Strategic Lawyering: Realizing the Potential of Military Lawyers at the Strategic Level

Colonel Kelly D. Wheaton[1]

On the morning of 8 April 2003, Task Force 4-64 of the 2d Brigade Combat Team, 3d Infantry Division (Mechanized), was engaged in fierce fighting in the center of Baghdad near the Republican Palace, Al Rashid Hotel, and Al Jumhuriya Bridge, which is across the Tigris River from the Palestine Hotel.[2] By a stroke of luck, Task Force 4-64 captured a two-way Motorola radio set on a frequency still being used by the enemy and intercepted radio transmissions from an enemy forward observer thought to be located in a high-rise building across the Tigris River.[3] The Soldiers already receiving indirect fire were informed of the existence of the forward observer and began a search to find him.[4] Task Force Soldiers observed a tripod and "some kind of optics" in a high-rise building approximately 1700 meters to the south—perhaps a ground or vehicular laser locater designator (a tripod-mounted laser targeting device).[5] After obtaining permission to engage, the Soldiers fired a High Explosive Anti-Tank (HEAT) round into the Palestine Hotel.[6] Occupying the Palestine Hotel were approximately 100 reporters and cameramen observing and filming the battle occurring across the river.[7] Spanish cameraman Jose Couso was wounded in the explosion and subsequently died of his wounds.[8]

On 21 April 2003, Secretary of State Colin Powell forwarded a letter to the Foreign Minister of Spain stating that the United States "share[s] your sorrow over Mr. Couso's death" and adding that "Mr. Couso's death occurred in a war zone during an ongoing battle. . . . our forces responded to hostile fire appearing to come from a location later identified as the Palestine Hotel."[9] In May 2003, Mr. Couso's next-of-kin filed a complaint in Spanish criminal court.[10] On 14 October 2003, the Spanish federal criminal court accepted the complaint, and on 19 October 2005 the court issued international arrest warrants for three U.S. Soldiers, including the company and battalion task force commander under the circumstances.[11] The prosecutor for the court filed an appeal of the warrant, arguing that the court lacked jurisdiction.[12] Nonetheless, the Interior Ministry of Spain will inform Interpol of the arrest warrants.[13] Under tough questioning about the court's action the next day, the U.S. Ambassador to Spain stated that bilateral relations between the United States and Spain had "not been negatively affected" by the court's decision.[14]

This single military action in the early days of Operation Iraqi Freedom almost immediately embroiled the U.S. military and its legal advisors in foreign courts defending complaints against U.S. Soldiers and, two years later, resulted in criminal indictments, Interpol referrals, and potential negative impact on international relations. This incident, and countless others like it, illustrate how the war on terrorism places increasingly complex demands on lawyers advising warfighters at the tactical, operational, and strategic level. Because the variety and import of legal issues at the strategic level are continuously increasing, it is necessary to examine how the spectrum of legal advice and advocacy that is required at the strategic level (strategic lawyering) must change to more effectively support the war on terrorism. While strategic lawyering would not

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[1] Judge Advocate. U.S. Army. Presently assigned as the Senior Military Assistant to the Department of Defense General Counsel. This article was submitted in partial completion of the Master of Strategic Studies requirements of the U.S. Army War College, Carlisle Barracks, Pennsylvania. The author wishes to thank Rear Admiral (Ret.) Jane G. Dalton, Colonel (P) Marc L. Warren, Colonel Michael W. Hoadley, and Charlotte and David Merrill for their generous assistance while writing this article.

[2] David Zucchino, *Thunder Run*, ATLANTIC MONTHLY PRESS, Apr. 2004, at 285.

[3] *Id.* at 294-95.

[4] *Id.* at 295.

[5] *Id.* at 296.

[6] *Id.* When the Task Force 4-64 Soldiers fired, they did not know that they were firing into the Palestine Hotel.

[7] Joel Campagna & Rhonda Roumani, *Permission to Fire*, May 27, 2003, http://www.cpj.org/Briefings/2003/palestine_hotel/palestine_ hotel.html.

[8] Zucchino, *supra* note 2, at 297-98.

[9] *Powell Letter: Force was Justified,* N.Y. TIMES, Apr. 25, 2003, at A13.

[10] Tito Drago, *Spain: U.S. Soldiers to Be Tried for Reporter's Death in Iraq*, GLOBAL INFO. NETWORK, Oct. 20, 2003, at 1 (on file with author).

[11] *Killing the Witness: Spanish Judge Orders Arrest & Extradition of U.S. Soldiers in Death of Spanish Journalist Jose Couso in Iraq*, 20 Oct. 2005, *available at* http://www.indybay.org/newsitems/2005/10/20/17762271.php.

[12] Vince Crawley, *Spanish Judge Orders Arrest of U.S. Soldiers Cleared in 2003*, Oct. 20, 2005, http://usinfo.state.gov/eur/Archive/2005/Oct/20-448501.html.

[13] *U.S. Ambassador 'Respects' Judge's Demand for Extradition*, SPAIN HERALD, Oct. 21, 2005.

[14] *Id.*

have saved Mr. Couso or necessarily changed any of the decisions leading to the action that caused his death, strategic lawyering is vital when incidents Mr. Couso's death occur.

Strategic lawyering requires both proactive and responsive legal advice and support in "lawfare"—the use of law as a weapon of war. Many strategists suggest that winning the war on terrorism will require winning a war of ideology including the use of effective international collective action. Lawyers, who receive specialized schooling and training with emphasis on effective analysis, reasoning, advice, and advocacy, must play both direct and indirect roles in winning this war of ideology. This article analyzes the capabilities of military legal advisors at the strategic level to support the war on terrorism using their specialized legal training, education, and experience and considers how commanders at the strategic and operational level may use this legal support best. The article reviews examples of strategic issues in which military lawyers could have played a larger role and contributed to better issue resolution and argues that the military should employ legal support more aggressively when addressing strategic-level concerns. Finally, this article offers recommendations for improving the role and functions of Army legal advisors.

The Strategic Level of War and Strategy

Three levels of war are described in current Army doctrine: strategic, operational, and tactical.[15] These levels are to be used as doctrinal perspectives to clarify the relationships between strategic objectives and tactical actions.[16] The strategic level is "that level at which a nation . . . determines national and multinational security objectives and guidance and develops and uses national resources to accomplish them."[17] Strategy recently has been defined as "the use that is made of force and the threat of force for the ends of policy."[18] This definition is similar to the model espoused at the U.S. Army War College, which analogizes strategy as a three-legged stool balancing ends, ways, and means.[19] Use of the military instrument of power to achieve the U.S. National Security Strategy is addressed in the National Defense Strategy and National Military Strategy.[20] The transformation of national level strategy and policy into theater strategy occurs at the strategic level of war.[21] Combatant commanders are central in the process of translating strategic direction into operational plans and execution.[22] Planning and execution of campaigns is the transition point between the strategic and operational level of war.[23]

Thus, the strategic level of war is executed at the combatant command level. Higher and within the Department of Defense (DOD) the roles, missions, and functions of the combatant commands, defense agencies, Military Departments, Service Chiefs, the Office of the Chairman, Joint Chiefs of Staff (and Joint Staff), and the Secretary of Defense (and Office

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[15] U.S. DEPARTMENT OF THE ARMY, FIELD MANUAL 3-0, OPERATIONS 2-2 to 2-3 (14 June 2001) [hereinafter FM 3-0].

[16] *See, e.g. id.* at 3-0, 2-2.

[17] *Id.*

[18] COLIN S. GRAY, MODERN STRATEGY 17 (Oxford Univ. Press, 1999). This definition is comparable to that of the famous military theorist, Carl von Clausewitz, who defined strategy as "the use of engagements for the object of the war." CARL VON CLAUSEWITZ, ON WAR (Michael Howard & Peter Paret, eds. & trans., Princeton U. Press 1984) (1832). Clausewitz, however, wrote at a time when war was intensely personal, when commanders could—for perhaps the last time—see all the troops under their command during battle because effective weapon ranges were less than what a car can drive on the highway in one minute and operational plans were constrained by the distance man and animal carrying a load could march in one day. Clausewitz could not envision the destructiveness of today's weapons; the ability of twenty men to kill over 3,000 civilians in a few minutes time, the shrinking of time and space, and the increasingly phenomenal ability to communicate across distance and with multiple persons. Nonetheless, Clausewitz wrote about war in a way that is still relevant. He provides insights that are still worth considering.

[19] H. Richard Yarger, *Toward a Theory of Strategy: Art Lykke and the Army War College Strategy Model*, *in* I THEORY OF WAR AND STRATEGY 3 (James A. Helis ed. 2005). Under joint doctrine, a national security strategy is the "art and science of developing, applying, and coordinating the instruments of national power . . . to achieve objectives that contribute to national security." JOINT CHIEFS OF STAFF, JOINT PUB. 0-2, UNIFIED ACTION ARMED FORCES I-2 to I-3 (2001) [hereinafter JOINT PUB. 0-2].

[20] *Id.*

[21] FM 3-0, *supra* note 15, at 2-3.

[22] *Id.* at I-6, II-2. The President exercises his Constitutional authority as commander-in-chief to direct the U.S. armed forces. The Secretary of Defense, heading the Department of Defense, is responsible to the President for creating, supporting, and employing military capabilities. The Department of Defense is a Cabinet-level organization with three military departments, four armed services, seven field activities, sixteen defense agencies, and nine combatant commands reporting directly to it. The four armed services are subordinate to their military departments. The armed services are responsible for recruiting, training and equipping their forces; operational control of those forces is assigned to one of the combatant commands. Department of Defense, DOD at a Glance, http://www.defenselink.mil/pubs/almanac (last visited May 16, 2006). The President and the Secretary of Defense exercise their authority over the armed forces communicating through the Chairman, Joint Chiefs of Staff, through the combatant commanders, Secretaries of the Military Departments and the Service Chiefs. *See* JOINT PUB. 0-2, *supra* note 19, at I-1–I-5.

[23] FM 3-0, *supra* note 15, at 2-2 to 2-3. Campaigns are the related series of military operations aimed at accomplishing strategic or operational objectives.

of the Secretary of Defense) are carried out. Lawyers are assigned and provide legal support throughout these many and varied strategic-level organizations.[24]

Current Army Doctrine on Legal Support to Operations

Current Army doctrine establishes that legal support to operations falls into three functional areas: command and control, sustainment, and personnel service support.[25] The practice of operational law involves providing those legal services that directly affect the sustainment and command and control of an operation.[26] There are six core legal disciplines: administrative law, civil law (including contract, fiscal, and environmental law), claims, international law, legal assistance, and military justice.[27] By doctrine, Army judge advocates have three fundamental objectives: supporting the mission (protecting and promoting command authority); providing service (meeting the legal needs—of commanders, staffs, personnel, and family members); and enhancing legitimacy (engendering public respect and support for military operations, by, among other things, promoting justice and ethical behavior).[28]

Doctrine recognizes that judge advocates in the 21st century will be challenged in accomplishing their objectives. In particular, to accomplish missions, Army judge advocates must thoroughly understand the military mission to better forestall and resolve legal issues affecting the mission and "must become more involved in the military decision-making process in critical planning cells, and at lower levels of command."[29] In accomplishing their objective of enhancing legitimacy, judge advocates will have to transmit their thorough understanding of U.S. values and constitutional and international law to assist commanders in integrating these laws and values into military operations.[30]

Current Army doctrine does an excellent job of articulating legal support at the tactical and operational levels of war, describing legal disciplines and providing an overview of Army judge advocate roles, functions, and challenges. Current Army doctrine, however, fails to adequately address how Army judge advocates specifically, and military legal advisors to senior strategic leaders generally, should operate at the strategic level in the current, legally-intensive security environment, including the ongoing war on terrorism.[31] Current doctrine does not describe the uses of Army lawyers' trained and ready minds when providing candid advice not only on the law but also on "moral, economic, social, and political factors."[32] Finally, doctrine does not effectively use military lawyers' ability to operate across the levels of war and to interact with and provide advice to all elements of a command and staff, working both laterally and horizontally within the organization

Increase in Legal Issues

It is apparent after any cursory review of national news that legal issues related to military operations are increasing. Within the last few months, the popular media have exhaustively discussed and dissected issues as disparate as prosecution of military personnel for abuses at Abu Ghraib, the legal status of detainees, the legal status of terrorists, the legality of pre-emptive war, and the prosecution of alleged war crimes perpetrators before the International Criminal Court (ICC). Part of

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[24] A review of *JAGC Personnel and Activity Directory and Personnel Policies* demonstrates that there are Army personnel at almost all of these strategic-level organizations. U.S. DEP'T OF ARMY, JAG PUB 1-1, JAGC PERSONNEL AND ACTIVITY DIRECTORY AND PERSONNEL POLICIES (1 Oct. 2005). A staff judge advocate is a member of the commander's personal staff. As such, the staff judge advocate works under the immediate control of the commander and has direct access to him. A staff judge advocate also works under the supervision of the chief of staff as a member of the special staff, providing legal services to the staff and throughout the command. U.S. DEP'T OF ARMY, FIELD MANUAL 6-0, MISSION COMMAND: COMMAND AND CONTROL OF ARMY FORCES figs. C-2, D-46 (11 Aug. 2003).

[25] U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS vii (1 Mar. 2000).

[26] *Id.*

[27] *Id.* at viii. In general, some elements of all the core legal disciplines are present in each of the legal functional areas.

[28] *Id.* para. 1-1.

[29] *Id.* para. 1-8.

[30] *Id.*

[31] For purposes of this article, the "war on terrorism" is used to describe all military operations aimed at defeating terrorist groups—those that employ the calculated use of unlawful violence or threat of unlawful violence to inculcate fear with the intent to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious or ideological. *See* CHAIRMAN, JOINT CHIEFS OF STAFF, NATIONAL MILITARY STRATEGIC PLAN FOR THE WAR ON TERRORISM 37 (2006) [hereinafter NATIONAL MILITARY STRATEGIC PLAN FOR THE WAR ON TERRORISM].

[32] U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYER 19 (1 May 1992). This regulation provides comprehensive rules governing the ethical conduct of Army lawyers. *See infra* note 133 and accompanying text for a discussion of lawyers' ethical responsibilities to render legal advice tempered by practical judgment.

the increasing pace of legal issues affecting the military can be attributed to the steady increase of substantive international law after World War II, starting with the foundation of the United Nations (UN) and the issuance of the Geneva Conventions of 1949, and continuing through the numerous arms control and human rights treaties and conventions more recently.[33] The U.S. military is subject to heightened expectations and considerable regulatory guidance as a result of increasingly demanding international legal constraints and domestic concerns.[34] Globalization—the ever-increasing interdependent nature of life throughout the globe—also naturally increases the amount and impact of international law because of the need for effective regulation of commerce and information flow for commerce to flourish.[35]

Also, current U.S. national security strategy is inextricably intertwined with legal issues and lawyering. One of three goals of the President's National Security Strategy (NSS) is "respect for human dignity."[36] In championing human dignity, the United States must stand for liberty and justice, the rule of law, and the limit of absolute power of the state.[37] To achieve the goals of the NSS, the United States will "champion aspirations for human dignity" and "develop agendas for cooperative action with other main centers of global power."[38] In developing agendas for cooperative action, consultation and common action are necessary to "sustain the supremacy of . . . common principles."[39]

The National Defense Strategy (NDS)—the Secretary of Defense's implementation of the NSS—states that the United States has "a strong interest in protecting the sovereignty of nation states."[40] The NDS, however, also says that nations must "exercise their sovereignty responsibly, in conformity with customary principles of international law."[41] The NDS finds that international partnerships are "a principal source" of the strength of the United States and that the United States will play a leading role on "issues of common international concern."[42] Of the four strategic objectives of the NDS, two relate to international relations: the United States must "strengthen alliances and partnerships" and establish conditions "conducive to a favorable international system. . ."[43] The NDS outlines an approach that "seeks to create conditions conducive to respect for the sovereignty of nations and a secure international order."[44] This strategy is designed to secure and improve the international order; nations must "exercise their sovereignty responsibly, in conformity with international law. . . ."[45] The United States must use international partnerships as a "principal source" of strength, act collectively, and play leading roles in international fora and on international issues.[46] To meet strategic challenges, the NDS requires the military to transform the global defense posture by modifying old alliances and forming new alliances and partnerships and ensuring international agreements reflect the current strategic circumstances and support the greatest possible operational flexibility.[47] This

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[33] *See, e.g,*, Adam Roberts, *Law and the Use of Force After Iraq*, SURVIVAL, Summer 2003, at 34.

[34] Department of Defense policy and joint doctrine establish that legal support is to be pervasive throughout the length and breadth of military operations. All operations plans and orders, rules of engagement, and policies and directives must receive a legal review to ensure compliance with domestic and international law and the DOD Law of War program. Also, DOD policy requires legal advisers to provide advice addressing law of war compliance, *including* legal constraints on operations and legal rights to use force. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 5810.01B, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM 2, A-3 (2002). Some have criticized the integral relationship between lawyers and operations. *See, e.g.*, Harvey M. Sapolsky, *War Needs a Warning Label*, *Breakthroughs*, Spring 2003, at 3, 12 ("It's getting so that the American military does not even loads (sic) its weapons these days without consulting its lawyers.").

[35] *See generally* JOHN F. MURPHY, THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS (2004) (noting a dramatic increase in the scope of issues in international law since World War II driven by economic, regulatory, and social globalization); DEP'T OF DEFENSE, QUADRENNIAL DEFENSE REVIEW REPORT 24 (2006) [hereinafter 2006 QDR] ("Globalization enables many positive developments such as the free movements of capital, goods, and services, information, people and technology, but it is also accelerating the transmission of disease, the transfer of advanced weapons, the spread of extremist ideologies, the movement of terrorists and the vulnerability of major economic segments.").

[36] OFFICE OF THE PRESIDENT OF THE UNITED STATES, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 1 (2002) [hereinafter NATIONAL SECURITY STRATEGY].

[37] *Id.* at 3.

[38] *Id.* at 1-2.

[39] *Id.* at 28.

[40] U.S. DEP'T OF DEFENSE, THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 1 (2005) [hereinafter NATIONAL DEFENSE STRATEGY].

[41] *Id.* The National Defense Strategy outlines the Secretary of Defense's approach to addressing likely DOD challenges. *Id.* at iii.

[42] *Id.* at 4-5.

[43] *Id.* at 6-7.

[44] *Id.* at iv.

[45] *Id.* at 1.

[46] *Id.* at 4-5, 7.

[47] *Id.* at 18-19.

> Many of the current legal arrangements that govern overseas posture date from an earlier era. Today, challenges are more diverse and complex, our prospective contingencies are more widely dispersed, and our international partners are more numerous. International

approach is echoed in the most recent strategy document for the defense of the nation, the 2006 Quadrennial Defense Review Report (QDR).[48] Among other things, the QDR states that "building and leveraging partner capacity" will be absolutely essential and that "[w]orking indirectly with and through others, and thereby denying popular support to the enemy, will help transform the character" of the war on terrorism.[49] These are only a few examples from the NDS and QDR that demonstrate how legal issues and legal efforts are significantly intertwined with national strategy.

Lawfare: The Use of Law as a Weapon of War

This increase in legal issues impacting warfare and the military has spawned a new term: "lawfare." First discussed by Major General (Maj Gen) Charles J. Dunlap[50] in a seminal paper he released in 2002, the term has several meanings. Major General Dunlap defined lawfare as simply the use of law as a weapon of war—a means of realizing a military objective.[51] In his paper he raises the question of whether the growth of substantive international law, including the increase in international agreements and organizations, is undercutting the U.S. military's ability to conduct effective military interventions.[52] In particular, he examines whether international law and the law of armed conflict (LOAC)[53] is being used by America's adversaries to constrain America's power.[54] For example, use of lawfare against the United States would include cynically manipulating the LOAC to undermine United States and international support for a military operation, potentially restricting or completely stopping the military effort.[55] He examines the International Criminal Tribunal for Yugoslavia (ICTY) review of the North Atlantic Treaty Organisation (NATO) airstrike on 23 April 1999 against Radio Television Serbia (RTS) as a potential violation of the LOAC and the lawsuit before the European Court of Human Rights regarding the same airstrike as an example of the use of the legal process that potentially constrains military decision-makers.[56] Ultimately, Maj Gen

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> agreements relevant to our posture must reflect these circumstances and support greater operational flexibility. They must help, not hinder, the rapid deployment and employment of U.S. and coalition forces worldwide in a crisis. Consistent with our partners' sovereign considerations, we will seek new legal arrangements that maximize our freedom to: deploy our forces as needed; conduct essential training with partners in the host nation; and, support deployed forces around the world. Finally, legal arrangements should encourage responsibility-sharing between us and our partners, and provide legal protections for our personnel through Status of Forces Agreements and protections against transfers of U.S. personnel to the International Criminal Court.

Id.

[48] *See* 2006 QDR, *supra* note 35.

[49] *Id.* at 23. The QDR is not a programmatic or budget document. *Id.* at vi. The QDR "represents a snapshot in time of the Department's strategy for defense of the Nation and the capabilities needed to effectively execute that defense." *Id.* at ix.

[50] Major General Dunlap is currently serving as the Deputy Judge Advocate General , Headquarters, U.S. Air Force. Biography, U.S. Air Force, Major General Charles J. Dunlap, http://www.af.mil/bios/bio_print.asp?bioID=5293&page=1 (last visited Aug. 30, 2006) [hereinafter Dunlap].

[51] Colonel Charles J. Dunlap, Jr., Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflict, *available at* http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf, at 5 (last visited May 18, 2006) (prepared for the Humanitarian Challenges in Military Intervention conference, Carr Center for Human Rights Policy, Kennedy School of Government, Harvard University). Major General Dunlap states that the term "lawfare" first appeared in a 1975 article. *Id.* n.5.

[52] *Id.* at 4.

[53] Modern Law of Armed Conflict is generally considered to have its inception in the 1863 "Lieber Code." The Lieber Code, named after its author Dr. Francis Lieber, was published as U.S. War Department, General Orders No. 100, Instructions for the Government of the Armies of the United States in the Field, 24 April, 1863, during the American Civil War. Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, (Apr. 24, 1863), reprinted in THE LAWS OF ARMED CONFLICTS 3 (Dietrich Schindler & Jiri Tomas eds., 3d ed., 1988). Analysis of the LOAC continued for the next half century, culminating in the Hague Conventions of 1899 and 1907 relating to the conduct of warfare on land, sea, and air. The original Geneva Convention, relating to the treatment of wounded in the field, was adopted in 1864, revised and replaced in 1906 and 1929 and then, after the trauma of World War II, completely superseded by four Geneva Conventions in 1949. These Conventions address the wounded and sick in the field (Convention I), wounded and sick at sea (Convention II), prisoners of war (Convention III), and protection of non-combatants (Convention IV). The Cold War made further changes or additions to the codified LOAC more difficult, but in 1977 the Additional Protocols 1 and 2 to the Geneva Conventions (Protocols) were codified. Protocol I addresses international armed conflicts and Protocol II non-international armed conflicts. The United States has not ratified the Protocols; it recognizes and conforms to the Protocols to the extent they represent customary international law. These various documents form the core of the LOAC. There are, however, numerous other treaties regulating hostilities. Many of the treaties address weapons or weapon use. *See* YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 9-12 (2004).

[54] Dunlap, *supra* note 51, at 4–6.

[55] Specific examples would include using civilians as involuntary or voluntary "human shields" of legitimate military targets and placing military assets in otherwise noncombatant facilities (e.g., churches, hospitals). *Id.* at 13.

[56] *Id.* at 13-14. The RTS was the state-run media station in central Belgrade and was used as a tool for propaganda dissemination. The airstrike resulted in the death of sixteen people and injured sixteen more. Human Rights Watch criticized the strike as violative of the Law of Armed Conflict because the strike did not directly contribute to the military operation and because the risks to noncombatants greatly outweighed any military benefit. Human Rights Watch, Civilian Deaths in NATO Air Campaign, Vol. 12, No. 1 (Feb. 2000), http://www.hrw.org/reports/2000/ nato/index.htm#TopOfPage. The ICTY accepted NATO's defense of the airstrike based on RTS's broadcast of military communications, but observed in its decision that a broadcast station merely being used for propaganda purposes would unlikely be a legitimate military objective. Dunlap, *supra* note 51, at 14 (citing Bankovic v. Belgium and 16 NATO Contracting States, Application No. 52207/99 European Court of Human Rights, *available at* http://www.echr.coe.int/NR/rdonlyres/028CA52C-12A7-

Dunlap concludes that while the role of the law and lawyers in the U.S. military exists for practical and altruistic reasons, "there is disturbing evidence that the rule of law is being hijacked into just another way of fighting (lawfare), to the detriment of humanitarian values as well as the law itself."[57]

Since Maj Gen Dunlap's paper, the term lawfare has seen increasing use. It has been used generally to indicate the "ill-intentioned use of international law and the courts to harm American interests."[58] Lawfare also has been defined as "the pursuit of strategic aims, the traditional domain of warfare, through aggressive legal maneuvers."[59] Lawfare has been sufficiently recognized to be the subject of two roundtable discussions held by the Council on Foreign Relations (CFR). The CFR roundtables made the following conclusions: lawfare results from the intersection of globalization and the emergence of international law, lawfare is defined as the strategy of using or misusing law as a substitute for traditional military means to achieve military objectives, and the use of lawfare is expanding.[60]

Lawfare includes use of asymmetrical methods of warfare that violate the LOAC, for example the use of human shields and attacks from protected places.[61] Lawfare also includes actions in peacetime by nations, international groups, and service organizations to restrict the activities of the U.S. military through international treaties, conventions, and other applications of international law.[62] Traditional international relations theory holds that states will balance against concentrations of power.[63] Thus, lawfare includes the long-used tactic of nations collectively acting to create restrictive international conventions and then pressuring hegemonic nations to be bound by those restrictions as a means of limiting the hegemon's power[64] Significant scholars today argue that because the United States is so strong that this balancing of power must occur not through direct challenges to the United States but rather through use of nonmilitary tools "to delay, frustrate, and undermine aggressive unilateral U.S. military policies" using international institutions, economic statecraft, and diplomatic arrangements.[65] Although the issue of the so-called "soft balancing" is strongly disputed, there appears to be a consensus that weaker states consistently act together, including acting through the use of international organizations and conventions and, for a variety of reasons, acting to constrain stronger states.[66] As the sole global hegemon,[67] the United States must be concerned with lawfare in this form.

Major General Dunlap's concern that the law is being "hijacked" is echoed by other commentators. One legal scholar finds "a rising trend in the frequency and severity of adversary violations of [the law of armed conflict] and humanitarian

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4B7F-A327-0823819AC378/0/Alphaeng.pdf); *see also* Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. REV. 65 (2005).

[57] Dunlap, *supra* note 51, at 6.

[58] *The Pentagon and "Lawfare,"* WASH. TIMES, Mar. 24, 2005, *available at* http://www.washtimes.com/op-ed/20050323-091218-7514r.htm.

[59] Jeremy Rabkin, *"Lawfare,"* OPINION J., July 17, 2004, *available at* http://www.opinionjournal.com/extra/?id=110005366.

[60] Council on Foreign Relations, Lawfare, the Latest in Asymmetries (March 18, 2003), http://www.cfr.org/publication.html?id=5772 [hereinafter Lawfare, the Latest in Asymmetries].

[61] *Id.*

[62] Council on Foreign Relations, Lawfare, the Latest in Asymmetries – Part Two (May 22, 2003), http://www.cfr.org/publication/6191/lawfare_the_latest_asymmetries_ part_two.html; *see also* David B. Rivkin, Jr. & Lee A. Casey, *Friend or Foe?* WALL ST. J., Apr. 11, 2005 (stating that the ICRC "has become the leading practitioner of 'lawfare' – a form of asymmetrical warfare that aims to constrain American power using the law.").

[63] Keir A. Lieber & Gerard Alexander, *Waiting for Balancing: Why the World Is Not Pushing Back*, INT'L SECURITY, Summer 2005, at 111. There are many variations on this theory, including, among others, that states balance only against perceived threats and that geography qualifies the balancing theory (e.g., the United States is separated by two oceans from other possible great powers). *Id.* at 111-12.

[64] An example frequently cited of collective action attempting to limit a great power is the creation of the ICC under the Rome Statute and international pressure for the United States to become a party to the ICC. *See infra* note 94 and accompanying text (providing a discussion of the ICC and argument for U.S. participation in the ICC as supportive of the war on terrorism despite concerns about politically motivated prosecutions of U.S. servicemembers).

[65] Robert A. Pape, *Soft Balancing Against the United States*, INT'L SECURITY, Summer 2005, at 9.

[66] *Compare e.g.*, *id.* at 36-38 (noting that Bismarck created a "web of international cooperation" to isolate and balance France's power by removing capabilities available to France), *with* Lieber & Alexander, *supra* note 63, at 130-132 ("routine diplomatic friction" and "diplomatic maneuvering by U.S. allies and nonaligned countries against the United States in international institutions").

[67] *See* John O'Sullivan, *The Reluctant Empire*, NAT'L REV., May 19, 2003 (providing a discussion of the United States as a global hegemon).

> The U.S. is, of course, militarily stronger than any previous power, whether imperial or national. It also has a greater share of the world's productive capacity than any previous "hegemon." And its dominance in everything from technology to popular culture dwarfs the combined efforts of most other major nations. All these forms of superiority would enable it to get its way in most matters if it were determined to do so.

Id.

principles to gain a strategic advantage."[68] Another warns that "lurking in the back of the minds of commanders is the threat of international condemnation and possible calls for prosecution when errors are made, as they inevitably will be in the confusion of battle."[69] The CFR roundtable expressed a similar concern.[70] Other commentators pose the possibility of a legal "decapitation strike" against the President or military commander—using a personal lawsuit to harass and distract the leader.[71] Ultimately, concern about the misuse of the law by our enemies to achieve their objectives has made its way into U.S. strategy documents. The NDS notes that a significant strategic vulnerability for the United States is states using international fora and judicial processes to challenge the United States in order to further their objectives.[72]

Other commentators dispute that lawfare is a risk to military operations. They argue that conducting military operations in a manner fully consistent with international law and the LOAC does not constrain the military and actually helps the United States win its conflicts.[73] This line of analysis dismisses concerns about constraints on U.S. military force imposed through international law, sovereignty-constraining treaties, or "soft balancing" and, more importantly, maintains that concerns about lawfare have eroded the United States' respect for international law with negative consequences in the war against terrorism.[74] Because the United States is a democracy founded under the rule of law, some commentators assert that the United States must act in accordance with the law, even when confronted with serious threats, or risk losing its foundation in values.[75] Additionally, as the United States often functions in, or desires to function in, a military coalition, commentators point out that the United States cannot afford to be viewed by the international community as completely disregarding international law and the LOAC.[76]

Fundamentally, lawfare in its broadest meaning represents both risk and opportunity for the U.S. military. Substantive international law is becoming increasingly more complex. Application of the LOAC, particularly given the increasing accuracy of many weapons in the U.S. inventory and the urban nature of counter-insurgency warfare, is becoming more and more nuanced. These increasing challenges provide opportunities for U.S. opponents to challenge and obstruct U.S. policies and operations in legal fora and the "court of world opinion." In today's complex, interrelated, and well-publicized environment, law has inexorably become a tool of war. Like most tools of war, the use of law in war is neither inherently right nor wrong. It is how the law is used that defines its nature and value.

Thus, military attorneys cannot cede to the enemy the use of law as a weapon of war. Military attorneys must embrace the concept of lawfare, recognizing that the use of law as a weapon of war is a permanent part of military operations. In today's environment, lawfare encompasses the actions that U.S. military attorneys take and advise their clients to take to maintain legitimacy, ensure the greatest freedom of action consistent with domestic and international law, and fight and win the nation's wars.

Strategic Lawyering and Proactive Defensive Lawfare

Lawyers at the strategic level, at a minimum, must be able to recognize lawfare when it occurs and react appropriately. Optimally, military lawyers should address lawfare that may damage U.S. defense interests before the damage occurs. Legal issues are decided by application of the law to the particular facts in question. Proactive lawfare, therefore, is working in advance of issues to shape the law and facts in such a way that the military attorney's clients' interests will be adequately supported once the issues arise.

In addressing defensive lawfare, one first must realize that *non-enemies* can successfully execute lawfare that strategically impacts the United States. For example, some scholars assert that the International Committee of the Red Cross

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[68] Reynolds, *supra* note 56, at 2.

[69] Sapolsky, *supra* note 34, at 4.

[70] Lawfare, the Latest in Asymmetries, *supra* note 60.

[71] Phillip Carter, *Legal Combat, Are Enemies Waging War in our Courts?*, SLATE, Apr. 4, 2004, *available at* http://www.slate.com/id/2116169.

[72] NATIONAL DEFENSE STRATEGY, *supra* note 40, at 5.

[73] David Scheffer is the most articulate of several legal commentators in making this argument. *See, e.g.*, David Scheffer, *The Legal Double Standards of Bush's War*,, FIN. TIMES (London, U.K.), May 6, 2004.

[74] *Id.*

[75] David J. Scheffer, *Recent Books on International Law Review Essay: Delusions About Leadership, Terrorism, and War:* Warrior Politics: Why Leadership Demands a Pagan Ethos, 97 AM. J. INT'L L. 209, 211 (2003).

[76] *Id.*

(ICRC) has employed lawfare against the United States, working through legal fora to constrain U.S. power.[77] The first step in addressing lawfare by non-enemies is becoming knowledgeable about their efforts. The strategic-level attorney must maintain familiarity with the arguments and efforts that are being made in international fora that can negatively impact U.S. security and military operations. By maintaining familiarity with these efforts, the strategic-level attorney can either deploy resources under his control or, more likely, interface with higher headquarters attorneys or attorneys at other U.S. government agencies and assist those attorneys in working to shape the future.

Along with knowledge, which enables the strategic level attorney to "spot the issue," the DOD must devote sufficient personnel and resources to adequately address the concerns raised. That is, is the DOD devoting sufficient resources to advocating U.S. interests before the various international organizations that consider issues that may result in legal limitations and have negative impacts on U.S. security and military operations? Active participation has the benefit of defending the United States from unmanageable restrictions and shaping the nature of the discussion and resolution of issues. Additionally, active participation demonstrates that the United States is taking a leadership role in the international community and supports the NSS's objectives of engagement and use of coalitions.

An example of proactive lawfare in the area of international convention and treaties would be the United States initiating a review of and suggesting changes to current international treaties and conventions concerning status of combatants who do not comply with the LOAC.[78] Working towards, and ultimately obtaining, international consensus on this contentious issue would demonstrate U.S. respect for international law and would be a proactive measure to improve U.S. stature in the international community. It would be a means of "taking the fight" to the international community that endlessly criticizes the U.S. policy regarding unlawful combatants.[79] Successful resolution of this issue would also benefit the U.S. military by ensuring the continuance of the absolute status protection currently granted under the LOAC to military personnel operating in conformity with the LOAC requirements.[80] Proactive lawfare, of course, requires a careful weighing of risks and benefits. Thus, proactively seeking international consensus on the status of unlawful combatants has risks that must be weighed against the potential gains. The point for strategic level lawyers, however, is that they should aggressively seek possible proactive courses of action and actively assess the risks of such proactive actions. The mere existence of risk, however, should not nullify a proactive action. If the potential benefits outweigh the risks, the proactive action should be pursued following coordination with other pertinent actors, including commanders or other senior officials.

A more commonly accepted concept is that *enemies* use lawfare to constrain U.S. options. Placing voluntary or involuntary human shields near important targets and emplacing valuable military assets near places protected under the LOAC (e.g., near mosques) are common examples. Other examples include adversaries killing civilians near a U.S. strike and asserting that the civilian casualties were the result of the strike or captured enemy combatants making false allegations to the ICRC and others of abuse by United States and coalition troops. Major General Dunlap observed in his seminal article that when an enemy during armed conflict employs lawfare the enemy generally is aiming to diminish the strength of U.S. and coalition troops' will and support for the military effort.[81] Actual violations of the LOAC may not be necessary to have a detrimental effect—perceived violations can have just as deleterious effects on U.S. and coalition troops' will to fight.

In addressing adversary-initiated lawfare, the strategic-level attorney must work aggressively to ensure that the correct legal analysis is presented in the public domain. A predicate to successfully defending against this form of lawfare is

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[77] David B. Rivkin & Lee A. Casey, "Friend or Foe," WALL ST. J. (11 Apr. 2005). An example of this would be the ICRC efforts to impose through the LOAC a zero collateral damage approach.

[78] The author gratefully acknowledges Lieutenant Colonel Thomas E. Ayres' contributions to this proposal. Thomas E. Ayres, *"Six Floors" of Detainee Operations in the Post-9/11 World*, PARAMETERS, Fall 2005, at 39. For one of the first published uses of the term "unlawful combatant" in the context of the U.S. war on terror, see Memorandum, George. W. Bush, to Vice President, et al., subject: Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), *available at* http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf. This memorandum also states that captured Taliban fighters were unlawful combatants and, therefore, did not qualify to be considered prisoners of war under Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War. This memorandum also state that al Qaeda operatives would not qualify as prisoners of war under the Geneva Conventions because the Geneva Convention Relative to the Treatment of Prisoners of War was not applicable to the conflict. *See id.*

[79] One commentator asserts, for example, that U.S. detention of unlawful combatants at Guantanamo has resulted in: "angry foreign allies, a tarnishing of America's image, and declining cooperation in the Global War on Terrorism." Gerard P. Fogarty, *Is Guantanamo Bay Undermining the Global War on Terror?*, PARAMETERS, Winter 2005 – 2006, at 62.

[80] Among other categories, captured personnel of a force that abides by the LOAC and wears a uniform openly during combat are prisoners of war and accorded all privileges specified in Geneva III. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, *available a*t http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/ 6fef854a3517b75ac125641e004a9e68.

[81] Dunlap, *supra* note 51, at 11-12. Clausewitz stated that "[w]ar is . . . an act of force to compel our enemy to do our will." Clausewitz, in defining war, stated that to overcome an enemy the opponent must match his efforts to the opponent's power of resistance, "which can be expressed as the product of two inseparable factors, viz. *the total means at his disposal* and *the strength of his will*." CARL VON CLAUSEWITZ, ON WAR 75, 92-93 (Michael Howard & Peter Paret eds. & trans., Princeton U. Press 1976) (1832).

ensuring that the command has an accurate understanding of the facts and has adequately documented these facts. Without this understanding and documentation to back up that understanding, lies can be made believable and good faith misunderstandings are much more likely to occur. Assuming the command has a good grasp of the facts, the next step is ensuring that these facts and the applicable law are effectively communicated to the public and other interested parties. Ultimately, where groups "challenge a prudent command decision that involves civilians, well-prepared, thorough, fact-based arguments should be made aggressively and swiftly to defend command action, to maintain the initiative, and prevent operational degradation."[82] Effective communication involves not only well-trained military attorneys, but well-trained public affairs officers, command spokespersons, and information operations officers. Strategic-level attorneys must ensure that these personnel are educated in the LOAC and application of the LOAC to the situation at issue so that precise, accurate, and pertinent information is provided. To defeat lawfare of this type, however, military attorneys also must convince command spokespersons that an aggressive public education campaign about what the LOAC requires is necessary..[83] Ultimately, military attorneys also may have to shed their normal reticence and engage the media themselves on behalf of their command.

The War on Terrorism, the War of Ideologies, and the Strategic Legal Advisor: Using Lawfare to our Advantage?

Our national strategies recognize that the war on terror is a war of ideas.[84] It is a clash of U.S. values, which are being spread through globalization, against the reactionary beliefs of radical Islamists who desire to replace the globalization of western beliefs with a radical Islamist world order. Such is inevitable given that the United States is a values-based country with a values-based government.[85] The NSS states that unparalleled responsibilities and opportunities come with America's current unprecedented strength and influence.[86] United States strategic precepts are based on an American internationalism reflecting U.S. values combined with U.S. national interests in a globe that is increasingly united by common values and interests. That the war on terrorism is a war of ideas is frequently the subject of scholarly and popular writing.[87] Henry Kissinger, former Secretary of State, for example, has written that the phenomenon of radical Islam "is an ideological outpouring by which Islam's radical wing seeks to sweep away secularism, pluralistic values and Western institutions wherever Muslims live."[88] Numerous analysts have emphasized the importance of ideas to defeat an ideology. For example, one analyst states that Al Qaeda is an insurgency appealing to the Islamic world with the revolutionary vision of strict Islamist governments replacing current moderate or secular Islamic regimes.[89] Accordingly, to win the war against terrorism the United States must offer more appealing opportunities than Al Qaeda.[90] Although the United States possesses such great military and economic power, it is at a disadvantage in the war of ideas because its very power is threatening. Fundamentally, to someone outside the United States, the scope of U.S. power makes it difficult to determine if the U.S. rhetoric of democracy and freedom is only that—rhetoric.[91] Thus, it can be difficult to determine how the United States should undertake to win the war of ideas. While much attention has been paid to the impact of information operations or strategic communications, the actual actions of the United States speak volumes.[92] For example, a strong case can be made that the teachings of the radical Islamists are significantly strengthened by the large number of authoritarian regimes in the mostly Muslim countries of the world, U.S. support for those regimes, and the perception of the imbalance of global distribution of power as exemplified in recent U.S. actions.[93] One way that the United States can positively influence this

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[82] Reynolds, *supra* note 56, at 108. Major Reynolds's article presents several well-thought out and sound recommendations for addressing allegations of improper targeting, specifically, and lawfare, generally.

[83] *See id.* at 104-05 n.409 (providing an example during Operation Iraqi Freedom of a missed opportunity to educate the public about the LOAC).

[84] *See* NATIONAL MILITARY STRATEGIC PLAN FOR THE WAR ON TERRORISM, *supra* note 31, at 7 (stating that the enemy's "strategic center of gravity" is "extremist ideology"); 2006 QDR, *supra* note 35, at 22 (stating that war on terrorist networks is ". . . both a battle of arms and a battle of ideas—a fight against terrorist networks and against their murderous ideology"); THE OFFICE OF THE PRESIDENT OF THE UNITED STATES, NATIONAL STRATEGY FOR COMBATING TERRORISM 23 (2003) [hereinafter NATIONAL STRATEGY FOR COMBATING TERRORISM].

[85] ANTHONY E. HARTLE, MORAL ISSUES IN MILITARY DECISION MAKING 45-46, 132 (2004).

[86] NATIONAL SECURITY STRATEGY, *supra* note 36, at 1.

[87] *See, e.g.*, Zeyno Baran, *Fighting the War of Ideas*, FOREIGN AFFAIRS, Nov.-Dec. 2005, at 68.

[88] Henry A. Kissinger, *How to Exit Iraq*, WASH. POST, Dec. 18, 2005, at B7.

[89] Michael F. Morris, *Al Qaeda as Insurgency*, JOINT FORCES Q., Autumn 2005, at 45.

[90] *Id.*

[91] James Page, *The U.S. Is Suffering a Chronic Deficit of Legitimacy*, NEW STATESMAN, Dec. 2004, at 34.

[92] Baran, *supra* note 87, at 76 (stating that more and more Muslims believe United States "'freedom and democracy agenda' is a trick"; U.S. strategy must stress "justice and dignity").

[93] Mohammed Ayoob, *The Future of Political Islam: The Importance of External Variables*, 81 INT'L AFFAIRS 960-61 (2005).

war of ideology is by its choices relating to the international order. Examination of the U.S. policy regarding the Rome Statute of the ICC (Rome Statute),[94] of which the United States is not a party, is exemplary.

The ICC is a permanent, treaty-based criminal court with international jurisdiction.[95] The ICC was established by the Rome Statute on 17 July 1998 and went into force on 1 July 2002.[96] Unlike the existing International Criminal Tribunals for Yugoslavia and Rwanda, which are ad hoc organizations established within the framework of the UN, the ICC is independent of the UN.[97]

State parties to the Rome Statute and the UN Security Council may refer situations to the ICC for investigation.[98] Absent referral, the ICC prosecutor may initiate an investigation based on reliable information. Under this circumstance, the prosecutor must obtain judicial review and approval by two judges of a three-judge panel before issuing an arrest warrant for the suspect.[99] The Rome Statute also establishes the Assembly of States Parties, which includes all parties to the Rome Statute and provides oversight to the Court.[100] The ICC has jurisdiction over all crimes that are recognized under the Rome Statute and occur in a state party's territory or are committed by a state party national.[101] Thus, the ICC has jurisdiction over accused nationals from nations that are *not* parties to the Rome Statute if the alleged crime occurs in the territory of a state party. By the terms of the Rome Statute, the ICC will investigate and prosecute only if a state is unwilling or unable to effectively prosecute.[102] Under Article 98 of the Rome Statute, the ICC may not request the surrender of a person if doing so would require the requested state to violate an international agreement.[103]

The United States participated in the development of the Rome Statute. President Clinton signed the treaty on 31 December 2000, but, in a letter to the UN dated 6 May 2002, the United States formally notified the UN that the United States did not intend to become a party to the Rome Statute.[104] The U.S. decision to not become a party to the Rome Statute is based on several perceived "fundamental flaws."[105] Ultimately, the United States contends that accountability for war crimes should be obtained primarily by relying on national judicial systems and international tribunals appropriately established by the UN Security Council within the UN framework.[106] The United States does not intend to become a party to the ICC and continues to maintain its objections to the ICC because the ICC's jurisdiction over non-party state nationals

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[94] Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 (2002), *available at* http://www.un.org/law/icc/statute/rome fra.htm [hereinafter Rome Statute].

[95] *See id.* art. 4-5.

[96] *See* United Nations Treaty Collection, Rome Statute of the International Criminal Court, http://untreaty.un.org/ENGLISH/bible/englishinternetbibl/partI /chapterXVIII/treaty11.asp (last visited July 12, 2006). As of 14 November 2005, 100 countries are state parties to the Rome Statute. The Rome Statute and ICC have an intellectual lineage dating back to the war crime tribunals occurring after World War II. Between 1949 and 1954, at the request of the UN, the UN International Law Commission prepared several draft statutes for an international criminal court. Work on the statute then ceased for 35 years. In 1989 the International Law Commission resumed work on draft statutes resulting in the adoption of the Statute in 1989. *See* International Criminal Court, Chronology of the International Criminal Court, http://www.icc-cpi.int/about/ataglance/chronology.html (last visited July 12, 2006).

[97] International Criminal Court, Historical Information, http://www.icc-cpi.int/about/ataglance/history.html (last visited July 12, 2006). The relationship between the UN and the ICC is established by a memorandum of agreement, which went into effect on 4 October 2004.

[98] International Criminal Court, How does the Court work?, http://www.icc-cpi.int/about/ataglance/howdoesthecourtwork.html (last visited July 12, 2006).

[99] *See* Rome Statute, *supra* note 94, art. 15.

[100] International Criminal Court, How does the Court work?, http://www.icc-cpi.int/about/ataglance/howdoesthecourtwork.html (last visited July 12, 2006) (noting that state parties are also required to cooperate with ICC investigations).

[101] Rome Statute, *supra* note 94, art. 5; *see also* International Criminal Court, Jurisdiction, http://www.icc-cpi.int/about/ataglance/ jurisdiction.html (last visited July 12, 2006). Crimes over which the ICC has jurisdiction include genocide, crimes against humanity, war crimes and aggression. The ICC will not exercise jurisdiction over the crime of aggression until the crime is adequately defined. *See* Rome Statute, *supra* note 94, art. 5.

[102] *See* Rome Statute, *supra* note 94, art. 17.

[103] *Id.* art. 18.

[104] Press Statement, International Criminal Court: Letter to UN Secretary General Kofi Annan (May 6, 2002), http://www.state.gov/r/pa/prs/ps/2002/0068. htm.

[105] *See* U.S. Dep't of State, Fact Sheet, Frequently Asked Questions About the U.S. Government's Policy Regarding the International Criminal Court (July 30, 2003), http://www.state.gov/t/pm/rls/fs/23428.htm. In short, the U.S. position is that the jurisdiction of the ICC is too broad because the ICC has jurisdiction over nationals of non-party States, including U.S. servicemembers. In addition, the existing checks and balances over the power of the ICC prosecutor, who can proceed with investigation and prosecution with only judicial review and approval, are insufficient. The ICC also has too much discretion in determining whether a State is "unable or unwilling" to prosecute its national. The United States believes that these last two flaws create a significant risk of politically motivated prosecutions. Finally, the United States is concerned that State parties can opt out of jurisdiction of certain crimes, while non-state parties cannot, and that the ICC has jurisdiction over an undefined crime—aggression. *See id.*

[106] *See id.*

"strikes at the essence of the nature of sovereignty."[107] Additionally, U.S. policy maintains that military members must be protected from prosecution before the ICC absent express consent from the United States or a referral from the UN Security Council.[108]

Responding to significant concerns about the Rome Statute and the ICC, Congress passed the American Servicemembers' Protection Act (ASPA) as part of the 2002 Emergency Supplemental Appropriations Act.[109] The ASPA, among other things, prohibits U.S. military assistance to countries that are parties to the ICC and have not signed Article 98 agreements.[110] Countries that are not a party to the Rome Statute are not affected by the ASPA.[111]

The U.S. decision not to become a party to the Rome Statute runs counter to the NSS's approach of cooperative action and sustaining common principles.[112] Failure to become a party is also inconsistent with the NDS's conclusion that international partnerships are "a principal source" of U.S. strength.[113] Additionally, non-membership is contrary to the NDS objectives of "strengthen[ing] alliances and partnerships" and establishing conditions "conducive to a favorable international system."[114] Non-participation results in U.S. failure to lead a growing international body—failure to exploit a U.S. strength. Additionally, the U.S. policy appears to run counter to the NSS goal of respect for human dignity, including championing justice and the rule of law.[115] Finally, non-participation exposes the United States to international criticism as "unilateralist," hypocritical for decrying war crimes but then acting parochially to protect its nationals, and oppressive for "bullying" diplomacy by pushing for Article 98 agreements to protect the U.S. military.[116] Because the war on terrorism is a war of ideologies, the United States must make a significant effort, if not its main effort, in convincing moderate Muslims that Western liberal democratic institutions, ideals, and values provide a better future than radical Islam. The United States must act consistently from a values basis and cannot appear to act hypocritically or parochially. Anything that adversely affects perceptions about the U.S. goals in the war on terrorism will weaken U.S. global legitimacy, and, therefore, adversely affect U.S. ability to successfully prosecute the war on terrorism.[117] In short, not being a party to the Rome Statute is a strategic mistake in the war on terrorism.

The NSS and the NDS explicitly and implicitly state that the United States has the right to act outside of a coalition or international organization to defend against a sufficient threat to U.S. national security.[118] The authority and necessity to use preemptive or preventive war to defend the United States does not negate the inconsistency between the national strategies and the current U.S. policy towards the ICC. Although the NSS and the NDS display a willingness to "go it alone," they clearly and repetitively articulate that a cooperative environment is the preferred course. Additionally, the NDS identifies that the United States will be challenged by the use of "international fora, judicial processes, and terrorism."[119] This statement recognizes the reality of terrorist tactics. If terrorists are using "judicial processes" and "international fora" against the United States, the United States should not absent itself from this part of the theater strategic environment of the war on

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[107] Press Release, Explanation of Vote on the Sudan Accountability Resolution (March 31,2005), http://www.state.gov/p/io/44388.htm; *see* U.S. Dep't of State, International Criminal Court, http://www.state.gov/p/io/c10836.htm (last visited July 12, 2006).

[108] *Id.*

[109] *See* American Servicemembers' Protection Act of 2002, Pub. L. No. 107-206, §§ 2001-2015, 116 Stat. 820, 899-909 (2002) (codified at 22 U.S.C. S. §§ 7421-7433) (LEXIS 2006).

[110] 22 U.S.C. S. § 7426(a) and (c).

[111] *Id.* If the foreign country is party to the Rome Statute and an agreement is not signed, the following types of assistance are suspended: International Military Education and Training, Foreign Military Financing, and Excess Defense Articles. Other types of aid, such as counternarcotics funding, is not affected. As of 3 May 2005, 100 countries had signed bilateral agreements with the United States under Article 98 of the Rome Statute. These agreements protect against the possibility of transfer or surrender of United States nationals to the ICC. Press Statement, U.S. Signs 100th Article 98 Agreement (May 3, 2005), http://www.state.gov/r/pa/prs/ps/2005/ 45573.htm.

[112] NATIONAL SECURITY STRATEGY, *supra* note 36.

[113] NATIONAL DEFENSE STRATEGY, *supra* note 40, at 4-5.

[114] *Id.* 6-7.

[115] NATIONAL SECURITY STRATEGY, *supra* note 36, at 3.

[116] *See* Nicholas D. Kristof, *Schoolyard Bully Diplomacy*, N.Y. TIMES, Oct. 16, 2005. Additionally, the ASPA's limitations on security cooperation are hampering U.S. security cooperation efforts, particularly in South America. *See* Juan Forero, *Bush's Aid Cuts on Court Issue Roils Latin America*, N.Y. TIMES, Aug. 19, 2005.

[117] *See, e.g.*, Andrew Harvey, Ian Sullivan, & Ralph Groves, *A Clash of Systems: An Analytical Framework to Demystify the Radical Islamist Threat*, PARAMETERS, Autumn 2005, at 73. From this viewpoint, it is important that the United States champion and demonstrate justice as well as freedom and democracy. George Perkovich, *Giving Justice Its Due*, FOREIGN AFFAIRS, July/Aug. 2005, at 80.

[118] NATIONAL SECURITY STRATEGY, *supra* note 36, at 6, 15; NATIONAL DEFENSE STRATEGY, *supra* note 40, at 1-2.

[119] NATIONAL DEFENSE STRATEGY, *supra* note 40, at 5.

terrorism.[120] As long as the United States is not a party to the ICC, it will have great difficulty in influencing ICC rules, policies, or application.

In light of national strategy and best practices in prosecuting the war on terror, the United States should consider revoking its non-party notification, becoming a party to the Rome Statute, and invoking Article 124 of the Rome Statute. Article 124 provides that a State on becoming a party to the Rome Statute may declare that it does not accept the jurisdiction of the ICC for crimes committed by its nationals for seven years after entry.[121] Under Article 127, a State may withdraw from the Rome Statute after written notification and a one-year delay.[122] Thus, the United States would become a party but would not have any risk of prosecution of U.S. nationals for seven years after becoming a party.[123] During that seven-year period, the United States could work to make necessary changes to the Rome Statute and obtain sufficient support from Congress for modification of the ASPA. If the United States is unable to secure any changes to the Rome Statute within a six-year period, the United States could notify the UN Secretary-General of its withdrawal and not suffer from any of its fundamental concerns about the ICC. The United States would receive significant credit internationally for adopting this policy and this course of action supports the NSS, the NDS, and the prosecution of the war on terror.

This example demonstrates how what may be considered a legal issue can be of strategic concern and how lawyers at the strategic level need to address legal issues in terms of national security strategy. United States military attorneys must always be cognizant that advice on the law and legal issues may move the United States closer to or farther away from realizing national strategic goals. Military lawyers must not only look at narrow legal issues but at the impact of how those issues are addressed to assure that legal, moral, *and* strategically enhancing decisions are reached. Furthermore, strategic leaders must be attuned to the strategic impact legal issues may have.

Military Legal Advisor Capabilities

Military attorneys at the strategic level must work to address, both defensively and proactively, the increase in legal issues impacting military operations and national strategy. Military lawyers must react effectively to lawfare, be proactive, and consider how decisions within a legal context can be used to support the national security strategy. Military lawyers, because of training and experience, however, can also provide practical judgment on almost any issue. At the strategic level, the common sense and sharp analysis that lawyers bring to the table should be fully utilized.

For most lawyers, legal education begins in law school. Despite what many non-lawyers think, legal education does not teach students law. This is because "law" is not a finite thing that can be learned. Although law students certainly read cases, statutes, and administrative rules, law students soon find that "law is rarely bounded, is often ambiguous, and sometimes practiced in great variance from how it is written."[124] Law students are taught the process by which law is created, why laws are made and how they evolve, values and ethics, legal research skills, and managing interpersonal relationships, among other things. An effective lawyer must be able to creatively handle novel situations because, in general, no two situations confronting a professional are ever precisely the same. Law schools, therefore, exist to prepare students to be effective practitioners of the legal profession, which requires law schools to teach their students "how to think like a lawyer."[125] Thus, a legal professional not only must be well-versed in the field of law but also must be able to exercise appropriate practical judgment while drawing on their knowledge in succeeding unique circumstances.[126]

Among the many characteristics required of competent lawyers, good practical judgment is the "key faculty needed when lawyers seek to identify, assess, and propose concrete solutions in particular and often complex social

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[120] The "theater strategic environment" is the composite of the conditions, circumstances, and influences in the theater that describe the diplomatic-military situation, affect the employment of military forces, and affect the decisions of the operational chain of command. JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS 539 (12 Apr. 2001).

[121] *See* Rome Statute, *supra* note 94, art. 124 ("Transitional Provision," states in pertinent part: "a State, on becoming a party to this Statute, may declare that, for a period of seven years after entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court. . . ."). Note that Article 126, "Entry into Force," states that" "[f]or each State ratifying, accepting, approving, or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month of the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval, or accession." *Id.* art. 126.

[122] *Id.* art. 127.

[123] *See id.*

[124] Richard A. Matasar, *The Rise and Fall of American Legal Education*, 49 N.Y. L. SCH. L. REV. 465, 467 (2004).

[125] D. Don Welch, *"What's Going On?" In the Law School Curriculum*, 41 HOUS. L. REV. 1607, 1607 (2005).

[126] *Id.* at 1611.

circumstances."[127] Legal education contributes to developing good practical judgment in a variety of ways, for example, through the casebook methodology of teaching the law[128] and the use of the Socratic teaching method.[129] Practical judgment is a combination of sound deliberation, including exercising the intellect and considering moral values, and prudent decision making.[130] Competent lawyers are able to see the big picture, taking into account opposing and varied perspectives and being able to articulate likely viewpoints and concerns of multiple participants in a process.[131] Judgment, for lawyers, means to "invoke and apply knowledge responsively when there are competing concerns and discrete decisions" that need to be made.[132]

Once a student leaves law school, passes the bar exam, and becomes an attorney, the requirement to apply judgment while drawing on the knowledge of the law only increases. One could argue that the exercise of practical judgment within a legal context is the *primary* activity of senior military attorneys. The ever-present need for lawyers to apply practical judgment is so widely understood within the legal profession that the legal rules of ethics formally endorse lawyers contemplating nonlegal considerations on behalf of their clients. For example, the Army *Rules of Professional Conduct for Lawyers* states in Rule 2.1 that "a lawyer shall exercise independent professional judgment and render candid legal advice. In rendering advice a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, that may be relevant. . . ."[133] The commentary to Rule 2.1 states that narrow legal advice may be of little value, especially where "practical considerations, such as cost or effects on other people, are predominant."[134] In addition to the strictures of Rule 2.1, Army legal ethics regulations require Army attorneys to improve the law and the legal system and take a special responsibility for the quality of justice.[135] Legal scholars generally agree that non-legal counseling should be encouraged—it is not only permissible, but desirable, in certain circumstances.[136] Additionally, as a practical matter given the growing complexity of life, lawyers are increasingly required to provide advice on issues that would not be considered legal by traditional standards.[137]

Through education, training, and life-long experience, lawyers become experts at analyzing facts and issues from a great mass of data, determining the import of this information, applying good practical judgment including consideration of non-legal factors, and ultimately, synthesizing and articulating this information in a helpful way within the context of the law.

The Strategic Lawyer and Candid Military Legal Advice Referring to "Moral, Economic, Social, and Political Factors"

With the nation in a long-term war on terrorism, it is increasingly important that all available tools are used to their fullest effect. Use of military lawyers' practical judgment, particularly at the strategic level, is a significant tool in this war. In this war of ideologies, democracy against radical, fundamentalist Islamism, the law, lawyers, and good judgment are

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[127] Mark Neal Aronson, *We Ask You to Consider Learning About Practical Judgment in Lawyering*, 4 CLINICAL L. REV. 247, 249 (1998).

[128] Welch, *supra* note 125, at 1614. Law school textbooks contain numerous cases from throughout U.S. jurisprudence. There is often little, if any, explanation contained in the textbook concerning the meaning of the case. Determining that meaning is left to the student. Pertinent facts and court holdings are often buried in large amounts of irrelevant or non-pertinent information. The student, however, learns from this experience to sort the important from the unimportant.

[129] *Id.* at 1616 (providing that under the Socratic method a law professor calls upon a student to recite the facts, issues, and holdings of a case. The questioning then moves beyond the case under review and the questions expand to application of the case to other hypotheticals. Although under significant attack as demeaning and demoralizing, the Socratic method does teach law students to analyze under stress the impact of changing circumstances.).

[130] Aronson, *supra* note 127, at 256.

[131] *Id.* at 251-53.

[132] *Id.* at 264. Judgment encompasses qualities such as soundness, logic, discrimination, discernment, imagination, sympathy, detachment, impartiality, and integrity. *Id.* at 273.

[133] U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS R. 2.1 (1 May 1992) [hereinafter AR 27-26]. Pursuant to Rule 1.13, except when representing an individual client, an Army lawyer represents the Department of the Army. *Id.* R. 1.13. The American Bar Association's *Model Rules of Professional Conduct*, Rule 2.1 reads virtually identical to the Army's rule: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but also to other considerations such as moral, economic, social, and political factors, that may be relevant to the client's situation." *See* MODEL RULES OF PROF. CONDUCT R. 2.1 (2003).

[134] AR 27-26, *supra* note 133, at R. 2.1.

[135] *Id.* at 1, para. 6. Note that Army lawyers are ethically prescribed to owe allegiance not to any immediate group, but to the Department of the Army acting through its authorized officials. *Id.* at R.1.13.

[136] Larry O. Natt Gantt, II, *More Than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations*, 18 GEO. J. LEGAL ETHICS 365, 367-69 (2005) (providing that nonlegal counseling should be encouraged, but standards on when, how much, and impact are unsettled).

[137] *Id.* at 365.

crucial. Commanders' decisions must be considered in light of legal considerations to ensure that the enemy is not given ammunition to destroy the will of the people (defensive lawfare). Furthermore, legal decisions must be considered in light of national strategy to ensure that they support that strategy (offensive lawfare). Additionally, to win the war on terrorism, military decisions must be sound and derive from U.S. values. While it is recognized that the fundamental values of American society are consistent with the role of the American military professional,[138] military adherence to and spreading of the fundamental values of American society also are necessary to win the war on terrorism. Every time the actions of the United States and its military are seen as incompatible with the values the military espouses, the United States hands radical Islamism a round of ammunition.

An example of how lawyers' excellence in practical judgment can be used to further sound decision-making and adherence to American values occurs in Irving Janis's studies into the group decision-making failure he termed "groupthink." Janis introduced the concept of groupthink in his 1972 article, *Groupthink: The Desperate Drive for Consensus at Any Cost*.[139] In this article, Janis argued that significant policy decision fiascos were the result of a group dynamic he called "groupthink." Janis used as his example the decision by President John F. Kennedy to authorize the Bay of Pigs operation, noting that the lack of intelligence of the decision-maker and his advisors was not the cause for this notably bad decision.[140] Janis noted that one of the "key characteristics of groupthink" is that members of the group remain loyal to the group by sticking to the policies to which the group has already committed itself.[141] Groupthink arises among groups in which the members avoid being too harsh in their judgments of their leaders' or colleagues' ideas—the members adopt a "soft line" of criticism.[142] Although pressure from within the group to conform to the group's consensus is not unknown, self-censorship of thought is more prevalent. In groupthink, when addressing personal, lingering uncertainties the members tend to give the benefit of the doubt to the group consensus. Groupthink tends to increase, Janis stated, as group cohesiveness increases because "[i]n a cohesive group, the danger is not so much that each individual will fail to reveal his objections to what the others propose but that he will think the proposal is a good one, *without attempting to carry out a careful, critical scrutiny of the pros and cons of the alternatives.*"[143] Group members participating in a group of respected colleagues can fall into consensual validation of beliefs, vice individual, personal critical thinking. In a remarkably counter-intuitive manner, high group cohesion can work against a group and be a negative factor to making good decisions. Groupthink occurs as a "mutual effort among the group members to maintain self-esteem and emotional equanimity by providing social support to each other" especially during times of decision making under stress.[144] Since Janis's initial article was published, the concept of groupthink has grown in popularity, becoming a "standard item in textbooks in social psychology, organization and management, and public policy-making."[145]

Janis prescribed remedies for the groupthink trap. Groups "whose members have properly defined roles, with traditions concerning the procedures to follow in pursuing a critical inquiry," probably make better decisions than any lone decision-maker.[146] Policy leaders should stress that each member of a policy-forming group should act as a "critical evaluator";

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[138] HARTLE, *supra* note 85, at 150.

[139] Irving L. Janis, *Groupthink: The Desperate Drive for Consensus at Any Cost*, 5 PSYCHOL. TODAY 43 (1971), *reprinted in* U.S. ARMY WAR COLLEGE, SELECTED READINGS, AY 2006, STRATEGIC LEADERSHIP COURSE 224 (Charles R. Oman, ed., 2005). Janis followed this seminal work with several others, but he never deviated significantly from his analysis in this 1971 article. In 1972, Janis published *Victims of Groupthink: A Psychological Study of Foreign Policy Decisions and Fiascos.* In 1982, he expanded and refined his concept in *Groupthink: Psychological Studies of Policy Decisions and Fiascos*. In 1989 he used groupthink as a basis to analyze a theory of executive decision making in *Crucial Decisions: Leadership in Policy-making and Crisis Management*.

[140] *Id.* at 224 ("Stupidity certainly is not the explanation. The men who participated in the Bay of Pigs decision, for instance, comprised one of the greatest arrays of intellectual talent in the history of the American Government. . . .").

[141] *Id.* at 225.

[142] *Id.*

[143] *Id.* (emphasis added).

[144] *Id.* at 229.

[145] PAUL 'T HART, ERIC K. STERN, & BENGT SUNDELIUS, BEYOND GROUPTHINK: POLITICAL GROUP DYNAMICS AND FOREIGN POLICY-MAKING 11 (1997). Analysis of the small group as a unit of decision in foreign policy has been mainly guided by Janis' work on groupthink. *Id.* at 7. Note, however, that the groupthink model has been criticized on several grounds. It is difficult to determine how often groupthink actually drives a group decision. Janis's work, was primarily the result of analyzing a very small number of policy decisions. Research is scant on how national or cultural differences affect groupthink. In the area of foreign-policy decision making, Janis's primary source of analytical material, there are an enormous variety of groups and group processes that play into the decision making. Moreover, there are other aspects of small group behavior that are relevant when analyzing policy-making by small groups. Additionally, policy making and advisory groups are generally embedded in larger institutions and experience other constraints that impact the small group's performance. Ultimately, executive decision making is characterized by difficult trade-offs, including trade-offs between competing priorities, policy quality versus obtaining support for implementation, and determining how much decision making resources (including the decision maker's own time) to devote to determining the best option. Nonetheless, Janis's theory is worth considering in the context of strategic-level decision-making.

[146] Janis, *supra* note 139, at 226.

experts and evaluation groups outside the policy-making group should work on the same policy issues and challenge views of the core group; all members should be encouraged to air any residual doubts; and, finally, whenever an evaluation of policy alternatives is required, "at least one member should play *devil's advocate*, functioning as a good lawyer in challenging . . . those who advocate the majority opinion."[147]

Senior military lawyers, through education, training, and experience, are an excellent choice to mitigate groupthink during decision-making at the strategic level by acting as Janis's "devil's advocate" and as a "good lawyer" to challenge the majority position.[148] Lawyers' lack of specific information relevant to the group's decision under review does not detract from their capability to perform this role. Groups are frequently formed from those who know about the problem and the group members are expected to bring problem-specific expertise, information, and analysis to the group's problem-solving process. Groupthink can be mitigated, however, by the participation of members from outside the group or by having a participant responsible for challenging the majority position. A lawyer with little or no knowledge of the specific issue under discussion, because of training and experience, can fulfill the role of majority challenger. A senior military attorney is educated and trained to ask the right questions, rapidly assess and assimilate facts, consider their import, and articulate positions, with the expectation that non-legal concerns will be integrated into the analysis.

Pulling It All Together—the Role of the Strategic Legal Advisor

Senior military attorneys operating at the strategic level will understand the law and will provide the advice necessary to avoid violations of it. It must be recognized, however, that at the strategic level the law is often at its most flexible. At the strategic level there is the greatest capability to shape the law to meet a commander's or other decision-maker's needs. For example, the senior attorneys' direct clients may be the writers of the regulations under interpretation. In those circumstance, modifying the limiting regulation may be a viable solution to solving a particular issue. In the field, attempting to modify a governing regulation is a remote and time-consuming solution. Similarly, access to the Congressional legislative cycle is significantly greater at the strategic level and attempting to change a troublesome statute is always an option that should be considered. Finally, "precedential" interpretations or policies that drive field attorneys' opinions are published at the strategic level. Thus, an attorney at the strategic level must always consider how the law can be shaped or how interpretations can be changed as a possible answer to an issue with legal concerns.

In analyzing how the law can be shaped, the attorney must consider the effect of the interpretation or change and provide advice on the strategic and policy implications of the interpretations or possible changes to the current law. All too often, clients of senior attorneys are interested in what the law says and what the law permits or prohibits and are not interested enough in the possible or likely *results* of interpreting the law to permit or prohibit the activity in question or the time and effort required to change or obtain an exception to the current law. Without all the information, the client is not sufficiently informed to decide the better course of action. Experienced lawyers, through training and experience, are expert information synthesizers. Additionally, lawyers are ethically required to exercise independent judgment and, in so doing, consider more than just the law. Attorneys can take information from disparate substantive disciplines, make useful correlations, and reach useful conclusions.

Ultimately, military attorneys at the strategic level must view legal action and advice as a weapon of warfare. Given America's current long-term struggle against terrorism, U.S. national strategies for security, and the skills that military attorneys bring to the table, senior military attorneys must be prepared and encouraged to respond to attacks that use law as the weapon; to think about how the United States can actively use legal actions to win the war on terrorism; and to use their training and experience in synthetic thinking to assist commanders to make sound policy decisions.

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[147] *Id.* at 230 (emphasis added).

[148] *Id.* One should note the value of attorneys to the group, even outside of the groupthink phenomenon. In analyzing Enron's collapse, a recent author has stated that the directors of Enron lacked "vigilant attention" when making far-reaching decisions.

> Company directors, the Senate investigation revealed, also fell short in acquiring the essential information for making the vigilant decisions required by their oversight role. In 2001, for example, the board's compensation committee approved pay plans that gave 65 Enron executives a total of $750 million for their work in 2000, a year in which Enron's total net income was only $975 million. When directors were later asked by a Senate investigator why they had approved such exceedingly generous packages - an average of $11.5 million for each of the more than five dozen executives - they confessed that the $750 million had come from several distinct incentive programs and that nobody on the compensation committee had thought to add up the numbers before approving the programs.

Michael Useem, *The Essence of Leading and Governing is Deciding*, *in* LEADERSHIP AND GOVERNANCE FROM THE INSIDE OUT 65, 68-69 (Robert Gandossy & Jeffrey Sonnenfeld eds., 2004). Army attorneys, with their education, training, and ethical duty to the Army as their client, if appropriately empowered by strategic leaders, can be effective in assuring that policy making bodies pay necessary "vigilant attention."

Recommendations

Army doctrine fails to address adequately the role of the strategic legal advisor. It is a well-known fact that many senior military attorneys and Staff Judge Advocates have had and currently have excellent personal relationships with commanders and clients and that once a solid relationship is developed discussions become far ranging and cover a breadth of topics. This oral tradition needs to be formally addressed in doctrine. Doctrine should also address the use of judge advocates at all levels as "devil's advocates." Formal recognition of this role in doctrine would enhance the capability of judge advocates to perform this role. Additionally, the increasing importance of law as a weapon of warfare, particularly in the war on terrorism, needs to be addressed. Doctrine should recognize the significant importance that legal decisions can have on the strategic situation and direct military lawyers to address policy implications of otherwise legal courses of action. *Field Manual 27-10*, should be reviewed and changed to address comprehensively the role of military lawyers at the strategic level and the expanded spectrum of legal advice needed at all levels to more effectively fight the war on terrorism.

Additionally, the military legal establishment, both at DOD and Service levels, should consider establishing a joint legal office at the national level responsible for analyzing legal trends and issues, making recommendations to senior legal personnel responsible for advising strategic leaders, and working to keep the larger legal community informed of these trends and the ongoing analysis. This organization would be chartered to recognize legal threats and propose responses with a constant view towards their impact on strategic operations. It would also provide advice on how to address recurrent issues (e.g., common targeting issues) and be responsible for publishing articles and information throughout the military legal community.