

BACKGROUND

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Winning Without Fighting: Chinese Legal Warfare

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Abstract

Over the past decade, there has been growing interest in legal warfare or “lawfare.” While the U.S. is focusing on the interplay between the law and counterinsurgency operations, China is approaching lawfare from a different perspective: as an offensive weapon capable of hamstringing opponents and seizing the political initiative. Indeed, Chinese planners are almost certainly preparing legal war plans aimed at controlling the enemy through the law or using the law to constrain the enemy. Consequently, the United States must take steps to prepare for the possibility of legal warfare and incorporate defensive measures into its strategic, operational, and tactical policies.

Over the past decade, many nations have demonstrated a growing interest in legal warfare or “lawfare.” In the United States, lawfare discussions are focusing on the interplay between the law and counterinsurgency operations. Specifically, the U.S. is concerned that opponents, especially insurgents, may employ legal means to secure victories that they cannot obtain on the battlefield.

The People’s Republic of China (PRC), and, in particular, the People’s Liberation Army (PLA), is approaching lawfare from a different perspective: as an offensive weapon capable of hamstringing opponents and seizing the political initiative in wartime.

Context: The “Three Warfares”

Chinese writings often refer to the “three warfares” (*san zhan*): public opinion warfare, psychological warfare, and legal warfare. Chinese analyses almost always link the three together, as they are seen as interrelated and mutually reinforcing.

1. Public opinion/media warfare is the struggle to gain dominance over the venue for implementing psychological

TALKING POINTS

- Over the past decade, many nations have demonstrated a growing interest in legal warfare or “lawfare.”
- In the United States, lawfare discussions are focusing on the interplay between the law and counterinsurgency operations.
- The U.S. is concerned that opponents, especially insurgents, may employ legal means to secure victories that they cannot obtain on the battlefield.
- The People’s Republic of China and, in particular, the PRC People’s Liberation Army are approaching lawfare from a different perspective: as an offensive weapon capable of hamstringing opponents and seizing the political initiative.
- America can no longer regard lawfare from a purely defensive standpoint. Offensive legal warfare, whether practiced by the PRC or by militarily overmatched insurgents, can neutralize America’s military might while damaging its allies and strategic partners.
- The United States must therefore prepare for the possibility of legal warfare and incorporate defensive measures into its strategic, operational, and tactical policies.

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and legal warfare. It is seen as a stand-alone form of warfare or conflict, as it may occur independent of whether there is an actual outbreak of hostilities. Indeed, it is perhaps best seen as a constant, ongoing activity, aimed at long-term influence of perceptions and attitudes. One of the main tools of public opinion/media warfare is the news media, including both domestic and foreign entities. The focus of public opinion/media warfare is not limited to the press, however; it involves all of the instruments that inform and influence public opinion (e.g., movies, television programs, and books).

2. Psychological warfare provides the underpinning for both public opinion/media warfare and legal warfare.

With regard to the PLA, psychological warfare involves disrupting the enemy's decision-making capacity by sapping their will, arousing anti-war sentiments (and therefore eroding the perception of popular support), and causing an opponent to second-guess himself—all while defending against an opponent's attempts to conduct similar operations.

3. Legal warfare is one of the key instruments of psychological and public opinion/media warfare.

It raises doubts among adversary and neutral military and civilian authorities, as well

as the broader population, about the legality of adversary actions, thereby diminishing political will and support—and potentially retarding military activity. It also provides material for public opinion/media warfare. Legal warfare does not occur on its own; rather, it is part of the larger military or public opinion/media warfare campaign.

In order to be as effective as possible, both psychological warfare and legal warfare require the use of public opinion warfare. Public opinion warfare and legal warfare require psychological warfare guidance so that their targets and methods can be refined. Public opinion warfare and psychological warfare are, in turn, strengthened by information gleaned through legal warfare.¹

Legal Warfare: Chinese Definitions

In the People's Republic of China, and especially the PLA, the concept of legal warfare (*falu zhanzheng* or *falu zhan*) has sparked a great deal of discussion. This interest was codified when, on December 5, 2003, the PRC promulgated the "Political Work Regulations of the Chinese People's Liberation Army"—a regulation specifying that the General Political Department (GPD), in its implementation of political work, was to undertake the "three warfares."²

From the Chinese perspective, political warfare, including legal warfare, is seen as a form of combat.

Military combat preparations include the development and innovation of military political work, as well as more kinetic forms of operations. Indeed, political warfare is seen as a vital complement for more traditional forms of military operations. While they may not be decisive in their own right, political warfare tactics nonetheless may allow their practitioner to seize the initiative and otherwise multiply the effects of military power.

Legal warfare, at its most basic, involves "arguing that one's own side is obeying the law, criticizing the other side for violating the law [*weifā*], and making arguments for one's own side in cases where there are also violations of the law."³ The instruments of legal warfare include national laws as well as the full range of legal instruments: legislation, judicial law, legal pronouncements, law enforcement, and legal education.

Like more conventional forms of warfare, legal warfare is conducted under a unified command organization. It will include the use of the law in implementing offensive actions, defensive actions, counterattacking actions, and other forms of combat. Legal warfare includes such operations as legal deterrence (*falu weishe*) and the imposition of sanctions (*zhicai*).

In order to influence domestic and foreign populations and leaders, legal warfare is most commonly employed before the outbreak of physical hostilities. Furthermore, such a preemptive legal strike can weaken opposing

1. Liu Kexin, *Study Volume on Legal Warfare* (Beijing, PRC: National Defense University Press, 2006), pp. 18, 34–37.

2. The PLA is not managed by its services, but by four general departments: the General Staff Department, responsible for war planning; General Political Department, responsible for political education and personnel issues; General Logistics Department, responsible for providing logistics support; and General Armaments Department, responsible for weapons development.

3. Han Yanrong, "Legal Warfare: Military Legal Work's High Ground: An Interview with Chinese Politics and Law University Military Legal Research Center Special Researcher Xun Dandong," *Legal Daily* (PRC), February 12, 2006.

coalitions while building support for one's own side. In wartime, "The aim is to psychologically dissipate the other sides' fighting will in both the military and the civilian realms, while exciting one's own military and civilian passions and obtaining international sympathy and support."⁴

Legal warfare is also an important tool for consolidating gains made during a war.

Context: Influences Shaping Legal Warfare

Underlying the Chinese interest in legal warfare are two broad influences: a different view of the role of law and a perception that other states already employ legal warfare.

Chinese Views of the Role and Rule of Law. Important historical and cultural considerations inform the PRC's understanding of legal warfare, an understanding that is very different from that of the West. The concept of the rule of law—that the law exists as a distinct autonomous entity and applies to both the ruler and the ruled—is one of the foundations of the West's legal traditions. Despite its importance to the West, however, the rule-of-law maxim remained weak throughout imperial China and was ultimately devastated by Maoist rule.

The Confucian and Legalist schools of thought had the greatest impact on imperial Chinese understanding of the law. Confucianism emphasized morality and ethics as the proper basis for managing

society. Laws were secondary to the network of obligations enunciated under the Confucian ethic, supplemented by the presence of "moral men" who would apply the law and, more important, enforce morality and ethics. The Legalist "school" (more a loose set of ideas articulated by various scholars who disagreed with Confucianism) placed more emphasis on the creation of legal (as opposed to ethical) codes. But, like the Confucianists, the Legalists saw the law as a means of enforcing societal (and state) control of the population. No strong tradition that held the law as a means of constraining authority itself ever developed in China.

In the broadest sense, pre-1911 Chinese society viewed the law from an instrumental perspective—a means by which authority could control the population rather than a control extended over authority. Thus, imperial China may be said to have experienced rule *by* law, not rule *of* law. Not surprisingly, a strong, independent judiciary failed to develop in imperial China, while lawyers were neither numerous nor held in high esteem.⁵

During the early years of the PRC, Chinese legal development was influenced by the Marxist perspective that the "law should serve as an ideological instrument of politics."⁶ Consequently, during the formative years of the PRC, the Chinese Communist Party (CCP) considered the law to be essentially an

instrument of governance, but not a constraint upon the Party, much less the Great Helmsman (Mao Zedong). In any case, the Party exercised rule by decree rather than through legal mechanisms. During the Cultural Revolution, Mao himself effectively abolished both the judiciary and the legal structure.⁷

Since the passing of Mao, the CCP has made a concerted effort to create a body of laws—a tacit admission that governance by decree is incompatible with the expansion and modernization of China's economy. Most of these new regulations, however, focus on commercial and contract law; the legal structure for criminal and civil law remains weak, and international law is virtually nonexistent. Moreover, the law remains an instrument that applies primarily to the "masses," as opposed to the Party. As a result, China is still subject to rule *by* law rather than the rule *of* law.

Chinese Perception of Legal Warfare in the West. If China has an instrumentalist view of the law, it perceives that others share that perspective, at least when it comes to the role of law in international relations and especially warfare. As Carl von Clausewitz observed, "War is an act of force to compel our enemy to do our will... [Attached to] force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it."⁸

Nor is this solely a matter of legal philosophy. According to PLA

4. Major General Liu Jiaxin, "General's Views: Legal Warfare—Modern Warfare's Second Battlefield," *Guangming Ribao*, November 3, 2004. At the time, MG Liu was commandant of the Xian Political Academy of the PLA General Political Department.
5. Dwight Perkins, "Law, Family Ties, and the East Asian Way of Business," in *Culture Matters*, ed. Lawrence E. Harrison and Samuel P. Huntington (New York: Basic Books, 2000), p. 233.
6. Eric W. Orts, "The Rule of Law in China," *Vanderbilt Journal of Transnational Law*, January 2001.
7. Murray Scot Tanner, *The Politics of Lawmaking in China* (Oxford, UK: Clarendon Press, 1999), p. 43, and Perkins, "Law, Family Ties, and the East Asian Way of Business," in *Culture Matters*, p. 235.
8. Carl von Clausewitz, *On War*, trans. Michael Howard and Peter Paret (Princeton, NJ: Princeton University Press, 1976), p. 75.

analyses of recent conflicts, including the two Gulf Wars, the United States is one of the leading practitioners of legal warfare.

For example, Chinese analysts note that in the first Gulf War, the United States obtained U.N. authorization for sanctions, as well as the use of force, against Iraq, thus providing itself with a legal basis for waging war. The ability to impose sanctions legally is a powerful instrument of legal warfare, as it affects all the partners of the sanctioned state (including those who might have opposed the imposition of sanctions in the first place). Chinese authors also note that the U.S. used the law to justify such actions as the bombing of both the al-Firdos bunker (which Chinese writings describe as an air raid shelter) and retreating Iraqi forces.⁹

Furthermore, PRC analyses note that in the Kosovo conflict, even though the United States failed to obtain U.N. authorization, the U.S. argued that its actions were “consistent with the law” because they were undertaken under NATO auspices.

Finally, the PRC studied the second Gulf War, a conflict for which the U.S. did not obtain formal U.N. authorization and in which NATO was not involved. Beijing believes Washington was able to manipulate international law to portray the Iraqis as violating previous U.N. resolutions regarding weapons of mass destruction. These violations were, in turn, sufficient to provide a legal justification for the invasion of Iraq. Even more disturbing, in the view of

PRC authors, was the use of threats of legal prosecution, in many cases transmitted directly to Iraqi generals to dissuade them from following any orders Saddam Hussein might have issued for the use of WMD.

It should be noted that, from the Chinese perspective, it was the Iraqis who waged more successful, albeit defensive, legal warfare in the second Gulf War. Through adroit legal and diplomatic maneuvering, Iraqi officials were able to prevent the U.S. from securing U.N. approval for its actions.

The Iraqis’ legal advantage, however, did not translate into meaningful military or political benefit. According to PRC analyses, by conducting over a decade of public opinion warfare, the United States was able to demonize Saddam Hussein to the extent that Baghdad was unable to capitalize on its legal warfare victories. Consequently, no nation was willing to support Iraq openly, despite (in Beijing’s view) Iraq’s superior legal case and the lack of legal authority for the American action. Legal warfare, therefore, is not decisive on its own—it must be backed by military capability.¹⁰

Aside from recent wars, the Chinese also perceive a legal warfare component in two major irritants in Sino–U.S. relations. The United States has long justified the sale of arms to Taiwan as a requirement of the Taiwan Relations Act (TRA). In particular, the following clause is essential: “The United States will make available to Taiwan such defense articles and defense services

in such quantity as may be necessary to enable Taiwan to maintain a sufficient self-defense capability.”¹¹ From Beijing’s perspective, the U.S. is claiming that its domestic laws justify, if not require, interference in what Beijing has long termed a purely domestic concern.

Similarly, Beijing has argued that the annual Department of Defense (DOD) report to Congress on Chinese military developments is an obstacle to better relations and has compared these documents with the Cold War-era *Soviet Military Power* reports. That the report is mandated under the fiscal year (FY) 2000 National Defense Authorization Act does little to assuage the Chinese, who consider these reports to be an example of legal warfare facilitating public opinion warfare, which in turn serves the American goal of stoking the “China threat” fear.

Legal Warfare: American Views

In some ways, the Chinese definition of legal warfare is not that different from the one held by U.S. analysts, who define legal warfare (or lawfare) as “a method of warfare where law is used as a means of realizing a military objective.”¹² Thus, both Chinese and American analysts, at one level, see legal warfare as the use of law as an instrument of war. Upon closer examination, however, the differences between the two nations’ understanding of legal warfare become clear.

First, American analysts often point out that discussions of legal

9. Zong Wenshen, *Legal Warfare: Discussion of 100 Examples and Solutions* (Beijing, PRC: PLA Publishing House, 2004), pp. 184–186.

10. *Ibid.*, p. 8.

11. Taiwan Relations Act, <http://www.taiwandocuments.org/tra01.htm> (accessed May 11, 2012).

12. Charles J. Dunlap, Jr., “Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts,” Harvard University Kennedy School of Government, Carr Center for Human Rights Working Paper, November 29, 2001, p. 8.

warfare are distinct from the use of laws to determine whether a nation is justified in going to war (*jus ad bellum*) or to govern the conduct of armies and nations in war (*jus in bello*). Whether a war is just is, from the American perspective, an issue separate from the concept of legal warfare.

On the other hand, the proper conduct of armies and nations, especially in the context of the Laws of Armed Conflict (LOAC), is seen as integral to legal warfare. A brief, non-exhaustive review of American writings suggests that U.S. analysts of legal warfare focus on how charges of violations of the LOAC might be used to frustrate or hinder American military operations, especially in the context of counterinsurgency (COIN) operations.

In his landmark 2001 essay on legal warfare, then-Colonel Charles Dunlap observed that a particular form of legal warfare was gaining broader acceptance: “a cynical manipulation of the rule of law and the humanitarian values it represents.”¹³ Dunlap raised the concern that lawfare was pursued not so much to ensure that nations followed the LOAC, but to “destroy the will to fight by undermining the public support that is indispensable” for

successful war-fighting, especially in democracies such as the United States.¹⁴

Dunlap himself has since somewhat modified this view, emphasizing that the concept of legal warfare is neutral rather than pernicious. He has recently described legal warfare as “the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective,” eliminating the presumption that it is misuse of the law (while noting that such misuse may nonetheless occur).¹⁵

Even where it is not seen as a deliberate misuse of the law, there are concerns that legal warfare will hamper Western, and especially American, military operations. As a summary of a 2003 Council on Foreign Relations conference observes, “Lawfare can be used to undercut American objectives.”¹⁶ Furthermore, the 2005 National Defense Strategy of the United States (NDS) placed lawfare (the use of “judicial processes”) alongside terrorism and international fora in its list of American vulnerabilities.¹⁷ In the 2008 NDS, the Department of Defense noted that there is a significant concern with violent extremist movements “hiding behind international norms and national laws

when it suits them, and attempting to subvert them when it does not.”¹⁸ The 2008 NDS goes on to state that there is a need to address “growing legal and regulatory restrictions that impede, and threaten to undermine, our military readiness.”¹⁹

The U.S. remains concerned that Western military commanders will operate under excessive restraint, choosing to err on the side of caution for fear of violating international law—especially the LOAC. Exacerbating this undue caution would be concerns about undercutting public support, both at home and abroad, if military operations were seen as contravening legal standards.

In some respects, Western militaries have already begun to restrain themselves. From the suspension of airstrikes after the bombing of the al-Firdos bunker in the 1991 Gulf War to imposition of restrictive rules of engagement governing airstrikes in Afghanistan, fear of legal sanction (and attendant loss of public support) has constrained the West’s ability to exploit its considerable military advantages.²⁰ For example, the DOD is said to have forgone certain cyber attacks against Slobodan Milosevic during the Kosovo conflict because of the possibility that such actions might be construed by some as

13. Ibid.

14. Ibid.

15. Charles J. Dunlap, Jr., “Lawfare Today,” *Yale Journal of International Affairs*, Winter 2008, p. 146.

16. “Lawfare, the Latest Asymmetries,” Council on Foreign Relations, summary of FY03 National Security Roundtable, sixth session, March 18, 2003, <http://www.cfr.org/national-security-and-defense/lawfare-latest-asymmetries/p5772> (accessed April 28, 2012).

17. U.S. Department of Defense, *The National Defense Strategy of the United States of America* (Washington, DC: Office of the Secretary of Defense, March 2005), p. 5.

18. U.S. Department of Defense, *The National Defense Strategy of the United States of America* (Washington, DC: Office of the Secretary of Defense, June 2008), p. 2.

19. Ibid., p. 20.

20. Thomas E. Ricks, “Target Approval Delays Irks Air Force Officers,” *The Washington Post*, November 18, 2001, <http://www.washingtonpost.com/wp-srv/nation/Airwar18.html> (accessed April 28, 2012).

constituting war crimes.²¹ More controversially, permission for an orbiting Predator drone to attack Mullah Omar early in the Afghanistan war was reportedly withheld due to legal concerns about civilians in Omar's convoy.²²

Differences Between American and Chinese Views on Legal Warfare

In surveying (briefly) American and Chinese views on legal warfare, it becomes apparent that there are both strategic and operational/tactical differences between those views.

Strategic Level. The most important strategic difference between the two nations is that there is little evidence that Chinese analysts and decision-makers see legal warfare as a misuse of the law. Given the much more instrumentalist view of the law in Chinese history, the idea that the law would be employed toward a given end (in support of higher military and national goals) would be consistent with Chinese culture but problematic, if not antithetical, from the Western perspective.

Chinese writings specifically note that the purpose of legal warfare is to obtain military, and not legal, victory. In this regard, it is essential to recall that legal warfare occurs only in the context of actual warfare; legal disputes and proceedings in a non-military context are not legal warfare. Consequently, legal warfare, from the Chinese perspective, must focus on a conflict's political objective:

attaining previously determined objectives and retaining the political initiative.

A second strategic difference is that the Chinese view legal warfare (as well as public opinion warfare and psychological warfare) as beginning before the onset of formal hostilities—and continuing afterward. This distinction has important implications, as it entails pre-war "preparation of the battlefield" and post-conflict legal maneuverings that, like wartime legal warfare activities, are aimed at fulfilling larger strategic goals.

In this regard, PRC writers assign equal importance to preparing the legal and physical battlefields. Such preparations include the creation of legal experts—both military lawyers and a cadre of internationally recognized legal scholars—whose opinions will carry influence abroad as well as at home.

Such efforts also involve the legal preparations so that legal warfare will have a proper foundation. While much of the discussion focuses on domestic laws and regulations, it is also likely to involve influencing international laws and customary legal understandings. One Chinese article noted that publicizing Chinese laws and regulations is essential so that Chinese legal perspectives are "recognized by the international community."²³

In this light, the passage of several Chinese laws governing territorial claims over Taiwan should be seen both as providing a foundation

for legal warfare and as a means of influencing the broad international community. In particular, the 2005 Anti-Secession Law should be seen as providing the basic legal justification for any move against Taiwan (or Tibet or Xinjiang). In addition, though, the 1992 Law on the Territorial Sea and the Contiguous Zone may also have a legal warfare function even though it was enacted before the recent focus on lawfare. Similarly, China's idiosyncratic interpretations of the U.N. Convention on the Law of the Sea (UNCLOS), whether it is regarding its claims to the South China Sea or to the Arctic, should be seen as strategic-level preparation for legal warfare.

Operational/Tactical Level. The PRC's discussions of legal warfare (and political warfare in general) emphasize the importance of coordinating military and legal operations. This blurring of the political and the martial is in sharp contrast to the attitude of U.S. military operators who consider psychological operations (renamed military information support operations or MISO) as distinct from typical military activities.

In this regard, the General Political Department may simplify the PLA's legal warfare efforts. At present, there is an entire GPD chain of command that is separate from the operational chain of command (but still within the PLA). Therefore, the PLA is potentially able to execute a unified political warfare

21. William M. Arkin, "The Cyberbomb in Yugoslavia," *The Washington Post*, October 25, 1999, <http://www.washingtonpost.com/wp-srv/national/dotmil/arkin.htm> (accessed April 28, 2012), and Julian Borger, "Pentagon Kept the Lid on Cyberwar in Kosovo," *The Guardian*, November 8, 1999, <http://www.guardian.co.uk/world/1999/nov/09/Balkans> (accessed April 28, 2012).

22. Seymour Hersh, "King's Ransom: How Vulnerable Are the Saudi Royals?" *The New Yorker*, October 22, 2001, p. 36. For an alternative view, Gary Solis argues that the failure was in the commanding officer and the rules of engagement (ROE), not the JAG per se. Gary Solis, *The Law of Armed Conflict* (New York: Cambridge University Press, 2010), p. 499. But failure to adhere to ROE may itself become the grounds for legal action and would therefore seem nonetheless vulnerable to lawfare.

23. Liu Jiaxin, "General's Views: Legal Warfare—Modern Warfare's Second Battlefield."

campaign from strategic to tactical level. Furthermore, because of the intimate, extensive links between operational and political officers, it is possible that legal warfare operations may be integrated into military operations more smoothly than in Western military operations. When considered alongside the PLA's commitment to waging political warfare under a unified command structure, these facts suggest that there may be a political warfare cell within the campaign headquarters that oversees Chinese legal warfare operations, especially within the joint campaign command headquarters (JCCH).²⁴

Such coordinated legal warfare operations, in turn, would most likely be offensive in nature. As noted, there is a fundamental cultural divergence about the role of the law in general, a divergence that extends to the LOAC. Western military legal experts appear more focused on ensuring that their forces and commanders are not liable to war crimes charges than they are on undertaking offensive legal warfare, unlike their Chinese counterparts.

This variance is compounded by the differences between the PRC and the U.S. in their allocation of legal warfare responsibilities. With regard to the American side, it is diplomats (informed by a variety of legal and political advisers) who are often responsible for "offensive" legal warfare rather than traditional military forces, much less military legal bodies. Not only are these actions not necessarily coordinated with military actions; they are not even

necessarily considered (by the implementing bodies) to be offensive legal warfare.

By contrast, Chinese writings suggest a conception of legal warfare that would involve a range of activities intended to seize the initiative on the legal and public opinion battlefield in addition to disrupting an opponent's military activities. These activities would include legal coercion/deterrence efforts, which would warn an opponent that they were under close scrutiny for possible violations of the laws of armed conflict; legal strikes, which would charge the enemy with operational activities in violation of international and domestic laws; and legal counterattacks, which would highlight the enemy's attempts to slant or misrepresent international law, unfavorably contrast their conduct with one's own (in legal terms), and counter any enemy legal activities.²⁵

Potential Chinese Application of Legal Warfare

Chinese planners are almost certainly preparing legal war plans aimed at "controlling the enemy through the law, or using the law to constrain the enemy [*yifa zhidi huo yong fa zhi di*]."²⁶ Some of these efforts are likely indistinguishable from typical governmental activities, such as the expansion of the military legal infrastructure. For example, China has been expanding its entire corpus of laws while training additional lawyers, so it is quite probable that the military would benefit from additional human resources whether it was engaging in legal warfare or not.

The PRC, however, will likely take some actions that stand out as obvious attempts to advance a legal warfare agenda. In the pre-war context, some of the possible legal warfare measures include research into third-party laws and regulations and exploitation of identified vulnerabilities, influencing international legal customs and laws, and creating a cadre of international legal experts. The last two have already been mentioned. The first, however, is an important additional consideration.

There can be little doubt that the PLA and Chinese leaders in general are well aware that the success of U.S. military operations often hinges on access to foreign bases. Much of the recent discussion of anti-access/area-denial operations has focused on the physical weapons that might be employed to prevent American military access. But the increasing emphasis on political warfare suggests that there are additional (rather than alternative) anti-access measures available to Beijing.

The most obvious such measure would be the filing of a variety of legal motions in American courts aimed at delaying any American intervention. These motions could be filed in response to a host of issues, ranging from the War Powers Act to the right to mobilize various American resources. More subtle actions could include legal action related to environmental or labor law—areas that, while not directly related to foreign policy and national security, could still have an impact on U.S. military operations.

24. Zhang Yuliang, *The Science of Campaigns* (Beijing, PRC: National Defense University Press, 2006), p. 209.

25. Liu, *Study Volume on Legal Warfare*, p. 3.

26. Zong, *Legal Warfare*, p. 5.

Such efforts are not limited to the U.S. and may also be aimed at any of America's allies and security partners—such as Australia, Singapore, and the Philippines—that might provide the U.S. with forward basing facilities. Such efforts would be coordinated not only with military activities (overflights, naval exercises), but also with economic measures such as promises of expanded investment or threats of factory closures, as well as diplomatic-legal steps such as support in other territorial or economic disputes (e.g., World Trade Organization cases).

In particular, Japan appears vulnerable to legal warfare. Japan's pacifist constitution (as embodied in Article IX) and Japanese laws and policies pertaining to national defense and military engagement (e.g., rules governing arms trade) create fertile ground for the raising of legal issues about support provided by Tokyo to the United States. One could imagine, for example, legal challenges to the U.S.–Japan defense guidelines in a period of tension, coupled with a PRC public diplomacy and public opinion campaign warning Japan of dire consequences should it challenge China. Similarly, any provision of Japanese weapons, or even fuel and food, to American forces might be seen as contravening Japanese rules regarding arms exports to belligerents.

Such challenges are likely to begin in peacetime, both (ideally, for the Chinese) in order to prevent Japanese cooperation with the U.S. and in order to hamper American logistical planning. For example, American military planners would have to take into account

the possibility that Japanese courts might limit Japanese cooperation with the U.S. Such a scenario would require American military planners to account for the spare parts and ammunition expected from Japanese sources—how much additional transport space would be required? This might not be a likely scenario, but given Japanese political ineffectiveness over the past several years, it must be considered.

The intensity of such measures is likely to rise as a crisis deepens or as military operations become more imminent. Such an uptick in activity would provide valuable intelligence and warning (I&W); however, in this scenario, local lawyers—not Chinese nationals or the Chinese government—might take many of these theoretical legal actions.

Nor would these measures necessarily be carried out at China's behest; organizations or persons with no visible sympathies or links to the PRC could drive these actions. For example, an environmental activist group could attempt to limit the U.S. Navy's anti-submarine warfare activities on the grounds that sunken nuclear-powered boats would constitute an environmental hazard. Similarly, where there is universal jurisdiction, there might also be attempts to use third-party national courts to issue warrants for the arrest or subpoena of American and allied military and political leaders, again without an explicit Chinese role.

In the wartime context, possible legal warfare measures include charges of war crimes against U.S. and allied forces and exploitation of "fault lines" between U.S. and allied

laws. As noted, American analysts are concerned that during a conflict, the U.S. military might be accused of violating the LOAC, particularly if enemy forces tried to spark such a violation by, for instance, hiding forces among civilians.

Indeed, such concerns are hardly hypothetical: Consider the American experience with the Iraqis in the 2003 conflict (where Iraqi forces were deployed near mosques and hospitals) and the Israeli experience in Lebanon in 2006 (where Hezbollah forces dispersed forces and matériel among civilians)—two recent examples of deliberate attempts to create violations of the LOAC. The potential resources available to a nation as large and wealthy as the PRC would multiply the problem substantially. Other possible forms of legal warfare might entail activities intended to raise doubts about which nation started a conflict.²⁷

Chinese legal warfare measures would almost certainly occur in conjunction with psychological and public opinion/media warfare measures. Chinese analyses of the second Iraq War suggest that the ability of the coalition to contact Iraqi commanders and warn them not to employ weapons of mass destruction is deeply disturbing. It would not be surprising if the PLA sought to engage in comparable legal and psychological warfare operations against U.S. and allied commanders, attempting to dissuade them from engaging in military activities (e.g., attacking key infrastructure or transportation targets) that could be seen as violating norms or laws.

Moreover, in the context of a Taiwan contingency, Chinese legal

27. On August 31, 1939, German forces dressed as Poles staged an attack against a German radio station at Gleiwitz. The action was intended to portray Germany as acting defensively when it invaded Poland.

warfare would most likely include not only offensive legal operations against the United States and its allies, but also a campaign in support of public opinion/media warfare measures intended to demonstrate that China's actions were justified. Such a campaign would entail references to the Anti-Secession Law, perhaps as part of a legal/public opinion warfare effort to portray the CCP as having no choice but to act. At the same time, Beijing would almost certainly argue that any such conflict was a domestic issue because, as the PRC believes, Taiwan is part of China. How such a legal argument (that conflict with Taiwan was an internal affair) would affect Chinese policies ranging from the PRC's "no-first-use" of nuclear weapons through treatment of prisoners of war is unclear.

Current PRC behavior suggests that one should not necessarily expect the Chinese to refrain from engaging in activities that they condemn in others. The Chinese do not necessarily accept that they operate under the same legal regime that they expect of others. For instance, the Chinese claim that although Okinotori (controlled by Japan) should not be an island, Chinese-claimed portions of the Spratlys should be. In 2010, they argued that the United States should not engage in naval activities in the Yellow Sea (an international body of water) while they themselves were engaged in major transits of the Miyako Straits. These actions suggest that China does not necessarily feel bound by the rules it invokes.

In the post-war context, Chinese legal warfare efforts would be aimed at consolidating gains that had been made and obtaining additional benefits where possible. It is difficult, at this time, to determine what those legal warfare measures might entail, but they would likely include adjudication of new frontiers and borders, dealing with prisoners of war (both those captured by the Chinese and those suffered by the PLA), and addressing war crimes charges. China almost certainly would also continue to push legal arguments that justified actions it had undertaken.

An American Response: The Future of U.S. Lawfare

American emphasis on the rule of law has generally assumed that one's adversaries will not engage in offensive lawfare—legal activities that are designed specifically to hamstring the opposition rather than seek legal redress. Chinese writings on legal warfare, however, serve as a warning that this might not be the case in the event of a Sino–American conflict. Equally as important, however, Chinese analysis suggests that international law, including the structuring of treaties, must be considered through the prism of legal warfare and how it might be exploited against American and allied interests.

The United States therefore must take steps to prepare for the possibility of legal warfare and incorporate defensive measures into its strategic, operational, and tactical policies. Specifically, the U.S. should:

- **Carefully examine new international commitments.** At the strategic level, the growing Chinese interest in legal warfare highlights the need to examine new international commitments carefully. For example, Chinese legal warfare operations suggest that it would be wise for America to remain outside the U.N. Convention on the Law of the Sea (UNCLOS) regime. It has been insinuated that American failure to join UNCLOS leaves the U.S. vulnerable to legal warfare under UNCLOS, but a treaty that the United States has not ratified can hardly be seen as constraining the U.S. By contrast, once the treaty has been ratified, the U.S. would be subject to its jurisdiction.

In the context of U.S. naval operations, the PRC's legal warfare could pose real problems. The Chinese claim that, under their interpretation of UNCLOS, foreign naval operations within another nation's 200 nautical mile Exclusive Economic Zone (EEZ) should be subject to the approval of the owning state.²⁸ Such a position is at odds with the American interpretation but not necessarily that of other states, including India.²⁹

There is little question that the Chinese are trying to use UNCLOS to restrict U.S. naval operations at a time when the Chinese navy does not yet have the wherewithal to do so directly. Joining UNCLOS would only

28. Donald Rothwell, "The Law of the Sea, Maritime Security, and Naval Operations in the South China Sea," paper presented at the 2011 International Law Association Asia-Pacific Regional Conference, May 29–June 1, 2011, http://www.law.smu.edu.sg/centre/practitioner_sem/4Oct11/paper_4Oct11.pdf (accessed May 14, 2012).

29. Guoxing Ji, "The Legality of US Conduct in the South China Sea," *China Security*, No. 14 (2009), http://chinasecurity.us/index.php?option=com_content&view=article&id=266&Itemid=8 (accessed April 30, 2012).

further jeopardize American freedom of navigation. Yet it is by no means clear that China would feel itself constrained by the UNCLOS rules. In the ongoing confrontation with the Philippines over islands and shoals in the South China Sea, China has refused to submit to UNCLOS arbitration, although both Manila and Beijing are signatories.

Similarly, American championing of an international code of conduct for space operations begs the question of whether such a code of conduct could ultimately be wielded against American national security interests. As China seeks to develop anti-access/area-denial capabilities, American countermeasures are likely to entail operations against Chinese sensor networks—including space-based ones. Yet the code of conduct proposed by the Obama Administration would restrict interference with space-based systems (including jamming) and forbid the testing of systems that might generate space debris. If a military will fight the way it trains, how are American forces expected to practice defeating anti-access/area-denial systems? The lives of thousands of American servicemen hang on the answer to that question.

- **Incorporate legal warfare countermeasures into U.S. operational planning and training.** At the operational and tactical levels, Chinese legal warfare suggests a need for U.S.

operational planning and training that incorporates legal countermeasures. For an example of an effective legal countermeasure program, the U.S. need look no further than the Israeli “operational verification” measures, which provide Israeli combat units with trained documentation teams. In order to counter charges of illegal activities, these teams provide real-time documentation of military activities.³⁰ Such a move, of course, effectively cedes the initiative to opponents, as it grants them a measure of credibility by viewing their charges as something that requires rebuttal.

- **Train American military legal experts to be more conversant with foreign military legal systems.** Rather than focusing on how Chinese forces might be subjected to others’ application of legal warfare, PLA writings suggest that the Chinese will focus on identifying how opposing forces may be violating the LOAC and national and international laws. Consequently, American military legal experts should become more conversant with the military legal systems of the PLA (and other potential opponents) so as to be able to assess their adherence to the LOAC and their own national laws. In the cases of violations, not only should there be prosecution (which may not occur until after the conflict is concluded), but ample publicity should be focused on foreign failure to adhere to international norms, the LOAC, and national legal regimens.

- **Address issues of legal interoperability with allied and friendly forces.** One question posed by the legal warfare debate is of particular concern: The issue of *legal* interoperability and whether differences among allies’ legal systems and infrastructures might not create points of vulnerability.

In NATO’s Operation Allied Force in Kosovo, for example, “differences between the nineteen coalition members over what constituted a legal and legitimate target impacted unity of effort, lengthened NATO’s military decision cycle, and adversely affected the efficiency and morale of tactical level units.”³¹ Lawyers from many of the coalition forces *each* reviewed targets according to national laws and regulations, apparently in an uncoordinated fashion and often with very different views of what constituted a legitimate military target. NATO forces faced a relatively overmatched opponent who had not spent months or years potentially preparing for legal warfare (including influencing both national and international laws). Against the PRC, such legal interoperability problems could be problematic—especially if exacerbated by pre-war attempts to alter or modify such legal concepts as what constitutes valid military targets.

To avoid the potential problems of incompatible legal strictures, there needs to be pre-war engagement of key allies regarding such issues as targeting policies and a

30. Charles J. Dunlap, Jr., “Lawfare: A Decisive Element of 21st Century Conflicts?” *Joint Force Quarterly*, No. 54 (2009), pp. 36–37.

31. Lieutenant Colonel Troy Stone, “War Is Too Important to Be Left to the Lawyers,” paper submitted to the Naval War College, October 29, 2008, p. 5, <http://www.dtic.mil/dtic/tr/fulltext/u2/a494360.pdf> (accessed April 30, 2012).

reconciliation of points of difference. Just as communications, logistics, and other support functions cannot be coordinated “on the fly,” neither can the legal policies that govern how the military selects its targets.

Preparing for Legal Warfare

Given the PRC’s understanding of lawfare as an offensive weapon, the

U.S. must alter its current legal warfare strategy; no longer can America regard lawfare from a purely defensive standpoint. Indeed, offensive legal warfare—whether practiced by the PRC or by militarily over-matched insurgents—can neutralize America’s military might while damaging its allies and strategic partners.

Sun Tzu, the great Chinese military strategist, once cautioned,

“Know your enemy.” The American military, in planning its future lawfare strategies, especially with regard to the PRC, would be well served to heed Sun-Tzu’s advice.

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