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# Closing Argument

## Global Lawyering for a Global Fight Legal Considerations During Integrated Deterrence

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The wisdom in the statement attributed to Sun Tzu that “every battle is won before it is ever fought”<sup>1</sup> aptly applies to the modern conflict continuum. In the article *Legal Considerations Before and During LSCOs*,<sup>2</sup> the Office of Legal Counsel to the Chairman of the Joint Chiefs of Staff discussed how military lawyers should prepare to provide legal advice during large-scale combat operations (LSCOs). Specifically,

we examined the expectations placed on operational attorneys in LSCOs and how to prepare for the challenges we might face. Our current *National Defense Strategy* (NDS) directs the joint force to compete head-on with our pacing threat of China while simultaneously managing acute and developing global threats through integrated deterrence.<sup>3</sup> Integrated deterrence is a comprehensive strategy that generates

warfighting advantages by synchronizing operations across warfighting domains, theaters, the spectrum of conflict, instruments of national power, the interagency, private sector, and allies and partners.<sup>4</sup>

For Army judge advocates (JAs), it is also important to understand the relationship between integrated deterrence and multi-domain operations (MDO) because the Army’s capstone doctrinal publication, Field Manual (FM) 3-0, *Operations*, establishes MDO as its primary operating concept. MDO involves the synchronized use of capabilities across all domains—land, air, sea, space, and cyber—to create strategic advantages, which are integral to the effectiveness of integrated deterrence.

As the goal of integrated deterrence is to maintain our advantage against global competitors and ultimately prevent future conflict, lawyers must understand how they can support current operations during the competition phase of the conflict continuum.

Operations, activities, technological advancements, and investments during competition pose novel legal challenges that require JAs to be agile, creative, adaptive, and thorough when providing advice. Their role is vital in providing commanders with sound legal counsel and thus supporting the seamless and effective execution of integrated deterrence efforts. The following examples—irregular warfare (IW), the joint warfighting concept (JWC), and competing with money—illustrate areas where attorneys supporting operations within the context of competition will be asked to weigh in with their advice and stand as exemplars of navigating the complex environment of integrated deterrence.

### **IW and Competing Below the Level of Armed Conflict**

The NDS directs us to compete with our adversaries in a manner that dissuades them from considering aggression to further their national objectives, while concurrently cautioning that conflict is “neither inevitable nor desirable.”<sup>5</sup> Accomplishing this nuanced goal—considering the full capability and most common methods of

employing the joint force—is no easy task. While our senior leaders have several tools available, including a whole-of-Government approach and strengthening alliances to amplify our strength, another option is to employ IW across the competition continuum.<sup>6</sup> IW offers leaders an opportunity to influence our adversaries in a manner that prevents a perceived need to respond militarily and could ultimately assist in preventing conflict. For operational attorneys, using IW to support our NDS highlights how the legal and policy frameworks that apply during competition and integrated deterrence overlap in a complex way. During an IW campaign, JAs must prepare to provide commanders and leaders with comprehensive advice that spans multiple legal competencies and requires identifying the line that separates law from policy.

While IW is not a novel concept, it stands out as a useful tool as we increasingly focus on competing with global competitors in a manner that supports integrated deterrence without triggering conflict. Our joint doctrine defines IW as “a form of warfare where states and non-state actors campaign to assure or coerce states or other groups through indirect, non-attributable, or asymmetric activities.”<sup>7</sup> One of the initial challenges with advising on the conduct of IW is that the broad definition contemplates a similarly broad range of activities, including military information support operations (MISO), cyberspace operations, countering threat networks, countering-threat finance, use of surrogates, civil-military operations, and security cooperation.<sup>8</sup> Consequently, the first, and arguably the most important, task of the supporting JA is to define the particular activity or activities occurring during an IW operation to assess the legal and policy frameworks that apply to their analysis.

After answering the question, “What are we actually doing here?,” a JA supporting the planning and execution of an IW operation must look at these activities through multiple legal lenses. As is the case for most operations, the JA should ascertain the underlying legal authority that authorizes each activity. While an execution order (EXORD) in which the Secretary of Defense delegates authority to subordinate commanders is a good place to start, look

behind the EXORDs to better understand the applicable statutory or constitutional authority and determine reporting requirements, approval authority, and any fiscal limitations.<sup>9</sup> Furthermore, fully understanding the source of authority will ensure the proper approval level for a particular operational activity; even if a category of

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activity is delegated to a certain level of command, it is important to look closely at the IW activity in context to make sure that it does not rise to the level of use of force and potentially require a higher level of approval. With a comprehensive understanding of the activity, a JA can also apply a fiscal law framework to ensure the IW activity is funded properly.

Due to the diversity of activities under the IW umbrella, JAs will also need to be aware of the policy limitations that apply in different ways to different activities. A distinction certainly exists between policy and legal limitations, and a JA’s advice should be clear in that distinction. For example, specific implementing policies apply when creating and managing new surrogate force programs under 10 U.S.C. § 127d.<sup>10</sup> JAs advising on IW operations should become familiar with these policies to inform their comprehensive counsel.

This brief, and perhaps oversimplified, overview serves to emphasize the critical need for JAs to understand the tools our military leaders may use to meet integrated deterrence objectives and the associated legal issues that will materialize while planning and executing operations during competition. While operational attorneys may believe IW is unique to special operations forces or managed at the strategic level, IW will be present at all levels and available to conventional and special

operations forces alike during our campaign of integrated deterrence.

### **Joint Warfighting Concept**

In 2019, the Secretary of Defense tasked the Joint Staff to develop the JWC to address strategic conflict.<sup>11</sup> The JWC framework seeks to solve the problem of how the joint

force will deter peer adversaries.<sup>12</sup> It serves as a guide for the Services to integrate, synchronize, and communicate across multiple domains—land, sea, air, space, and cyberspace—by gaining new “intellectual tools needed to incorporate innovation and adaptation” that “ensure[s] we have the right technology, leaders, and [authorities].”<sup>13</sup>

The JWC further shapes the Services’ force design and development to compete and fight across multiple domains. Each Service uses its own doctrinal concept to guide force design and development to conduct joint operations.<sup>14</sup> The Navy implements its “distributed maritime operations” concept for land and sea.<sup>15</sup> The Air Force’s “future operating concept” is its future airpower concept to deter aggression.<sup>16</sup> The Army’s MDO is the “rapid and continuous integration of all domains of warfare to deter [in competition] . . . . If deterrence fails, Army formations, operating as part of the joint force . . . achieve . . . strategic objectives.”<sup>17</sup>

Operating as a joint force during competition is further advanced through integrated deterrence, which incorporates the JWC: “Integrated deterrence . . . [works] seamlessly across warfighting domains, theaters, the spectrum of conflict, all instruments of U.S. national power, and our network of alliances and partnerships . . . enabled by combat-credible forces . . . .”<sup>18</sup> To achieve integration, synchronization, communication, and technological

advancements through integrated deterrence or along the spectrum of conflict, the Department of Defense (DoD) uses rapid data collection, the cloud, artificial intelligence (AI), machine learning (ML), and advanced communication systems to enable decisive and fast decision-making across the multiple domains; in other words, the Combined Joint All Domain Command and Control (CJADC2) concept. CJADC2 is the backbone of this integration and synchronization within the JWC.

Lawyers are pivotal to achieving the JWC's strategic goals over multiple domains. Adversaries are challenging the rules-based order and international norms. According to the *Joint Operating Environment 2035*, the future world order will be defined by the conditions listed in Figure 1 below.<sup>19</sup>



Figure 1.<sup>19</sup>

As the ways to warfare, struggle for competition, and technology change, and as the world order becomes more complex—especially with rapid data collection, AI, and ML—it will become paramount that lawyers promote the rule of law around the world.

This changing world order, multi-domain integration and synchronization dilemma, and technological advances present numerous challenges for lawyers. The following, each discussed below, are just

a few: (1) How do lawyers provide sound legal advice in a time-compressed environment with an influx of data? (2) How do lawyers incorporate JWC principles through integrated deterrence to provide commanders with options and articulate risks? (3) How do we share intelligence and information with allies and partners? And (4) How do lawyers ensure that technological advancements and adaptation comply with domestic and international law?

**1. How do lawyers provide sound legal advice in a time-compressed environment with an influx of data?**

During counterinsurgency operations, commanders and lawyers often had days to assess patterns of life and intelligence while applying collateral damage estimates (CDE). This will not be the case during the next conflict or war. The global concept of operations requires legal integration across multiple areas of responsibility, multiple domains, and multiple relationships, with allies and partners unifying their efforts.<sup>20</sup> AI-enabled intelligence-gathering tools and data will rapidly flow to the commander, who will have only minutes to decide. Lawyers will have to educate the force on the basic law of war principles, and commanders will have to be comfortable applying proportionality and distinction without a full CDE analysis (unless one is required). This will become paramount in a degraded environment where a commander may not have an attorney nearby.

Additionally, lawyers will have to quickly adapt to apply the influx of intelligence to the environment, communicating with allies, partners, and attorneys from other Services and combatant commands.

**2. How do lawyers incorporate JWC principles through integrated deterrence to provide commanders options and articulate risks?**

The 2022 NDS states the DoD will “employ an integrated deterrence approach that draws on tailored combinations of conventional, cyber, space, and information capabilities.”<sup>21</sup> In addition to these conventional capabilities, we can employ unconventional methods, including IW and lawfare. China, Russia, Iran, North Korea, Hamas, and Hezbollah (to name a few) all

challenge international norms and laws in competition and through conventional capabilities. Lawyers will have to navigate domestic and international laws and incorporate policy restrictions to formulate options and risks to the commander. There will be times when lawyers may want to pursue a change in laws or policies or request delegations of authorities to streamline integrated operations across domains.

**3. How do we share intelligence and information with allies and partners?**

Alignment with allies and partners is crucial for deterring aggression and achieving strategic objectives. The challenge is sharing intelligence and data under the JWC-CJADC2 framework. Allies and partners will need access to the same intelligence, data, and communications systems. Putting our allies and partners on the same systems will speed up the flow of information sharing; however, lawyers will need to understand the laws and policies regarding intelligence sharing. Requests for exceptions to restrictions on sharing intelligence may come across a lawyer's desk. Understanding what information the request must contain, the JA can quickly review the request to expedite the process.

**4. How do lawyers ensure that technological advancements and adaptation comply with domestic and international law?**

As fast as technological advancements occur, the joint force strives to solve urgent problems while simultaneously seeking to develop, design, test, and incorporate new technologies into our force. AI and ML, coupled with autonomous weapons and robotics, add a new layer of complexity to an already complex multi-domain and global concept of operations. This provides lawyers with opportunities to advise on policy formulation while ensuring that the development and incorporation of AI into systems comply with international and domestic law, including law of war. Forward-thinking commanders seek ways to keep pace with data and adversarial competitors in the space, cyber, AI, and unconventional innovative spheres by operationally modifying and testing, or developing, weapons as defined in Army regulation.<sup>22</sup> Rapid innovation

initiatives—such as off-the-shelf technological modifications using 3D printing or incorporating AI/ML—require practitioners to understand the definition of weapons, the policy, procedures, and requirements of law of war legal reviews, and to initiate the review process early.

It will become essential for lawyers to understand and use technological advancements as they continue to reshape military operations. States' use of AI systems and algorithms as a decision support tool that recommends targets to an analyst exemplifies this trend.<sup>23</sup> Being the lawyer-in-the-loop from AI to analyst to commander may become challenging; lawyers must develop a comprehensive understanding of the technology to provide accurate advice that supports lawful and ethical military decision-making in these increasingly complex operational environments.

To further complicate these environments, the United States may sometimes have to rely on allies' and partners' resources, authorities, or capabilities. The joint force builds this interoperability by competing with money.

### Competing with Money

Combatant commanders have a statutory responsibility to take action to deter conflict.<sup>24</sup> The NDS is anchored in building relationships and increasing interoperability with our allies and partners.<sup>25</sup> In the competition phase of the conflict continuum, combatant commanders, particularly those assigned a terrestrial area of responsibility,<sup>26</sup> deter conflict by strengthening ties and increasing interoperability with allies and partners. While there are many tools combatant commanders can use to build these relationships, money reigns supreme. To operationalize this use of money for competition's sake, combatant commands develop theater security cooperation plans (TSCP).<sup>27</sup> Like the adage, "Bring lawyers, guns, and money,"<sup>28</sup> operational fiscal lawyers play a key role in assisting combatant commanders by identifying the most appropriate security cooperation (SC) authority to meet the commander's intent of deterring conflict by increasing interoperability.

SC is defined as interactions with foreign security establishments to build

security relationships that promote specific U.S. security interests, develop allied and partner nation military and security capabilities for self-defense and multinational operations, and provide U.S. forces with peacetime and contingency access to allied and partner nations.<sup>29</sup> SC includes both DoD-administered cooperation programs under Title 10 of the U.S. Code and DoD-implemented Department of State security assistance programs under Title 22 of the U.S. Code. While most Title 10 SC authorities were consolidated under Chapter 16 of Title 10 with the National Defense Authorization Act for Fiscal Year 2017,<sup>30</sup> many SC authorities still exist in the DoD's annual appropriation and elsewhere throughout Title 10.<sup>31</sup> Likewise, the DoD-administered Title 22 SC authorities are generally consolidated in the Foreign Assistance Act of 1961<sup>32</sup> and the Arms Export Control Act of 1976,<sup>33</sup> but other state assistance authorities are provided under the Department of State's annual appropriation. Further complicating this web of SC authorities, each authority is governed by numerous policies that delegate and provide guidance on the use of the authority.<sup>34</sup>

Today's operational fiscal lawyers must understand this large menu of SC authorities to help their clients identify the appropriate authority for the desired effect. It is common for the staff to develop an SC activity and incorrectly bin it under what they believe to be the correct authority. For example, an operational fiscal lawyer working in a combatant command legal office may receive a Section 321 "training with" packet for review that includes U.S. forces training with a partner nation, but it also mentions that the purpose of the event is to "build the capacity of the partner nation's forces." For seasoned operational fiscal lawyers, this language should trip Purpose Statute<sup>35</sup> warnings: the statutory purpose of Section 321 activities is "to train U.S. forces," not to build capacity.<sup>36</sup>

Identifying that the proposed SC activity is beyond the scope of the proposed authority, however, is only half the battle. Today's best operational fiscal lawyers identify the issue and then bring an alternative solution to accomplish the activity's intent. In the above hypothetical, a great

operational fiscal lawyer identifies that the proposed scope is beyond the authority of Section 321 and recommends either changing the stated purpose of the event or changing the SC authority to Section 333 "authority to build capacity."<sup>37</sup>

By studying and understanding the web of SC authorities and implementing policies and using critical thinking to develop creative solutions, operational fiscal lawyers bring great value to executing a TSCP. Today's best operational fiscal lawyers enable combatant commanders to compete with money and directly contribute to the NDS's goal of reinforcing relationships and preparing allies and partners to pursue mutually beneficial national security objectives with interoperable forces.

### Conclusion

Attorneys are critical in supporting integrated deterrence efforts within the modern conflict continuum. As articulated in FM 3-0, MDO synchronize capabilities across all domains to create strategic advantages essential for effective deterrence. Today's Army JAs must adeptly navigate complex legal frameworks to ensure compliance with international and domestic laws while helping commanders minimize and mitigate risks. By understanding and addressing the legal challenges associated with operations during the competition phase, attorneys provide commanders with the guidance needed to execute integrated deterrence seamlessly, effectively, and legally. By supporting efforts such as using IW to compete below the level of armed conflict, implementing the JWC, and increasing interoperability with U.S. allies and partners by competing with money, JAs demonstrate their vital role in maintaining our strategic edge and preventing future conflicts. **TAL**

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## Notes

1. While most often attributed to Sun Tzu's seminal work, *The Art of War*, this exact quote does not appear in its most popular English translations. See, e.g., SUN TZU, *THE ART OF WAR* (Lionel Giles trans., Allandale Online Pub., 2020) (n.d.); SUN TZU, *THE ART OF WAR* (Samuel B. Griffith trans., Oxford Univ. Press 1971) (n.d.). Nonetheless, the sentiment behind the quote—that preparation is imperative to success—is a foundation of Tzu's philosophy. See TZU (Giles trans.), *supra*, ch. III, para. 17 (“He will win, who, prepared himself, waits to take the enemy unprepared.”).
2. Rob Borcharding & Drew Kernan, *Large-Scale Combat Operations Symposium – Legal Considerations Before and During LSCOs*, ARTICLES OF WAR (May 24, 2023), <https://lieber.westpoint.edu/legal-considerations-before-during-lscos>.
3. U.S. DEP'T OF DEF., 2022 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA, at iii (2022) [hereinafter NDS].
4. *Id.* at 1.
5. *Id.* at 2. While this particular quote refers to China, the principle goal of integrated deterrence against all adversaries is to make restraint a more appealing option when compared to the costs of aggression.
6. See JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS, at V-1 (18 June 2022) [hereinafter JP 3-0] for a more detailed explanation of the competition continuum.
7. JOINT CHIEFS OF STAFF, JOINT PUB. 1-0, JOINT WARFIGHTING, vol. 1, at II-7 [hereinafter JOINT WARFIGHTING].
8. CATHERINE A. THEOHARY, CONG. RSCH. SERV., IF12565, DEFENSE PRIMER: WHAT IS IRREGULAR WARFARE? (2024).
9. See, e.g., 10 U.S.C. § 164; 50 U.S.C. § 3038.
10. See Memorandum from Deputy Sec'y of Def. to Chief Mgmt. Officer of Dep't of Def. et al., subject: Directive-Type Memorandum (DTM) 18-005 – Authority for Support of Special Operations for Irregular Warfare (IW) (Aug. 3, 2018) (C4, Mar. 16, 2023) (listing the requirements for establishing and running an IW program governed by 10 U.S.C. § 127d).
11. *The Fiscal Year 2022 National Defense Authorization Budget Request from the Department of Defense*, 117th Cong. 5 (2021) (statement of General Mark A. Milley, Chairman of the Joint Chiefs of Staff, Department of Defense).
12. JOINT WARFIGHTING, *supra* note 7, at i.
13. *Id.* at I-2, VI-3. *Joint Warfighting* uses the term “doctrine,” but here we replace it with “authorities” because JAs will have to navigate through a myriad of laws, policies, orders, and command and control issues.
14. Thomas A. Walsh & Alexandra L. Huber, *A Symphony of Capabilities: How the Joint Warfighting Concept Guides Service Force Design and Development*, JOINT FORCE Q., Oct. 2023, at 5.
15. U.S. DEP'T OF NAVY, CHIEF, NAVAL OPERATIONS, CHIEF OF NAVAL OPERATIONS NAVIGATION PLAN FOR AMERICA'S WARFIGHTING NAVY (2024).
16. U.S. DEP'T OF AIR FORCE, AIR FORCE FUTURE OPERATING CONCEPT EXECUTIVE SUMMARY (6 Mar. 2023).
17. U.S. DEP'T OF ARMY, TRADOC PAM. 525-3-1, THE U.S. ARMY IN MULTI-DOMAIN OPERATIONS 2028, at iii (6 Dec. 2018).
18. NDS, *supra* note 3, at 1.
19. JOINT CHIEFS OF STAFF, JOINT OPERATING ENVIRONMENT (JOE) 2035: THE JOINT FORCE IN A CONTESTED AND DISORDERED WORLD 5 fig.2 (14 July 2016).
20. For a discussion on the global concept of operations, see JOINT WARFIGHTING, *supra* note 7, at IV-1.
21. NDS, *supra* note 3, at 10.
22. See generally U.S. DEP'T OF ARMY, REG. 27-53, LEGAL REVIEW OF WEAPONS AND WEAPON SYSTEMS (23 Sept. 2019) (setting forth the requirements for submitting legal reviews of weapons and weapons systems).
23. See, e.g., Geoff Brumfiel, *Israel Is Using an AI System to Find Targets in Gaza. Experts Say It's Just the Start*, NPR (14 Dec. 2023, 4:58 am), <https://www.npr.org/2023/12/14/1218643254/israel-is-using-an-ai-system-to-find-targets-in-gaza-experts-say-its-just-the-st>.
24. 10 U.S.C. § 164(b).
25. NDS, *supra* note 3, at 14-16. It is hard to understate how important building relationships and increasing interoperability with allies and partners is to U.S. national defense. The term “allies and partners” appears forty-five times in the NDS. See *id. passim*.
26. Specifically, USAFRICOM, USCENTCOM, USEUCOM, USINDOPACOM, USNORTHCOM, and USSOUTHCOM—the combatant commands formerly known as “Geographic Combatant Commands.”
27. U.S. DEP'T OF DEF., DIR. 5132.03, DoD POLICY AND RESPONSIBILITIES RELATING TO SECURITY COOPERATION 14 (Dec. 29, 2016).
28. WARREN ZEVON, *Lawyers, Guns and Money, on EXCITABLE BOY* (Asylum Records, 1978).
29. 10 U.S.C. § 301.
30. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).
31. I.e., the Counter ISIS Train and Equip Fund (CTEF). Originally codified by the Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2290 (2014), the CTEF authority has been updated and amended in each subsequent appropriations act.
32. 22 U.S.C. § 2151 et seq.
33. International Security Assistance and Armed Export Control Act of 1976, Pub. L. No. 94-329, 90 Stat. 729.
34. By way of example, the SC authority to “train with friendly foreign partners” is codified at 10 U.S.C. § 321 and is governed by 2017 implementing guidance and delegations from the Secretary of Defense, 2017 delegation and guidance from the Deputy Secretary of Defense, 2019 additional guidance and delegations from the Under Secretary of Defense for Policy (USD(P)), the 2014 DoD Leahy Law implementing guidance, 2017 guidance and delegation from the Secretary of Defense on effecting congressional notifications for security cooperation activities, 2017 USD(P) guidance and delegation of authority on the payment of incremental expenses for high income countries, guidance on Joint Training Resources in *Chairman of the Joint Chiefs of Staff Manual* 3511.01A, and guidance published annually by the Joint Staff J-7 on information required to effect congressional notification. Finally, at the time of writing, the DoD is in the process of updating all the implementing guidance for the use of Section 321.
35. 31 U.S.C. § 1301. The Purpose Statute stipulates that appropriations must be applied only to the objects for which the appropriations were made, except as otherwise provided by law.
36. 10 U.S.C. § 321(c).
37. 10 U.S.C. § 333. “Foreign security forces: authority to build capacity” authorizes the Secretary of Defense to provide training and equipment to build the capacity of friendly foreign partners. See *id.*