

Asymmetric Challenge of Environmental Lawfare
By Michael T. Palmer# 30 January 2009

Introduction

The U.S. Navy is currently resolving a myriad of environmental judicial challenges and injunctions against its use of active sonar incident to at-sea testing and training that culminated in a U.S. Supreme Court ruling in December 2008. International environmental non-governmental organizations have also engaged in concurrent and extremely effective strategic communication campaigns targeting the world media and various international forums to leverage public opinion and political pressure to restrict or reduce worldwide military active sonar use.

These domestic lawsuits, public affairs strategies, and international organization efforts are purportedly premised on environmental stewardship, specifically marine mammal protection. This article analyzes whether these challenges are independent actions by well-intentioned non-governmental organizations solely interested in “saving the whales”, or could they be part of a comprehensive, long-term, and extremely sophisticated form of asymmetric attack against military anti-submarine war-fighting capabilities. This article explores the possibility of previously unrecognized nontraditional asymmetric legal lines of operations our adversaries could, and arguably perhaps do, exploit against the United States through international and domestic environmental "lawfare."

The U.S. Navy faces myriad legal, public affairs, domestic political and international challenges to its use of active sonar for undersea warfare testing and training. International environmental nongovernmental organizations (NGOs) find U.S. federal courts an effective venue for challenging Navy operations, particularly with respect to sonar and other at sea training activities. The most visible example was the recent United States Supreme Court decision in *NRDC v. Gates*, where the Court overturned some restrictions imposed by a lower court injunction limiting the Navy's ability to train with active sonar off Southern California. The U.S. Navy has also resolved lawsuits challenging low-frequency active sonar operations in the Western Pacific and mid-frequency active sonar testing and training worldwide. In addition, federal courts have also issued injunctions against U.S. Navy mid-frequency active sonar use during the 2006 biannual Rim of the Pacific multinational exercise and U.S. Pacific Fleet UnderSea Warfare Exercises off the big island of Hawaii. These injunctions either prohibited or severely limited U.S. Navy active sonar training resulting in significant adverse impacts to U.S. Pacific Fleet Undersea Warfare capabilities, U.S. Navy operational readiness, U.S. national defense, and international maritime security.

Traditionally, the U.S. Navy handles environmental compliance lawsuits as it would any other legal challenge to its operations or activities. U.S. Navy, U.S. Department of Defense, and U.S. Department of Justice lawyers work each of these challenges through the court system on an individual basis purely as civil law "legal issues."

The unexplored question is the basis, context, and desired outcome intended by the NGOs filing these legal challenges purportedly for “saving the whales” but could have the functional effect of reducing U.S. military training, readiness, and effectiveness. Because of their potential

significant adverse impact on military operations, national defense, and international maritime security, these actions constitute a potential but previously unrecognized non-technical asymmetric threat to U.S. Navy Undersea Warfare capabilities.

Asymmetric Warfare

Asymmetric warfare is generally the use of strategies or tactics designed to offset deficiencies in quantity or quality of warfighting capabilities. As the world's leader in warfighting capabilities, the United States faces a spectrum of asymmetric warfare threats, from cyber attacks to acts of terrorism. The Department of Defense 2005 National Defense Strategy for the United States of America clearly identified future non-traditional threats to our national security:

“Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international forums, judicial processes, and terrorism.” Adversaries, unable or unwilling to confront us symmetrically along traditional warfighting lines will seek their own goals, blunt our technology, and undercut our military objectives by targeting our vulnerabilities for asymmetric attack.

In their 1999 book *Unrestricted Warfare*, Colonels Qiao Liang and Wang Xiangsui of the Chinese People's Liberation Army, address the mechanisms a nation such as China can use to defeat a technologically superior adversary such as the United States. The authors, recognizing a major weakness of the United States is its myopic focus on technology, state that such countries are particularly vulnerable to attack along non-technological legal, economic, and terrorist lines. The vulnerability to potential legal lines of attack, and specifically with regard to environmental protection challenges to U.S. Navy active sonar use is of particular concern.

Lawfare

Experts define “lawfare” generally as the use or abuse of law and legal processes as a substitute for traditional military means to achieve military objectives. The “law,” both international and domestic, is simply one of several means an adversary may use to conduct offensive actions and obtain military advantage without the force of arms. Exploiting our society's respect for international and domestic legal systems, adversaries engaged in lawfare manipulate public opinion and use or misuse international processes, fora, and governing bodies as well as domestic laws and legal systems to advance their own strategic goals.

International Lawfare

Nations and NGOs have long practiced lawfare in international relations. In *Unrestricted Warfare*, the authors describe international lawfare as “seizing the opportunity to set up regulations.” The party that sets up the regulations defines the problem and structures the process to achieve desired results. Weaker nation-states have long used international legal processes, world opinion, and domestic political support to “level the playing field” and neutralize an adversary's technological or other advantage. This has been effectively accomplished by focusing arguments on alleged Law of Armed Conflict violations to restrict a stronger nation state's military capabilities and thus undercut an adversary's strategic or operational advantage.

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Historical examples of international lawfare include: the 1139 Second Lateran Council banning the crossbow against Christians ; the 1856 Congress of Paris attempt to set limits to naval warfare ; the St. Petersburg Declaration of 1868 prohibiting the use of explosive bullets under 40 grams in weight ; and the Convention of 1899’s international ban on expanding “Dum-Dum” ammunition .

Modern international lawfare examples include Iraq benefiting from a “defense shield” operational advantage by placing fighters next to a culturally protected landmark during the First Gulf War; Iraq’s employment of “human shields” on prospective lawful military targets during the Operation Iraqi Freedom; and the International Criminal Court holding Israel’s security fence in violation of international law.

During peacetime, adversarial governments and non-governmental organizations engage in international lawfare by focusing their media campaigns on restricting the use of certain weapons used by the U.S. military. Recent examples include efforts to ban land mines, cluster munitions, space weapons, blinding lasers, and testing of nuclear weapons. An interesting international lawfare effort to blunt U.S. military capabilities is the proposition that the existence of laser-guided munitions has rendered the use of kinetic munitions an indiscriminate use of force in violation of the Law of Armed Conflict. These asymmetric campaigns impose increased costs on the American military and can adversely affect national strategy and operational capabilities.

International Environmental Lawfare

Some environmental NGOs may be borrowing strategy and tactics from the *Unrestricted Warfare* playbook by seizing “the opportunity to set up regulations” at a series of recent influential international forums, conferences, and governing bodies. These parties develop an effective public information campaign to create the military sonar “problem” by a sophisticated, well-funded linking of a series of recent documented whale strandings to naval operations and, presumably, active sonar use. Examples of events that environmental NGOs have tried to associate with military active sonar use includes mass strandings in U.S. North Carolina (2005), northwest coast of the United States (2003), Canary Islands (1985, 1988, 1989, 2002, 2004), Madeira (2000), Bahamas (2000), U.S. Virgin Islands (1998, 1999), and Greece (1996) , and.

After generating “international consensus,” environmental NGOs follow-up with aggressive efforts at these forums, conferences, and governing bodies to obtain statements and resolutions endorsing the proposition that military sonars are harmful to marine resources in general and marine mammals in particular. Recent examples demonstrating the effectiveness of

environmental NGO tactics include: • June 2004 International Whaling Commission's Scientific Committee Report claiming compelling evidence implicates ocean noise as a threat to marine mammals; • October 2004 European Parliament resolution calling for a moratorium on military sonars; • November 2004 World Conservation Congress of the IUCN resolution calling for international action to address the problem of ocean noise, including military sonars; • June 2005 U.N. Convention on the Law of the Sea - a coalition of environmental NGOs called upon the United Nations to take the lead in organizing a "Multinational Task Force to develop international agreements regulating noise levels in the world's oceans."

U.S. Environmental Planning and Natural Resource Protection Laws

United States domestic laws offer unique and effective pathways for environmental lawfare. The U.S. Navy, like other Federal agencies, is subject to a myriad of domestic environmental planning and natural resource protection laws and regulations. Examples relevant to U.S. naval forces operating in the marine environment include National Environmental Policy Act requirements for Environmental Impact Statements; Marine Mammal Protection Act authorisation requirements, Endangered Species Act consultation requirements, and Coastal Zone Management Act Federal consistency requirements.

These environmental protection programs are different from most other Federal programs because Congress has waived traditional Federal government sovereign immunity in this area. These waivers of sovereign immunity subject the U.S. Navy and its officials to compliance lawsuits, court injunctions, as well as imposition of civil penalties and criminal sanctions.

An example, the U.S. Navy is required to assess the potential impacts of its mid-frequency active sonar use on maritime resources. If the expected impacts exceed certain statutory thresholds, the U.S. Navy is required to consult with Federal and state regulatory agencies on impacts to endangered species, obtain Federal regulatory agency authorization for any adverse impacts to marine mammals, and consult with state regulatory agencies to ensure its activities are consistent with applicable state coastal management resource programs. Under the current scheme, the Navy's use of a critical national defense asset such as mid-frequency active sonar is subject to various Federal and state environmental and natural resource regulatory agency regulations, requirements, and approvals and authorizations which often include time, place, and manner operational restrictions.

The Equal Access to Justice Act

Supplementing the legal authority to challenge Federal agency environmental compliance, the Equal Access to Justice Act, requires military and other Federal agencies to pay attorney fees and costs incurred by plaintiffs bringing environmental challenge lawsuits. Recent examples of fees and costs paid by the U.S. Navy are informative. They include \$1,700,000 for a legal challenge to the U.S. Navy's testing and use of a low-frequency active sonar system in the Pacific, approximately \$300,000 for the 5-day RIMPAC 2006 injunction, and an expected \$700,000 for the Southern California Operating Area injunction. None of these U.S. taxpayer funds went to increased military preparedness, environmental protection, or marine mammal research.

Unintended Vulnerability

Intended by Congress to ensure Federal agencies do their part to help protect the environment, the decision to subject the U.S. armed forces to environmental compliance legal challenges may have created an Achilles' heel in our U.S. security.

Some environmental NGOs may be engaging in legitimate public awareness campaigns and using international forums, conferences, and governing bodies as well as our domestic environmental laws and legal systems for the valid purpose of protecting our environment and its natural resources. The U.S. Navy, like all Federal agencies, must comply with applicable environmental planning and natural resource laws. The U.S. Navy and the American people both benefit from these types of challenges however 'disruptive' they may be to budgets and schedules.

However, what if the NGO's intended end-state is not environmental protection? What if our adversaries, working through environmental NGO proxies, are intentionally misusing these same international and domestic processes, laws, and systems to conduct asymmetric lines of attack against United States military capabilities under the guise of environmental and natural resource protection?

Does it matter? Applying effects-based analysis, the stated or actual motives of the groups challenging U.S. Navy environmental compliance become irrelevant. Whether brought to benefit marine mammals or adversarial militaries, the resultant end-state effect is the same – degradation of U.S. Navy ASW capabilities against the world's inventory of quiet diesel-electric submarines, inability to protect sea lines of communications and critical chokepoints, wasteful expenditure of resources, and a reduction of U.S. operational and strategic options.

Is it really about protecting the whales? International environmental NGOs advocate a temporal and geographic correlation between active sonar use and reported global marine mammal mass strandings. Assuming military sonar causation for these strandings, this would account for 50 deaths per year or approximately 2 deaths per month worldwide. For perspective, commercial fishing interests kill more than 600,000 marine mammals each year. In addition to commercial fishery by-catch, countries such as Iceland, Norway, and Japan continue to hunt whales, with Japan alone accounting for nearly 700 whale deaths a year under a controversial IWC research exemption. If the world's oceans can absorb the loss of more than 600,000 marine mammals annually without adverse effects to species populations and stocks, it is difficult to understand in terms of natural resource protection the intensive, almost exclusive, litigious focus by environmental NGOs on U.S. Navy military sonars.

If it is not about marine resource protection, then what is motivating these litigious environmental NGOs? It may be important to note that these aggressive international and domestic lawfare campaigns have coincided with the U.S.'s strategic, operational, and tactical emphasis on anti-submarine warfare capabilities, especially in the western Pacific. These efforts are reasonably related to geo-political events in Asia, including China's drive for naval domination on both sides of the Malacca Strait, the South China Sea, and Taiwan Strait, and efforts to acquire conventional submarines. This may well explain why environmental NGO

efforts and resources appear focused almost exclusively on lawsuits filed in California Federal District Courts seeking, and often obtaining, injunctions against U.S. Navy assets training and deploying in the Pacific. To date, there have been no injunctions sought to stop similar active sonar use or training in the Atlantic, Gulf of Mexico, Mediterranean, or Arabian Gulf. If military active sonars are harming marine resources, why does it occur only along the western threat axis? Finally, while all military sonars operate essentially the same, when approaching the issue of military sonars the lead environmental NGOs have engaged in a combative, adversarial, and litigative approach against the United States and its allies but maintain a cooperative “partnership” with nations like Russia and China. It may not be about protecting the whales after all.

Responding to the Threat

As with all asymmetric threats, there is little doctrine and less agreement on how to effectively respond to the peacetime lawfare threat.

First, recognize the threat. Our senior military and civilian leadership generally have a difficult enough time comprehending new asymmetric threats, especially those arising from arcane specialized areas such as the law. They are not positioned to perceive and appreciate the subtle, intentional manipulation and use of international organizations, the filing of environmental lawsuits, or even the manipulation of some environmental NGOs themselves as parts of a larger, coordinated, and sophisticated threat to U.S. military capabilities in a long-term asymmetric warfare campaign. The use of international and domestic legal lines of attack should not be perceived differently than other more traditional asymmetric threats such as terrorism and cyber-attack.

Second, respond to the threat. This starts with an aggressive, comprehensive strategic communications counter-offensive campaign to educate our military and civilian leadership, the world public, and our allies, on the nature of the threat and the strategic and operational implications to our national security and national defense. Senior military and executive branch leadership should begin by elevating this problem to an inter-agency operational level as opposed to the current state of segregated, piece-meal, Federal agency tactical responses with the lawyers fending off the lawsuits, the public affairs teams merely responding to press inquiries, and the Department of State attempting to track and respond to international efforts. The international counter-offensive should monitor and aggressively participate in international conferences, governing bodies, symposia, and other relevant forums, to educate and oppose attempts at international regulation of military readiness activities. The domestic counter-offensive should focus on eliminating pathways vulnerable to legal lines of attack. Options include, but are not limited to, exempting military readiness activities, enforcing registration and tracking of applicable environmental NGOs under the Foreign Agent Registration Act, and implementing NGO reform similar to recent election and lobbyist reform measures. Other steps could include limiting or removing judicial review and injunctive relief options, requiring regulatory agencies to balance military readiness impacts with environmental protection, and requiring military readiness activities to comply with environmental and natural resource protection requirements by Executive Order as opposed to congressional statute, similar to our overseas environmental planning requirements.

Conclusion

So, are our adversaries conducting asymmetric warfare against the United States through environmental NGO proxies engaged in international and domestic lawfare? The conditions that negatively affect U.S. Navy operations are all in place. First, the U.S. military's historical and cultural focus on technology and symmetric threats. Second, our Nation's cherished and warranted belief in the rule of law. Third, U.S. Congress' creation of vulnerabilities by subjecting the Navy to environmental compliance legal challenges and providing an almost unlimited "deep pocket" funding source for attorney fees and costs. Fourth, our sophisticated adversaries' receptiveness to these types of vulnerabilities and their desire and capability to exploit them. Finally, our inability to recognize the threat, organize, and effectively respond to significant non-technical asymmetric threats to military readiness activities, national defense, and, ultimately, to our national security.

Under the current construct, the means are available for an adversary to engage in full-scale international and domestic lawfare by exploiting international forums and misusing domestic environmental protection laws to blunt our technological anti-submarine advantages, degrade our training, reduce our capabilities, restrict our operations, reveal our training methods and locations, limit future technological advances, and undercut our national strategic objectives.

Whether or not our adversaries are currently engaged in lawfare campaigns, our Navy and national leadership should recognize and respond to the threats of this form of asymmetric warfare. This multi-faceted asymmetric threat requires a creative, multi-faceted response.

Notes

1. * This Article represents the views of the author, unless otherwise attributed, and not necessarily the views of the Department of Defense, Department of the Navy, or any other Federal agency.
2. The National Defense Strategy of the United States of America (2005), http://www.globalsecurity.org/military/library/policy/dod/nds-usa_mar2005.htm (accessed January, 2009)
3. Qiao Liang and Wang Xiangsui, *Unrestricted Warfare: China's Master Plan to Destroy America*, (Los Angeles: Pan American Publishing, 1999), 5-6.
4. Ibid. Illustrating this point is the following July 1974 exchange purportedly between Col. Summers, U.S. Army, Chief, Negotiations Division of the Four Party Joint Military Team (FPJMT) and his North Vietnamese counterpart: Col. Summers, "You know, you never beat us on the battlefield." Col. Tu, "That may be so, but it is also irrelevant". Available at <http://www.clausewitz.com/CWZHOME/SummersObitText.htm> (accessed January 2009)
5. Brigadier General Charles J. Dunlap, Jr., "The Law of Armed Conflict," Air & Space Conference and Technology Exposition 2005, Sep. 13, 2005; Jeremy Rabkin, "Lawfare," *The Wall Street Journal*, (July 13, 2004); Council on Foreign Relations, "Lawfare, the Latest in

Asymmetries,” (March 18, 2003), available at <http://www.cfr.org/publication.html?id=5772> (accessed January 2009)

6. Ibid.

7. Dunlap, Id.; David McCormack, “Waging Warfare”, Center for Security Policy, available at <http://www.centerforsecuritypolicy.org/Modules/NewsManager/ShowSectionNews.aspx?CategoryID=56&SubCategoryID=86&NewsID=11911> (accessed January, 2009)

8. Ibid.

9. Nanotechnology law, accessed at

10. Crossbow,” The MiddleAges.Net, available at <http://www.themiddleages.net/crossbow.html> (accessed January 2009).

11. Lance E. Davis and Stanley L. Engerman, *Naval Blockades in Peace and War; An Economic History Since 1750*, (Cambridge: Cambridge University Press, 2006), 1-2, available at <http://www.cambridge.org/catalogue/catalogue.asp?isbn=9780511243127&ss=exc> (accessed January 2009)

12. Declaration of St. Petersburg; November 29, 1868, The Avalon Project, Yale Law School, available at <http://www.yale.edu/lawweb/avalon/lawofwar/decpeter.htm> (accessed January 2009)

13. Harold C. Hutchinson, “Lawfare as a Terrorist Tool,” Strategy Page, (March 14, 2006), available at <http://www.strategypage.com/htmw/htiw/articles/20060314.aspx> (accessed January 2009)

14. Rabkin, *supra*; See Dunlap, *supra*; Council on Foreign Relations, “Lawfare, the Latest in Asymmetries – Part Two,” (May 22, 2003), available at <http://www.cfr.org/publication.html?id=6191> (accessed January 2009).

15. See Belt, Stuart W., “Missiles over Kosovo: Emergence, *Lex Lata*, of a Customary Norm Requiring the Use of Precision Munitions in Urban Areas” 47 *Naval Law Review* 47115-175 (2000).

16. See Council on Foreign Relations, May 22, 2003, *supra*.

17. Natural Resources Defense Council, “Protecting Whales from Dangerous Sonar”, available at <http://www.nrdc.org/wildlife/marine/sonar.asp> (accessed January 2009)

18. 16 U.S.C. §§ 1361-1421h, as amended.

19. 7 U.S.C. § 136, 16 U.S.C. § 1531 et seq. (as amended).

20. 16 U.S.C. §§1451-1456.

21. 5 U.S.C. § 504.

22. Andrew J. Read, Phebe Drinker, and Simon Northridge, "Bycatch of marine mammals in U.S. and global fisheries," *Conservation Biology*, 20, no. 1 (2000): 163-169. Matt Villano, "Study: Whale Deaths on the Rise," Suite 101.com, available at <http://www.suite101.com/article.cfm/whales/102032> (accessed January 2009)

23. Brad Kaplan, "China's Navy Today: Storm clouds on the Horizon . . . or Paper Tiger?", Navy League of the United States, available at http://www.navyleague.org/seapower/chinas_navy_today.htm (accessed January 2009)

24. See NRDC China Clean Energy Program website at <http://www.chinacleanenergy.org/aboutus.asp> (accessed January 2009)

25. See Council on Foreign Relations, May 22, 2003, *supra*.

26.E.O. 12114 (Jan. 4, 1979), 44 CFR 1957, 3 CFR, 1979 Comp., 356.

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E.O. 12114 (Jan. 4, 1979), 44 CFR 1957, 3 CFR, 1979 Comp., 356.

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