is to weaken or destroy an adversary against which the lawfare is being deployed.⁸

In other words, lawfare requires two components analogous to the criminal common law concepts of *actus reus* and *mens rea*. The intentions of an international actor—its guilty mind so to speak—are just as important to Kittrie as the actual act of using the law to achieve warlike policy objectives. Using these criteria, Kittrie identifies several case studies, forming the basis for the book's structure. These criteria improve on Dunlap's conceptualization of lawfare, creating a colourful group of case studies spanning several conflicts worldwide.

One such case study is the US' strategy aimed at preventing Iran from attaining nuclear weapons. For the past few years, the US' lawfare strategy against Iran has had two objectives: to stop the advancement of Iran's nuclear program and to stymie Iran's sponsorship of terrorist and/or radical organizations.⁹ To do so, the US Department of the Treasury was used to pursue criminal law and national security policy objectives—actions reminiscent of the famous Treasury investigation that ultimately brought down Al Capone.¹⁰ What distinguishes the US government's lawfare campaign against Iran from typical policy applications is that the US Treasury was enforcing domestic US laws on US soil. By leveraging US economic clout—grounded in the primacy of the US Dollar as the world's reserve currency—the Treasury was able to wield an outsized, considerable influence over the international financial sector. The Treasury gave financial institutions a choice between two markets: the US and Iran. For the banks implicated—a veritable who's who of the financial world, including infamous European sanction-buckers BNP Paribas, Credit Suisse

8. *Ibid* at 8.

9. *Ibid* at 117.

10. *Ibid* at 120 [footnote omitted].

and HSBC¹¹—the choice between the US, the world’s largest economy, and Iran, an embattled regional power, was stark.

The end result of the US’ lawfare campaign against Iran is impressive. By 2013, “as much as \$80 billion out of Iran’s total \$100 billion in hard currency reserves could not be repatriated due to compliance with U.S. measures by foreign financial institutions”.¹² And by 2015, the Joint Comprehensive Plan of Action to diminish Iran’s nuclear weapon-creating capacity was finalized. The lessons learned from the campaign to end Iran’s nuclear program are many, and point positively towards lawfare’s use in the future:

[T]he effects of the various lawfare deployments described . . . indicate that lawfare, deployed in a more coordinated and systematic manner, could likely save U.S. and foreign lives, and U.S. taxpayer dollars, by supplementing or replacing kinetic warfare as a tool for achieving some significant U.S. military objectives.¹³

Although *Lanfare* focuses on the US’ impact on Iran, it also notes that similar tactics have been used by the US against Russia since its 2014 annexation of Crimea, and against the Islamic State that same year.¹⁴ Such tactics may have wide-ranging implications in the future, perhaps supplementing the sanctions regimes employed by many other countries to achieve similar policy ends.

Another well-articulated example of state-on-state lawfare is that of the coordinated legal strategy employed by the People’s Republic of China (PRC). *Lanfare’s* chapter on China effectively presents evidence that the Chinese government endorses a more fluid interpretation of legal norms than would be expected from countries more closely aligned with the US. For instance, the People’s Liberation Army’s military handbook includes instructions to the effect that Chinese troops can ignore the law of armed conflict, and even manipulate it, to further tactical objectives.¹⁵ Other notable Chinese lawfare tactics include creating and promoting “international legitimacy for expanding

11. *Ibid* at 144–45. HSBC forfeited approximately \$1.3 billion and agreed to pay additional penalties for violating sanctions laws; BNP Paribas pled guilty to aiding Iran and other rogue states in unlawfully accessing the US financial system and paid nearly \$9 billion in fines. *Ibid*.

12. *Ibid* at 123.

13. *Ibid* at 113–14.

14. *Ibid* at 112 [footnote omitted].

15. *Ibid* at 162, citing Paul A Stempel, *Reading Lanfare in Chinese: The Meaning of the Term “Falu Zhan” (“Lawfare”) in Chinese Military Literature* (2011) [unpublished]. Stempel uses a book called *Legal Warfare in Modern War* by Xun Hengdong, a “high-ranking military officer”, published by the

China's sovereignty rights".¹⁶ The ready example, among others,¹⁷ is China's disregard for the *United Nations Convention on the Law of the Sea*, while policing its maritime exclusive economic zones and creating barely habitable islands to expand Chinese sovereignty.

But Kittrie is at his best—likely because of his background as a State Department nuclear non-proliferation negotiator¹⁸—describing China's use of lawfare in flouting the international non-proliferation regime. Described in terms of compliance-leverage disparity lawfare, China's motivations for doing so amount to advancing what China sees as being in its national interest. Kittrie describes Chinese efforts in the non-proliferation sphere as follows:

The PRC has a long history of gaming the international legal system by entering into legally binding nuclear nonproliferation obligations with which its rivals (including the United States, Japan, and South Korea) tend to comply while the PRC secretly violates these obligations by providing nuclear technology to its allies, often through proxies.¹⁹

China is party to the UN *Treaty on the Non-Proliferation of Nuclear Weapons*, which expressly states that party states cannot "assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices".²⁰ Notwithstanding Chinese obligations under this treaty, in recent years, China has reportedly been the main point of transit for nuclear components destined for Iran. In fact, some officials estimate that no less than ninety percent of goods destined for use in the

People's Liberation Army, to support the notion that China approves of the use of law to "achieve such objectives as manipulating the perceptions of the international community". *Lawfare*, *supra* note 1 at 162.

16. *Lawfare*, *supra* note 1 at 165.

17. Other examples from *Lawfare* include China promoting interpretations of international law to further its interests. For example, claiming that sovereignty over outer space extends above national territory to infinity as an interpretation consistent with international legal norms (it is not), or by claiming that the law of armed conflict does not apply to cyber warfare (it should). See *ibid* at 168–70.

18. He has co-authored a book on the subject. See Kittrie et al, *US Nonproliferation Strategy for the Changing Middle East* (Washington, DC: Institute for Science and International Security, 2013).

19. *Lawfare*, *supra* note 1 at 173 [footnote omitted].

20. *Treaty on Non-Proliferation of Nuclear Weapons*, 1 July 1968, 729 UNTS 161 art 1 (entered into force 5 March 1970). The treaty is between various members (including China), though it excludes a number of nuclear states such as India, Israel and Pakistan.

nuclear programs of both Iran and North Korea flow through China.²¹ *Lawfare* echoes the recommendation in Kittrie's other work in non-proliferation: that the US designate China a "destination of diversion concern"²² under a domestic US law aimed at preventing nuclear weapon-related components from reaching Iran.²³ The chapter ends with various recommendations to US policy-makers that seem to be designed as portents of things to come. Ominously, it is recommended that the US "[m]aximize [c]urrent U.S. [p]reeminence in [s]haping [i]nternational [l]aw"²⁴ while it still can, and that America should "[e]mulate PRC [s]eriousness [a]bout [l]awfare".²⁵ Though China's seriousness is convincing enough, it is still unclear from Kittrie's account of Chinese wrongs that the US, or its allies, should emulate China's focus on lawfare tactics.

Though generally well-founded, the discussion of China's lawfare strategy is undermined by a grating, polemical argument that Chinese lawfare has cultural roots. A quote from Sun Tzu is referred to no less than three times in the chapter on China as evidence of a unique cultural bent conducive to developing lawfare tactics: "Defeating the enemy without fighting is the pinnacle of excellence".²⁶ Notwithstanding this, evidence that Chinese culture is at the root of this seems scant, even fallacious. After all, *Lawfare* is not a work of sociology or social psychology. Such platitudinous claims detract rather than bolster Kittrie's primary argument—weakening an otherwise compelling case.

Much of this book—the shortest four of its eight chapters, though more like a quarter of the total page length—deals with lawfare innovation coming from the Israeli-Palestinian conflict. Kittrie uses the analogy of the Spanish Civil War to explain the importance of the Israeli-Palestinian conflict to the emergence of lawfare: "[m]uch as the Spanish Civil War served as a testing ground for weapons and tactics subsequently used in World War II, the Israeli-Palestinian conflict is foreshadowing lawfare strategies and tactics that will soon be replicated in other conflicts."²⁷

21. *Lawfare*, *supra* note 1 at 177, citing Wyn Q Bowen, Ian J Stewart & Daniel Salisbury, "Engaging China in Proliferation Prevention" (24 October 2013), online: Bulletin of Atomic Scientists <thebulletin.org/engaging-China-proliferation-prevention>.

22. *Lawfare*, *supra* note 1 at 183.

23. *Comprehensive Iran Sanctions, Accountability and Divestment Act of 2010*, 22 USC § 8501 (2010).

24. *Lawfare*, *supra* note 1 at 195.

25. *Ibid* at 192.

26. *Ibid* at 161, citing Sun Tzu, *The Art of War*.

27. *Lawfare*, *supra* note 1 at 198 [footnote omitted].

All parties to the Israeli-Palestinian conflict use warfare in very different ways, indicative of the potential diversity of tactics employable within the realm of the concept of lawfare. On the Palestinian side, it is no surprise that Hamas and the Palestinian Authority (PA) opt for dissimilar lawfare tactics. The chapter on Hamas deals largely with Hamas' well-publicized flouting of the law of armed conflict by placing military operations in the midst of civilian areas during both the 2008–09 and 2014 wars in Gaza. This was done purportedly to render Israeli tactics less effective (as the Israelis sought to follow the law of armed conflict) and to erode “public and international support for [Israel] by causing it to actually or arguably violate the law of armed conflict”.²⁸ Hamas' actions in Gaza are textbook compliance-leverage disparity lawfare. But Israel's reaction—to take every precaution to ensure that its actions fall within the law—could equally be considered lawfare. Both sides take an interpretation of the law of armed conflict that they find advantageous, and the line between lawfare and a public relations battle becomes fuzzy.

Entirely different lawfare tactics against Israel are employed by the PA, pointing to the diversity of lawfare even when directed towards similar ends. For its part, the PA advances its cause by seeking membership in international organizations, much to Israel's chagrin. One well-publicized example is the campaign for Palestine to be recognized as a UN member state. The PA's push to join international organizations has been such an effective tactic that, in order to facilitate the 2013 peace process negotiations, the US brokered a deal to release over one hundred Palestinian prisoners in Israeli custody—several of whom had been convicted of murdering Israeli civilians—in exchange for a promise that Palestine refrain from joining international organizations for a mere nine months.²⁹ The PA also joined the International Criminal Court, a legal venue that could be used to bring claims against Israeli actions. In fact, the PA will seemingly use any venue that will hear their claims against Israel—including the United Nations Educational, Scientific and Cultural Organization, and the International Court of Justice.

The definition of lawfare in this book is, at times, stretched to its limit, making it difficult to see what it encapsulates and why some things are left out. The chapter on the financial lawfare used by the US against Iran is a prime example. Economic sanctions are excluded, though they undoubtedly would meet Kittrie's organizing criteria. Definitions are further stretched by including

28. *Ibid* at 285.

29. *Ibid* at 206.

the international Boycott, Divestment and Sanctions (BDS) movement, which seeks to hurt Israel and Israelis financially. It is estimated that \$1.4 billion is lost to the Israeli economy each year as a result of BDS-inspired consumer boycotts and the like.³⁰ But although some BDS activities could be argued as lawfare—such as the use of European Union sanctions to bar Israeli products—others are clearly not. Discouraging popular musicians from performing in Israel, for example, may be activism, and perhaps it is even effective in promoting the BDS cause. But such tactics cannot credibly be considered lawfare, notwithstanding the BDS movement’s own (dubious) interpretation of international law as the rationale for such tactics. Likewise framing rhetoric “in highly legalistic terms”³¹ should not necessarily allow an action to be considered lawfare, as opposed to mere activism.

Definitional issues aside, the biggest critique that can be made about Kittrie’s book is that not enough is done to fulfill its stated objectives. For one thing, the first of Kittrie’s stated objectives, to spur on further research, is undermined by *Lawfare*’s plodding style, which focuses on events at the expense of enriching the concept of lawfare. Various lawfare events are documented meticulously, providing a treasure trove of source data that could indeed be of use to researchers. But all too often, a detailed description of lawfare tactics or events leaves the reader craving closure, begging questions as to how the events should colour our understanding of lawfare. The overall effect is that *Lawfare* reads like a laundry list of events, rather than a coherent argument elucidating lawfare as an organizing principle. Greater effort towards a more conceptual thrust could have better tilled the soil for future scholars with an interest in this subject—giving them a conceptual framework on which to build.

Whether or not the second objective of this book, to encourage the US to adopt a comprehensive lawfare strategy, is satisfied remains an open question. To Kittrie’s credit, there are parts of *Lawfare* that provide a clear call to policy-makers. The chapter analyzing the US’ lawfare campaign against Iran could well serve to encourage more innovative thinking about alternatives to traditional wars. And given the evidence presented that China is purportedly taking lawfare quite seriously, it makes sense that the US should as well. But certain tactics detailed in this book do not clearly further this objective, resulting in a muddle of lawfare tactics that the US cannot, and should not, emulate. There

30. *Ibid* at 241, citing John Reed, “Israel: A New Kind of War” *Financial Times*, (12 June 2005), online: <www.ft.com>.

31. *Lawfare*, *supra* note 1 at 240.

is no compelling reason why the US, being the architect and guardian of the current international rules-based order, should stoop to consider Hamas' use of human shields, the BDS movement, or Chinese claims to sovereignty over outer space as worthwhile policy templates. Some culling of such unimpressive tactics could have benefitted this book, providing a more focused road map for interested policy-makers.

But *Lawfare* is still worth reading, especially for those interested in the changing nature of warfare. It makes sense that twenty-first century warfare tactics encompass not only the use of bullets and bombs but also public interest litigation, political activism and state-sponsored policies inducing combatants to flout international law. This book is an excellent current survey of this area, providing ample source material for those with an interest in the cases discussed. However, given the pace of world events, it will not stay current for long. Kittrie identifies the need for liberal democratic governments to engage in prescient policy-making when it comes to lawfare: “[f]or the United States and its allies, it is critical to attempt to identify and prepare for the additional lawfare arenas and types of lawfare”.³² *Lawfare* makes a valiant effort at identifying current arenas. Though Kittrie is undoubtedly correct that preparing for the future of warfare using legal tactics certainly merits further study, its arenas may turn out to be less than predictable.

32. *Ibid* at 187.