Changing Character of Public Legal Scrutiny of Operations
Legal Scrutiny

• Few nations in ISAF (for example) have not faced having their legal responses to operational incidents publicly deconstructed

• Not to be lamented – to be lauded

• But this overall positive should not disguise the fact that rapid evolution in any system nevertheless creates tensions, flaws, and plain wrongness
Outline

• Law

• Technology

• Additional and alternative accountability agents

• Consequences?
Law as a Scrutiny Enabler (1)

• Greater certainty in the law is a good endstate, but it creates significant uncertainty as you are getting there
  – CDPH
    • Influential players in the debate?
    • OPSEC and State practice?
    • Different views on the IED maker

• Innovations – local or universal?
  – US Arty Regt in Afghanistan
Law as a Scrutiny Enabler (2)

• The language of scrutiny and critique is legal
  – Iraq debate, 2002-03
  – UK sniper story
  – Maya Evans cases
  – But... loose use of paradigm-sensitive concepts can create legal effects
    • Proportionality in LOAC – v – Proportionality in Human Rights Law
Technology as a Scrutiny Enabler (1)

- Myths about means and methods of warfare
  - PGM, 15,000 feet, and Kosovo

- Depth of scrutiny
  - Public availability of individual bytes of information

- Hindsight and detail
  - Attributed weight
  - Mistake does not necessarily equal illegality
Technology as a Scrutiny Enabler (2)

- Immediacy of scrutiny
  - The 4th weapon of mass destruction
  - “Informed” (data) - v - informed (analysis)
  - Public affairs actors in the ideas and influence marketplace

- The ubiquity of rabbit holes
  - 12 Feb prosecution example: the ICC myth

- Stages of public legal scrutiny and deconstruction in an incident’s legal life
The Capacities of Accountability Agents

• Some are very professional, very well resourced, have excellent access, and are very influential

• Enables significantly greater fidelity in alternative investigations and legal analysis

• “your policy is wrong” – v – “you are in breach of the law”
Consequences?

• Public scrutiny will continue to be dominated by legal paradigms
  – More law, more paradigms, more points of critique (not a bad thing)

• Intelligence led and effects based = primacy of information = more information = greater opportunities for detailed legal scrutiny
  – Motive of your informant?
  – Corroboration and correlation?

• No longer just about what is investigated
  – Who, when, where, which law, how investigated
  – All are additional avenues for legal scrutiny
Thank you

Questions?