

**MINISTRY OF EDUCATION AND SCIENCE OF UKRAINE  
NATIONAL UNIVERSITY OF  
KYIV-MOHYLA ACADEMY**

Qualified scientific work,  
manuscript

**FISHER, BRAD**

УДК: 341.48:327.5:32.019.51](470:477)

**THESIS**

**MALIGN LEGAL OPERATIONS IN INTERNATIONAL LAW  
IN THE CONTEXT OF RUSSIA'S INVASION OF UKRAINE**

293 «International Law»

29 «International Relations»

Submitted for obtaining the degree of Doctor of Philosophy.

The dissertation contains the results of own research. The use of ideas, results and texts of other authors are linked to the appropriate source

 B. Fisher

Research supervisor: **Roman Petrov**, Dr. Hab., Professor

DocuSigned by:  
*Brad Fisher* X  
1B225B48228C42F...  
12/27/2023

Kyiv – 2023

## АНОТАЦІЯ

*Фішер Б.* Підривні правові операції в міжнародному праві в контексті вторгнення Росії в Україну. – Кваліфікаційна наукова праця на правах рукопису.

Дисертація на здобуття наукового ступеня доктора філософії у галузі знань 29 «Міжнародні відносини» за спеціальністю 293 «Міжнародне право». – Національний університет «Києво-Могилянська академія», Київ, 2023.

Ця дослідницька робота пропонує цілісну теорію підривних правових операцій (ППО), яка пояснює складні та багатогранні виклики в сучасних міжнародних конфліктах, що одночасно маніпулюють та загрожують публічному міжнародному праву. Потреба в комплексному каркасі для розуміння складної та все більше впливової природи цих операцій стала надзвичайною. У центрі сучасного міжнародного порядку знаходиться концепція правило-орієнтованого міжнародного порядку. Цей порядок підтримуваний публічним міжнародним правом та вважається основою сучасних міжнародних відносин і містить елементи реалізму в своєму структуруванні. Він залежить від єдності держав, що вказує на відсутність універсально прийнятого тлумачення міжнародних правових інструментів та фундаментальних принципів. Ці норми призначені для регулювання поведінки держав, запобігання конфліктам та збереження глобальної стабільності. Однак державні актори, такі як Росія та Китай, продемонстрували високий рівень розуміння цієї системи, зловживаючи її витонченістю для досягнення стратегічних переваг. В результаті ми опиняємось на перехресті, де принципи міжнародного правопорядку зброюються та маніпулюються в інтересах політичних об'єктивів. Це складне явище проявляється в складному взаємодії державних акторів, правових інструментів та інформаційної війни. Отже, розуміння

природи, наслідків та стратегій протидії, пов'язаних з підливними правовими операціями, стало надзвичайно важливим для збереження міжнародної стабільності та виконання принципів міжнародного права. Ця ситуація підкреслює, що міжнародна правова система - це поле бою, де держави змагаються за вплив та формують сприйняття легітимності для досягнення своїх політичних цілей. Таким чином, право, зокрема публічне міжнародне право, слід вважати як інструмент конфлікту, так і домен, в межах якого відбувається конфлікт.

Традиційно отримання влади було синонімом військової сили, але сучасний конфлікт вводить нову парадигму. Він вказує на те, що перемогу можна досягнути завдяки вправному використанню міжнародних правових норм, розмиваючи межу між правовим та політичним доменами. Ця здатність до здобуття влади без відкритого використання сили представляє собою форму асиметрії, навіть для тих, хто зіштовхується з більш потужними супротивниками. Дослідження розглядає складність цього асиметричного явища, яке створює розбіжності влади шляхом викривлення міжнародних норм і правил, щоб запобігти відповіді тих, хто дотримується цих норм. Термін, який часто використовують для опису цієї багатовимірної стратегії, - це «гібридна війна». Проте це поняття недостатньо описує сутність виклику, який ставлять ППО, і не має нормативного значення в прийнятому корпусі публічного міжнародного права. Подібно до цього концепція «правовійна» (lawfare) існує як спроба використовувати закон для досягнення стратегічних військових цілей, зокрема в контексті некерованих радикальних організацій. Проте це поняття також має різноманітні тлумачення, що призвело до дискусій і політизації. В кінцевому підсумку він не надає задовільної характеристики ролі права, зокрема публічного міжнародного права, в сучасному конфлікті.

Отже, запропонована концепція ППО має на меті служити загальноосязним каркасом для опису, ідентифікації та протидії сучасному використанню правових

доменів. Вона встановлює відмінності між вправними застосуваннями правових механізмів в рамках закону і маніпуляціями, які включають в себе викривлення чи спотворення духу і наміру закону для фейкової легітимності. Цей комплексний каркас є важливим для визнання і вирішення багатовимірної природи ППО. У дослідженні надаються численні історичні та сучасні приклади цих операцій, включаючи глибокий юридичний аналіз і підкреслюючи надзвичайну важливість цього каркасу в сучасних міжнародних справах. Головним прикладом є російська інвазія в Україну, яка розпочалася в 2014 році і триває й до цього часу. Однак інші важливі приклади включають російську інвазію Грузії в 2008 році, незаконне присвоєння Китаєм території в Південному Китаї, а також юридичні маніпуляції транснаціональних терористичних організацій та невизнаних сутностей, які використовуються як приклади протягом цього дослідження.

Дисертаційне дослідження має вступ і 5 розділів. У «Вступі» надається огляд проблеми та узагальнюється стан дослідження сучасних міжнародних конфліктів. У Розділі 1 розглядається поточна криза міжнародного права та досліджується роль гібридної війни в сучасному правовому дискурсі, якщо вона існує і робиться висновок, що ця концепція не має нормативного значення і має бути відкинута. У Розділі 2 аналізується поняття «правовійна» (lawfare), розглядається його роль відносно поточної кризи, і обґрунтовується висновок, що це поняття не має загальноновизнаного значення поза політичними застосуваннями і має бути відкинута. У Розділі 3 надає опис і аргументацію впровадження теорії підривних правових операцій. У Розділі 4 надає інструменти для протидії ППО. Нарешті, Розділ 5 розглядає загальну інвазію Росії в Україну 2022 року та підкреслює кілька обмежень і перемог в контексті публічного міжнародного права та агресії Росії.

Дослідження не пропонує всеохопного рішення проблеми підривного юридичного маніпулювання, особливо між державними силами, однак вона надає основу для майбутніх дослідників цього явища та розробки нових і творчих рішень.

Можливою найбільшою проблемою для теорії ППО є те, що багато держав використовують право в своїх політичних цілях. Проте існує велика різниця між державою, яка використовує ППО як питання політичної доцільності, або, можливо, як стратегічний ресурс, та визнаними та невизнаними сутностями, які використовують ППО як питання доктрини або стратегії держави для досягнення об'єктиву. Важливо уточнити, що порушення права саме по собі не означає автоматичне існування ППО. Щоб бути класифікованим як таке, маніпулювання правовими доменами повинно включати в себе певний рівень витонченості, спотворення чи спотворення міжнародних норм. У дисертації наведено ряд тактик для протидії та знімання ППО, які включені в Комплект інструментів протидії ППО. Ці стратегії включають в себе ідентифікацію ППО завдяки грамотності та розвідці, розкриття цих маніпуляцій через інтегровану стратегічну судову справу, освітлення ППО, механізми обліку та захист правових доменів через правову стійкість та стримування, через «red teaming» та воєнні ігри, закриття юридичних розривів і недоліків. Крім того, ті, хто залучені до завдання протидії ППО, називаються захисниками ППО. Цей термін визнає роль осіб, чи то юридичних експертів, чи то політиків, чи то міжнародних сутностей, в забезпеченні міжнародних норм і протистоянні маніпулюванню правовими доменами. Він підкреслює важливість освіти, обізнаності та міжнародного співробітництва в ефективному вирішенні цього питання.

У кінцевому підсумку існування всебічної теорії підривних правових операцій надає юридичним теоретикам і практикам базовий каркас для створення гармонійного і принципового корпусу міжнародного права. Головна мета полягає в збереженні та захисті самого міжнародного права, оскільки воно залишається важливим інструментом для вирішення конфліктів та забезпечення глобальної стабільності. Це дослідження підкреслює необхідність визнання проблеми, створення спільної лексики для дискусій та розвитку базової роботи для подальшої

юридичної теорії, що захищає міжнародні норми. У цей час невинної еволюції конфліктів і маніпуляцій правовими доменами збереження та захисту міжнародного права має найвищий пріоритет і вимагає спільних зусиль від урядів, юридичних експертів та міжнародних сутностей.

**Ключові слова:** підривні правові операції, публічне міжнародне право, правовійна, зловживання договорами, правова війна, Росія, Україна, Китай, підпорні впливи, дезінформація, війна інформацією, вирішення міжнародних конфліктів, агресія, монетарна політика.

## ANNOTATION

Fisher B. Malign Legal Operations (MALOPs) in International Law in the Context of Russia's Invasion of Ukraine. – Qualified research work (manuscript).

Dissertation to obtain the scientific degree of Doctor of Philosophy in the Field “29 International relations”, specialty 293 "International Law". – National University of Kyiv – Mohyla Academy, Kyiv, 2023.

This research offers the theory of Malign Legal Operations (MALOPs) as a complex and multifaceted challenge in contemporary international conflicts that both manipulates and threatens Public International Law (PIL). The need for a comprehensive framework to understand the intricate and increasingly influential nature of these operations has become paramount. The international rule of law hinges on unanimity among states, revealing the absence of a universally agreed-upon interpretation of international legal instruments and fundamental principles. These norms are designed to regulate state behavior, prevent conflict, and maintain global stability. However, state actors like Russia and China have demonstrated a sophisticated understanding of this system, exploiting its intricacies for strategic gains. As a result, we find ourselves at a

crossroads where the principles of the international legal order are weaponized and manipulated in pursuit of political objectives. This nuanced phenomenon is exemplified in the complex interplay of state actors, legal instruments, and information warfare. Hence, understanding the nature, implications, and counter-strategies related to MALOPs has become crucial in maintaining international stability and upholding the customs and principles of the law itself. This situation underscores that the international legal system is a battleground where states vie for influence and shape perceptions of legitimacy to advance their political objectives. As such, the law, particularly PIL, should be considered both an instrument of conflict and an operating domain within which conflict occurs.

Traditionally, the acquisition of power was synonymous with military force, but modern conflict introduces a new paradigm. It suggests that power shifts can be achieved through the artful manipulation of international legal norms, blurring the lines between the legal and political domains. This ability to acquire power without the overt use of force represents a form of asymmetry, even for those confronted by more powerful adversaries. This research delves into the complexity of this asymmetric phenomenon, one that creates power disparities by twisting international norms and laws to prevent measured responses from those who adhere to these norms. The terminology often employed to describe this multidimensional strategy is hybrid warfare. Yet, this term falls short of comprehensively capturing the essence of the challenge posed by MALOPs and has no normative significance within the accepted body of PIL. Similarly, the concept of lawfare exists as a bumper-sticker attempt to educate non-lawyer decision-makers, military leaders, and politicians about the use of law to achieve strategic military objectives. It originally applied primarily in the context of non-state radical organizations. However, the term has undergone various redefinitions, leading to debate and over-politicization. Ultimately, it has failed to provide a satisfactory characterization of the role of law, particularly PIL, in modern conflict.

As such, the dissertation introduces the concept of MALOPs, aiming to serve as an all-encompassing framework to describe, identify, and counter the modern manipulation of legal domains. It distinguishes between clever applications of legal mechanisms within the boundaries of the law and manipulations that involve mischaracterizing or distorting the law's spirit and intent to feign legitimacy. This comprehensive framework is essential for recognizing and addressing the multidimensional nature of MALOPs. The dissertation provides numerous historical and contemporary examples of these operations, including in-depth legal analysis and emphasizing the critical need for this framework in contemporary international affairs. The principal example is Russia's invasion of Ukraine that began in 2014 and continues today. However, Russia's invasion of Georgia in 2008, China's illegal accession of territory in the South China Sea, and the legal manipulations of transnational terrorist organizations and unrecognized entities are also major examples used throughout this research.

The introduction provides an overview of the problem and summarizes this author's research and contributions to the state of the art. Chapter 1 discusses the current crisis of international law and explores what role hybrid warfare has, if any, in contemporary legal discourse. It determines that the concept has no normative significance and should be discarded. Chapter 2 discusses the notion of lawfare as it relates to the current crisis and determines that the term has no commonly accepted meaning or significance beyond political applications. It, too, should be discarded. Chapter 3 formally introduces the theory of Malign Legal Operations and Chapter 4 provides the Counter-MALOPs toolkit. Finally, Chapter 5 addresses Russia's 2022 total invasion of Ukraine and highlights several limitations and victories as it pertains to PIL and Russia's aggression.

This research is not a singularly comprehensive solution to the problem of malign legal manipulation, particularly between major state powers. However, it offers a new baseline for future researchers to explore this phenomenon and develop new and creative solutions. Perhaps the greatest challenge to the theory of MALOPs is that many states

manipulate the law for political benefit. However, there exists a major difference between a state employing MALOPs as a matter of political expedience, or perhaps as a strategic blunder, and those recognized and unrecognized entities that employ MALOPs as a matter of state doctrine or strategy to achieve an objective. It is crucial to clarify that a mere violation of the law does not automatically constitute MALOPs. To be classified as such, the manipulation of legal domains must involve a particular level of sophistication, misrepresentation, or distortion of international norms. The dissertation outlines a range of tactics to counter and dissuade MALOPs, categorized within the Counter-MALOPs Toolkit. These strategies encompass the identification of MALOPs through literacy and intelligence, the disruption of these manipulations through integrated strategic litigation, the illumination of MALOPs, accountability mechanisms, and the defense of legal domains through legal resilience and deterrence, red teaming and war gaming, and the closure of legal gaps and loopholes. Furthermore, those engaged in the task of countering MALOPs are referred to as MALOPs Defenders. This term acknowledges the role of individuals, be they legal experts, policymakers, or international entities, in safeguarding international norms and confronting the manipulation of legal domains. It underscores the importance of education, awareness, and international cooperation in addressing this issue effectively.

Ultimately, the existence of a comprehensive theory of Malign Legal Operations provides legal theorists and practitioners with a foundational framework to build a harmonious and principled body of international law. As President Zelenskyy aptly stated, "right now, it depends on our joint efforts whether humanity will have such an instrument as international law." The overarching objective is to preserve and protect international law itself, as it remains a crucial instrument for resolving conflicts and maintaining global stability. This research underscores the necessity of acknowledging the problem, creating a shared vernacular for discourse, and developing a foundational body of work to further the legal theory that safeguards international norms. In this era of evolving conflicts and

manipulations of legal domains, preserving and safeguarding international law is of paramount importance, calling for collaborative efforts from governments, legal experts, and international entities alike.

**The views expressed are written solely in the author’s personal capacity and do not represent those of the United States Government in any capacity.**

**Keywords:** Malign Legal Operations, Public International Law, lawfare (правовійна), treaty abuse, legal warfare, hybrid warfare, Russia, Ukraine, China, malign influence, disinformation, information warfare, international conflict resolution, aggression, monetary politics.

#### **List of publications**

1. Fisher B., The Origins of “Lawfare” and the Exploitation of Public International Law / B Fisher // Scientific notes NaUKMA. Legal Science. – 2023. – Vol.11. – P.100-107. DOI: <https://doi.org/10.18523/2617-2607.2023.11.100-107>
2. Fisher B., Russia’s Invasion of Ukraine and the Doctrine of Malign Legal Operations / B Fisher // Access to Justice in Eastern Europe. – 2022. – DOI: <https://doi.org/10.33327/AJEE-18-5.4-a000456>
3. Fisher B., Ideological Aggression and International Law: Soviet and Russian Malign Influence within Legal Domains / B Fisher // Scientific notes NaUKMA. Legal Science. – 2020. – Vol.5. – P.78-93. DOI: <https://doi.org/10.18523/2617-2607.2020.5.78-93>
4. Fisher B., The Kremlin’s Malign Legal Operations on the Black Sea: Analyzing the Exploitation of Public International Law against Ukraine / B Fisher // Kyiv-Mohyla Law and Politics Journal. – 2019 – P.193-223. DOI: <https://doi.org/10.18523/kmlpj190000.2019-5.193-223>

## CONTENTS

<b>GLOSSARY</b> .....	<b>14</b>
<b>INTRODUCTION</b> .....	<b>21</b>
<b>General Characteristics of the Research</b> .....	<b>21</b>
I. Relevance of the Topic.....	21
II. Relation of Work with Scientific Programs, Plans, and Topics .....	22
III. The Purpose and Objectives of the Study.....	24
IV. Research Methods, Structure, and Scope .....	24
V. Scientific Novelty and Expected Results of the Research.....	25
VI. The Practical Significance of the Results.....	26
VII. Main Content and Literature of the Research .....	28
<b>CHAPTER 1 Hybrid Warfare and the crisis of Public International Law</b> .....	<b>31</b>
1.1. Introduction.....	31
1.2. Origins of Hybrid Warfare and Relevance to Public International Law .....	37
1.3. The Legal Lacuna between War and Peace.....	44
1.4. Conflicting Ideologies within Public International Law .....	49
1.5. Hybrid Warfare and China’s Relationship with International Law .....	53
1.6. Hybrid Warfare and Russia’s Relationship with International Law .....	57
1.7. Conclusion: Hybrid Warfare has No Relevance to International Law.....	70
<b>CHAPTER 2. Lawfare and the crisis of Public International Law</b> .....	<b>73</b>
2.1. Introduction.....	73
2.2. Dunlap’s Lawfare .....	75
2.3. “The Lawfare Project” and “Lawfare Blog” .....	78
2.4. A Semiotic Analysis of the Term Lawfare.....	80
2.5. Bartman’s Definition of Uniquely Russian Lawfare.....	83
2.6. Kittrie’s Lawfares: Instrumental and Compliance-Leverage Disparity .....	85
2.7. Value-Neutrality Conclusions: The use and misuse of lawfare .....	88
2.8. Conclusion: The Notion of Lawfare is Obsolete.....	95
<b>CHAPTER 3. The Theory of Malign Legal Operations (MALOPs)</b> .....	<b>98</b>

	12
3.1. Introduction.....	98
3.2. Legal Warfare as State Doctrine.....	100
3.2.1. The Chinese Communist Party .....	100
3.2.2. The Russian Federation.....	110
3.3. The Definition of Malign Legal Operations.....	113
3.4. The Tenants of MALOPs.....	115
3.4.1. The Foundation: Information Operations .....	115
3.4.2. Contain the Adversary.....	121
3.4.3. Shape Legitimacy .....	123
3.4.4. Probe Legal Lacunae.....	128
3.4.5. Exploit Legal Loopholes .....	132
3.4.6. Abdicate Legal Obligations .....	137
3.4.7. Malign Influence Within Legal Domains (MILDs).....	140
3.5. Law, De Facto: The Exploited Principles of Public International Law .....	143
3.5.1. Pacta Sunt Servanda versus Clausula Rebus Sic Stantibus .....	144
3.5.2. Ex Factis Jus Oritur versus Ex Injuria Jus Non Oritur .....	147
3.5.3. Lex Lata versus Lex Ferenda .....	150
3.5.4. Jus Ad Bellum versus Jus In Bello.....	150
3.6. Conclusion: Malign Legal Operations is a Novel Theory of Legal Domains in Modern Conflict.....	151
<b>CHAPTER 4. The Counter-MALOPs Toolkit.....</b>	<b>153</b>
4.1. Introduction.....	153
4.2. The Identification Stage.....	155
4.2.1. MALOPs Literacy.....	155
4.2.2. MALOPs Intelligence .....	156
4.2.3. Operationalizing MALOPs Defenders.....	158
4.3. The Disruption Stage .....	160
4.3.1. Integrated Strategic Litigation .....	160
4.3.2. Combatting the Litigator’s Dilemma .....	163
4.3.3. Increase MALOPs Accountability .....	164
4.4. The Defensive Stage .....	167

4.4.1. Build Legal Resilience and a Deterrent Posture .....	167
4.4.2. MALOPs Red Teaming and War Gaming.....	169
4.4.3. Close Gaps, Loopholes, and Vulnerabilities.....	172
4.4.4. Illuminating MALOPs .....	173
<b>CHAPTER 5. Lessons from Russia’s 2022 Invasion of Ukraine.....</b>	<b>176</b>
5.1. Introduction.....	176
5.2. International Response and Russian Claims.....	177
5.3. MALOPs Intelligence .....	178
5.4. Illuminate and Maintain Accountability.....	184
5.5. Limitations and Victories .....	187
<b>CONCLUSION.....</b>	<b>189</b>
<b>REFERENCES .....</b>	<b>194</b>
<b>FIGURES .....</b>	<b>205</b>
<b>APPENDIX 1. List of publications .....</b>	<b>206</b>
<b>APPENDIX 2. MALOPs Analysis of Putin Speech, 2014 .....</b>	<b>207</b>
<b>APPENDIX 3. Voyger’s Matrix of Lawfare and Hybrid Warfare .....</b>	<b>210</b>

## GLOSSARY

<b>Asymmetric Warfare</b>	Conflict involving the disproportionate distribution of power. When a participant in a conflict leverages its competitive advantages against a target which, due to the target's disadvantage in the particular area, provides an asymmetric advantage that may render military force or other traditional means ineffective. Particularly effective when the target is unaware that their adversary yields such an advantage until it is too late.
<b>China's Three Warfares: Legal Warfare</b>	“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, and making arguments for one’s own side in cases where there are also violations of the law.” <sup>1</sup>
<b>China's Three Warfares: Media Warfare</b>	“[Activities] aimed at influencing domestic and international public opinion to build support for China’s military actions and dissuade an adversary from pursuing actions contrary to China’s interests.” <sup>2</sup> Halper notes that the goals of media warfare are to: (1) preserve friendly morale; (2) generate public support at home and abroad; (3) Weaken an enemy’s will to fight; and (4) Alter an enemy’s situational assessment.
<b>China's Three Warfares: Psychological Warfare</b>	“[When a conflict participant] seeks to undermine an enemy’s ability to conduct combat operations through operations aimed at deterring, shocking, and demoralizing enemy military personnel and supporting civilian populations.” <sup>3</sup>
<b>Disinformation</b>	“Unlike misinformation, disinformation is intentionally false. Examples include planting false news stories in the media and tampering with private and/or classified communications before their widespread release.” <sup>4</sup>
<b>Fait Accompli</b>	mid 19th century: from French, literally ‘accomplished fact.’ a thing that has already happened or been decided before those affected hear about it, leaving them with no option but to accept. - Oxford Pocket English Dictionary
<b>Fait Accompli Attack</b>	A fait accompli attack is intended to achieve military and political objectives rapidly and then to quickly consolidate

<sup>1</sup> Dean Cheng, “Winning Without Fighting: Chinese Legal Warfare,” *The Heritage Foundation Backgrounders*, May 21, 2012, <https://www.heritage.org/asia/report/winning-without-fighting-chinese-legal-warfare>.

<sup>2</sup> Stefan Halper, “China: The Three Warfares” (Washington D.C., May 2013), [https://www.iwp.edu/wp-content/uploads/2019/05/201810171\\_HalperChinaThreeWarfares.pdf](https://www.iwp.edu/wp-content/uploads/2019/05/201810171_HalperChinaThreeWarfares.pdf).

<sup>3</sup> Halper.

<sup>4</sup> Catherine A. Theohary, “Defense Primer: Information Operations,” Congressional Research Service, December 15, 2020, <https://crsreports.congress.gov/product/pdf/IF/IF10771>.

	those gains so that any attempt to reverse the action would entail unacceptable cost and risk. See <sup>5</sup>
<b>Gerasimov Doctrine (so-called)</b>	See figure 1. “In the 21st century we have seen a tendency toward blurring the lines between the states of war and peace. Wars are no longer declared and, having begun, proceed according to an unfamiliar template...a perfectly thriving state can, in a matter of months and even days, be transformed into an arena of fierce armed conflict, become a victim of foreign intervention, and sink into a web of chaos, humanitarian catastrophe, and civil war.” <sup>6</sup> and the “integrated application of political, economic, informational and other no-military measures, implemented with the support of military force... Their purpose is to achieve political goals with a minimal military influence on the enemy... [such that the enemy] descends into a state of complete chaos, political crisis and economic collapse.”
<b>Gray Zone Conflict</b>	“Those covert or illegal activities of non-traditional statecraft that are below the threshold of armed organized violence; including disruption of order, political subversion of government or non-governmental organizations, psychological operations, abuse of legal processes, and financial corruption as part of an integrated design to achieve strategic advantage.” <sup>7</sup>
<b>Hybrid Warfare</b>	“The blurring of modes of war, the blurring of who fights, and what technologies are brought to bear, produces a wide range of variety and complexity that we call Hybrid Warfare. Hybrid Wars can be conducted by both states and a variety of non-state actors. Hybrid Wars incorporate a range of different modes of warfare, including conventional capabilities, irregular tactics and formations, terrorist acts including indiscriminate violence and coercion, and criminal disorder. These multi-modal activities can be conducted by separate units, or even by the same unit, but are generally operationally and tactically

<sup>5</sup> U.S. Army Training and Doctrine Command, “The U.S. Army in Multi-Domain Operations 2028,” *TRADOC Pamphlet 525-3-1*, 2018, [https://www.tradoc.army.mil/Portals/14/Documents/MDO/TP525-3-1\\_30Nov2018.pdf](https://www.tradoc.army.mil/Portals/14/Documents/MDO/TP525-3-1_30Nov2018.pdf).

<sup>6</sup> Valeriy Gerasimov, “НАУКИ В ПРЕДВИДЕНИИ,” *Military Industrial Courier* 8, no. 476 (2013): 2–3, [https://vpk-news.ru/sites/default/files/pdf/VPK\\_08\\_476.pdf](https://vpk-news.ru/sites/default/files/pdf/VPK_08_476.pdf).

<sup>7</sup> Frank G. Hoffman, “Examining Complex Forms of Conflict: Gray Zone and Hybrid Challenges,” *PRISM: The Journal of Complex Operations* 7, no. 4 (November 8, 2018), <https://cco.ndu.edu/News/Article/1680696/examining-complex-forms-of-conflict-gray-zone-and-hybrid-challenges/>.

	directed and coordinated within the main battlespace to achieve synergistic effects.” <sup>8</sup>
<b>Ideological Aggression (Russian)</b>	“an attack on the information security of the state...a psychological preparation for the violation of peace” <sup>9</sup>
<b>Information Operations (U.S.)</b>	“the integrated employment, during military operations, of information-related capabilities in concert with other lines of operation to influence, disrupt, corrupt, or usurp the decision making of adversaries and potential adversaries while protecting their own.” <sup>10</sup>
<b>Information Warfare (U.S.)</b>	“a strategy for the use and management of information to pursue a competitive advantage, including both offensive and defensive operations.” <sup>11</sup>
<b>Information Warfare / Information Operations (Russian)</b>	“a type of confrontation between parties, represented by the use of special (political, economic, diplomatic, military and other) methods [based on different] ways and means that influence the informational environment of the opposing party [while] protecting their own [environment], in order to achieve clearly defined goals. [Therefore] The major dimensions for waging informational-psychological confrontations [are] political, diplomatic, financial-economic, [and] military...[it] aims to interrupt the balance of power and achieve superiority in the global information dimensions [by targeting] the decision-making process of the adversary.” <sup>12</sup> AND “influencing the consciousness of the masses as part of the rivalry between the different civilizational systems adopted by different countries in the information space by use of special means to control information resources as ‘information weapons.’” <sup>13</sup>
<b>Kittrie's Compliance-Leverage Disparity Lawfare</b>	“lawfare, typically on the kinetic battlefield, which is designed to gain advantage from the greater influence that law, typically the law of armed conflict, and its processes exerts over an adversary.” <sup>14</sup>

<sup>8</sup> Frank G Hoffman, “The Rise of Hybrid Wars,” 2007, <http://www.potomac institute.org/>.

<sup>9</sup> Stanislav Valentinovich Chernichenko, “Ideological Aggression as the Use of Force in International Law,” *Eurasian Legal Journal* 1 (2019): 21–24, <https://eurasianlaw.ru/nashi-rubriki/yuridicheskie-stati/ideologicheskaya-agressiya-kak-primeneniye-sily-v-mezhdunarodnom-prave>.

<sup>10</sup> Theohary, “Defense Primer: Information Operations.”

<sup>11</sup> Theohary.

<sup>12</sup> Ofer Fridman, *Russian “Hybrid Warfare” Resurgence and Politicisation* (New York: Oxford University Press, 2018).

<sup>13</sup> Jolanta Darczewska, “The Anatomy of Russian Information Warfare: The Crimean Operation, A Case Study.,” *Warsaw: Centre for Eastern Studies*, 2014.

<sup>14</sup> F. Kittrie, *Lawfare: Law as a Weapon of War*, 11.

<b>Kittrie's Instrumental Lawfare</b>	“the instrumental use of legal tools to achieve the same or similar effects as those traditionally sought from conventional kinetic military action.” <sup>15</sup>
<b>Lawfare (Bartman)</b>	“the manipulation or exploitation of the international legal system to supplement military and political objectives legally, politically, and equally as important, through the use of propaganda.” <sup>16</sup>
<b>Lawfare, Original Definition (Dunlap)</b>	“Lawfare is the strategy of using – or misusing – law as a substitute for traditional military means to achieve an operational objective.” <sup>17</sup>
<b>Lawfare (Kittrie)</b>	Kittrie adopted Dunlap’s definition rather than defining a new term, however, he added two caveats to further narrow the term’s scope. The first caveat was that an incident of lawfare must be the instrumental application of the law as a replacement for what would otherwise be a physical attack on a target. The second caveat is that the lawfare practitioner must intend to “weaken or destroy an adversary against which the <i>lawfare</i> is being deployed.” <sup>18</sup>
<b>Legal Asymmetry</b>	Exploiting legal domains to create an asymmetric advantage over a target, resulting in the disproportionate distribution of power over a given adversary, situation, or conflict. Legal asymmetries provide a competitive advantage that may render military force or other traditional means ineffective. See asymmetric warfare.
<b>Legal Resilience</b>	“Legal resilience is concerned with the resistance of legal systems to change and their capacity to adapt in response to disturbances. In essence, the aim of legal resilience theory is to understand how legal systems cope with internal and external shock.” <sup>19</sup>
<b>Legal Deterrence</b>	“A sub-product of Legal Resilience is the creation of Legal Deterrence. Legal Resilience projects a desired posture, which discourages the opponent from using Lawfare partially or

<sup>15</sup> F. Kittrie, *Lawfare: Law as a Weapon of War*, 8.

<sup>16</sup> Christi Scott Bartman, “Lawfare and the Definition of Aggression: What the Soviet Union and Russian Federation Can Teach Us,” *Case Western Reserve Journal of International Law* 43, no. 1 (2010): 423–45, <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1163&context=jil>.

<sup>17</sup> Charles J, Jr. Dunlap, “Lawfare In Modern Conflicts,” *The Reporter, Keystone Edition*, October 3, 2005, 95–101, <https://www.afjag.af.mil/Portals/77/documents/AFD-090116-023.pdf>.

<sup>18</sup> F. Kittrie, *Lawfare: Law as a Weapon of War*, 8.

<sup>19</sup> Aurel Sari, “Legal Resilience in an Era of Gray Zone Conflicts and Hybrid Threats,” *SSRN Electronic Journal*, 2019, <https://doi.org/10.2139/ssrn.3315682>.

	totally. The mere understanding by the opponent that a robust Legal Resilience guards the ‘legal front’ will make Lawfare meaningless or at least a non-primary option in Gray Zone environments.” <sup>20</sup>
<b>Legitimacy Shaping</b>	<i>Legitimacy shaping operations</i> are the manipulation of perceptions concerning a given act or fact, specifically through the lens of domestic or international law, in the eyes of the public or specifically targeted audiences. The primary aspects of legitimacy shaping operations are: to manufacture uncertainty around a target’s legitimate legal claim or position; to wrongly claim, deny, or accuse a target of legal violation or manipulation; to prop up one’s own duplicitous approach to legal domains; to portray oneself favorably, or as adherent to legal principles, despite ongoing MALOPs; to characterize one’s own malign behavior as justified.
<b>Legal Layering</b>	“Leveraging a set of rotating arguments, with several legal justifications in play allows for movement from one legal argument to another should the previous suffer flaws in legal validity. Thus, if one argument fails, others can be swiftly leveraged to create, in the aggregate, an overall plausible legal case.” <sup>21</sup>
<b>Litigator’s Dilemma</b>	Part of the challenge of countering MALOPs, both in and out of the courtroom, is the intrinsic need for lawyers to present a fully developed body of evidence. This is necessary for many reasons – first and foremost to uphold the integrity of the practice of law altogether. The MALOPs practitioner, however, is concerned only with shaping the legitimacy of a particular behavior in-line with the tenants of MALOPs (see chapter 3). While the scrupulous litigator is conducting research and building a reputable case, for example, like Ukraine spending nearly five months building and submitting a request for ITLOS relief under the auspices of UNCLOS following the Kerch Strait incident, the MALOPs practitioner is already moving on to develop the next faux legal argument .
<b>Malign Legal Layering</b>	See <i>legal layering</i> . In the case of <i>malign legal layering</i> , the objective is to create enough uncertainty through sheer volume of faux legal positions and information operations that observers begin to question the situation altogether.

<sup>20</sup> A.B. Munoz Mosquera and N. Chalanouli, “Decoding Gray Zone Environments. Legal Resilience,” *Presented to the University of Exeter – ‘Legal Resilience in an Era of Hybrid Threats,’* n.d.

<sup>21</sup> Halper, “China: The Three Warfares.”

<b>Malign Influence Within Legal Domains</b>	“it can be said that Malign Influence within Legal Domains (MILDs) is the malicious, coercive, subversive, or duplicitous behavior of a state or entity within or against the domestic or international legal domains concerning a target state, individual, organization, or international institution.” <sup>22</sup>
<b>Malign Legal Operations (MALOPs)</b>	<i>Malign Legal Operations</i> (MALOPs) seek to exploit legal domains by employing disinformation to shape legitimacy, justify violations, escape legal obligations, contain adversaries, or to advantageously revise the rule of law.
<b>MALOPs Red Teaming</b>	<i>Legal red teaming</i> is the emulation of a potential adversary’s malign legal operations capabilities against a targeted entity. Legal red teams operate to highlight an adversary’s ability to: (1) identify vulnerabilities of the target’s legal or informational posture; (2) expose legal lacunae or loopholes for exploitation; (3) positively shape the adversary’s legitimacy while degrading that of the target; (4) evaluate the target’s susceptibility to legal containment; and (5) justify the abdication of legal obligations. In doing so, <i>legal red teams</i> seek to: (1) build legal resilience and a posture of legal deterrence; (2) support MALOPs literacy, intelligence, illumination, and accountability; and (3) foster the development of integrated strategic litigation approaches and best practices. See <i>red teaming</i> , Chapter 4.
<b>MALOPs Tenants</b>	Execute information operations, contain adversary, shape legitimacy, probe legal lacunae, exploit legal loopholes, abdicate legal obligations, malign influence within legal domains.
<b>Misinformation</b>	“This is the spreading of unintentionally false information. Examples include Internet trolls who spread unfounded conspiracy theories or web hoaxes through social media, believing them to be true.” <sup>23</sup>
<b>NATO's Legal Operations</b>	“The (ab)use of law by actors to either legitimize their own actions, positively impact their capabilities, or prop-up its strategic interests; or to delegitimize the actions of their opponents, negatively impact their capabilities or undermine its strategic interests.” <sup>24</sup>

<sup>22</sup> Brad Fisher, “Ideological Aggression and International Law: Soviet and Russian Malign Influence Within Legal Domains (MILDs),” *Наукові Записки НАУКМА. Юридичні Науки* 5 (2020), <http://nrplaw.ukma.edu.ua/article/view/208086>.

<sup>23</sup> Theohary, “Defense Primer: Information Operations.”

<sup>24</sup> Rodrigo Vázquez Benítez, “Legal Operations: The Use of Law as an Instrument of Power in the Context of Hybrid Threats and Strategic Competition,” *NATO Legal Gazette*, no. 41 (October 2020): 138–44, [https://act.nato.int/application/files/5316/0195/2156/legal\\_gazette\\_41.pdf](https://act.nato.int/application/files/5316/0195/2156/legal_gazette_41.pdf).

<b>Non-Linear Warfare</b>	See figure 1. The tendency for modern conflict to jump between phases. For example, a conflict in the “restoring peace” phase can shift back to the “crisis” phase at a moment’s notice – perhaps for one side to deliberately cause chaos and confusion. While one side may believe that the “restoring peace” phase has genuinely begun, the other side may be executing a plan to jump between phases of conflict to seize the initiative (again and again). Alternatively, one country may be executing the “sharpening” phase while the adversary country is still ignorant to any conflict at all.
<b>Passportization</b>	“The giving away of Russian passports in order to boost the number of Russian citizens in neighboring states.” <sup>25</sup> When coupled with Russia’s commitment to the protection of Russian citizens abroad, <sup>26,27</sup> this strategy constitutes an effort to create an enduring and on-demand <i>casus belli</i> opportunity.
<b>Propaganda</b>	“This means the propagation of an idea or narrative that is intended to influence, similar to psychological or influence operations. It can be misleading but true, and may include stolen information. A government communicating its intent, policies, and values through speeches, press releases, and other public affairs can be considered propaganda.” <sup>28</sup>
<b>Reflexology</b>	“The science of human personality studied from the strictly objective, bio-social standpoint.” <sup>29</sup>
<b>Unrestricted Warfare</b>	In modern conflict, a state must do whatever is necessary to achieve its political objectives and every adversary has weaknesses to be exploited, regardless of its military strength. “We find ourselves in a stage where a revolutionary leap forward is taking place in weapons, going from weapons systems symbolized by gunpowder to those symbolized by information...the best way to achieve victory is to control, not to kill” <sup>30</sup>

<sup>25</sup> Mark Voyger, *NATO at 70 and the Baltic States: Strengthening the Euro-Atlantic Alliance in an Age of Non-Linear Threats*, Estonia (Tartu: Baltic Defense College, 2019), [http://www.baltdefcol.org/files/files/publications/NATO\\_AT\\_70\\_AND\\_THE\\_BALTIC\\_STATES.pdf](http://www.baltdefcol.org/files/files/publications/NATO_AT_70_AND_THE_BALTIC_STATES.pdf).

<sup>26</sup> The Ministry of Foreign Affairs of the Russian Federation, “Foreign Policy Concept of the Russian Federation” (2016).

<sup>27</sup> Ministry of Defense of the Russian Federation, “The Military Doctrine of the Russian Federation” (2014).

<sup>28</sup> Theohary, “Defense Primer: Information Operations.”

<sup>29</sup> Vladimir M. Bekhterev, *Objective Psychology* (Unknown, 1907).

<sup>30</sup> Qiao Liang and Wang Xiangsui, *Unrestricted Warfare*, 1999, <https://doi.org/B 67812>.

## INTRODUCTION

### General Characteristics of the Research

#### I. Relevance of the Topic

The research objective of this study is to determine whether there exists a crisis of Public International Law (PIL) brought about by the malign manipulation of legal domains. In doing so, this research found that revisionist actors actively employ strategies that abuse and misapply PIL to achieve geopolitical objectives and undermine the international rule of law. To explain this phenomenon, this research proposes a term first introduced in this author's earlier doctoral research. Malign Legal Operations (MALOPs) exploit legal domains by employing disinformation to shape legitimacy, justify violations, escape legal obligations, contain adversaries, or to advantageously revise the rule of law.

While the tenants of MALOPs are as old as the law itself, this term highlights the growing threat to international order and is entirely new. Malign Legal Operations are intended to simultaneously attack the norms (laws) and observance (social reality) that underpin the rule of law, both domestically and internationally. MALOPs often amount to mimetic approaches towards international law, whereby practitioners attempt to build a façade of strict observance to international norms and universality while also undermining and exploiting these same principles for geopolitical gain. Russia's ongoing invasion of Ukraine serves as the primary case study, however, Russia's treaty abuse and exploitation of the notion of aggression, China's legal manipulations in the South China Sea, and manipulations by non-state violent extremist organizations are just a few examples of this research's relevance to the field of PIL.

Many researchers suggest that legal instrumentalism can be a force for good or evil. The primary difference between this research and other contributions, such as the notions of lawfare, legal gamesmanship, or NATO's legal operations is the important assertion that MALOPs can only be malign rather than value-neutral. The proper use of the law is

simply considered the prudent use of legal instruments and does not warrant a unique theory or “bumper sticker” term. Furthermore, MALOPs does not differentiate between right and wrong or good and evil, but rather whether the law is being used as intended, as internationally accepted, and as customarily observed.

The urgency of this study is the need to describe and understand these legal manipulations to identify and counter them. Presently, terms like lawfare and legal gamesmanship dominate contemporary discourse, however, this research will show that they are insufficient and harmful for use as theoretical models to address emerging challenges to the international legal system. Furthermore, terms like hybrid warfare confuse and distract from the real problems facing both Ukraine and the international community: legal asymmetry.

Thus, there is a need to develop a theory such as Malign Legal Operations to support a healthy academic and practical discourse and to hold the practitioners of MALOPs accountable for their actions under the auspices of PIL. The contribution to PIL scholarship is a counter-MALOPs toolkit offered in Chapter 4 of this research, which includes recommendations for strategic litigation and strategic communications, MALOPs literacy, red-teaming, and legal intelligence. This study is critical to contemporary research, addresses a clear gap, and may have an immediate impact on the current state of the art.

## II. Relation of Work with Scientific Programs, Plans, and Topics

This research was conducted according to the plan of work filed with the Department of International and European Law and the administrative processes of the Faculty of Law of the National University of Kyiv – Mohyla Academy (NaUKMA). Additionally:

- On May 26th, 2020, Ukrainian President Zelenskyy signed Presidential Decree 203/2020. It directed the government to “Establish and ensure the functionality of a

Center of Excellence for the Protection of Civilians during Armed Conflict and Counteracting Hybrid Aggression by Legal Means (Center of Excellence for Protection of Civilians during Armed Conflict and Legal Operations) (Deadline 2020).” This research is critical to the Ukrainian president’s effort, particularly in counteracting hybrid aggression by legal means and legal operations;

- In 2020, NaUKMA established a certificate program titled Lawfare and the misuse of international law. The program covers the abuse of international law, the politics of international law, collective memory and its role in the law, and numerous other topics. This research is important to emerging academic programs and understanding the role of the law in modern interstate conflict;
- In 2020, Ukraine’s Ministry of Justice (MOJ) launched a website located at [www.lawfare.gov.ua](http://www.lawfare.gov.ua) dedicated to “legal confrontation with the Russian Federation.” According to the MOJ, “The legal front is inconspicuous, but extremely important. Its key feature is that there is no noticeable disproportion in weight with the enemy. It is not subject to force-sharing agreements. Where there are no weapons, there is international law, sanctions and a tribunal...We are moving from the sometimes-chaotic ad hoc tactics to a well-thought-out, comprehensive and coordinated legal defense of our rights and interests.”<sup>31</sup> This research is vital to assist the MOJ in its attempt to organize a legal defense against Russia’s ongoing aggression;
- On 1 October 2021, the USAID Justice for All Activity began, designed to support the Judiciary, Government, Parliament, the Bar, Law Schools, Civil Society, Media, and Citizens to create the conditions for independent, accountable, transparent, and effective justice system that upholds the rule of law and to fight corruption. This research may be beneficial to the USAID Justice for All Activity as a framework to address the manipulation of legal domains against Ukraine and around the world.<sup>32</sup>
- In 2022, the Russian Federation expanded its aggression against Ukraine by executing a full military invasion of the country. Well over 150,000 have been killed in the nearly two years of fighting prior to the time of this research. Russia has employed several Malign Legal Operations campaigns against Ukraine and the international community to justify its unchecked aggression against the sovereign territory and people of Ukraine.

---

<sup>31</sup> Ukrainian Ministry of Justice, “Lawfare: Legal Confrontation with the Russian Federation,” accessed January 15, 2022, <https://www.lawfare.gov.ua/>.

<sup>32</sup> Ukrainian Ministry of Justice.

### III. The Purpose and Objectives of the Study

The purpose of this study is to offer a theoretical framework in the domain of PIL and to study the process by which PIL is manipulated to achieve political objectives. The objects of this study are the disparate approaches of both state and non-state actors (in this case primarily Russia against Ukraine) towards legal domains, particularly PIL and its role as the foundation of the international rules of law. The subject of this research is the theory and practice of PIL, specifically in ways not originally intended by its employed or created with disingenuous motives, to achieve political objectives against an adversary.

### IV. Research Methods, Structure, and Scope

The methodological basis of this dissertation is the system of research methods common to philosophy and legal analysis. This trans-disciplinary legal research is conducted primarily as an inductive and qualitative analysis of applicable public international treaties, conventions, historical cases, and agreements to establish a conceptual framework for understanding manipulations of legal domains. Open-source media and government reports are used to highlight contemporary and emerging examples of this research. Furthermore, historical and comparative analyses of PIL, its interpretations, and its abuses are offered as a framework to shape this discussion.<sup>33</sup>

In keeping with the purpose, objectives, and novelty of this study, this work consists of: a glossary; an abstract with key words in English and Ukrainian; a publications and approbations section; an introduction; five chapters that each contain an introduction, 3-6 subsections, and a conclusion; a list of sources used (145 titles); and a table of figures. The total volume of the main text of this dissertation (abstract, introduction, and chapters 1-5) is 9 author sheets or 359,500 characters with spaces. Furthermore, there are 3 appendices that include a MALOPs legal analysis of President Putin's 2014 speech and an analysis of Professor Mark Voyger's lawfare matrix.

---

<sup>33</sup> Khushal Vibhute and Filipos Aynalem, *Legal Research Methods* (Wordpress, 2009).

## V. Scientific Novelty and Expected Results of the Research

The primary contribution of this research to the state of the art is to define the notion of Malign Legal Operations, a concept created by this author which is now part of contemporary discourse in Ukraine, the United States, and the international community. This research also contributes a practical toolkit to identify and counter MALOPs. This trans-disciplinary approach to legal analysis is intended to be as useful to non-legal professionals, such as politicians, diplomats, and military commanders, as it is to legal scholars, practitioners, and operational national security lawyers.

The expected results are to bridge the gap between these disparate groups by offering a new and more doctrinally appropriate paradigm to synthesize concepts such as lawfare, hybrid warfare, and the exploitation of international law. It will help decision makers, experts, scholars, and policy makers understand, prevent, and better respond to MALOPS and breaches of PIL using this toolkit and definitions. This study advances four primary arguments:

- Law, particularly PIL, is not only an instrument of interstate competition but an operating domain to be fought over.
- Lawfare and hybrid warfare are inherently vague “bumper sticker” terms that lack normative significance and create strategic uncertainty. This gap in understanding detracts from efforts to create a resilient and defensible international legal system.
- Malign Legal Operations offers a doctrinally appropriate term to describe the exploitation of legal domains to achieve asymmetric advantages over an adversary. Organizing discourse around this phenomenon enables coherent strategy development to counter MALOPs.
- MALOPs are successfully employed by Russia against Ukraine, and there are numerous lessons learned, case studies, and opportunities for a more effective MALOPs defense in the form of a “Counter-MALOPs Toolkit.”

## VI. The Practical Significance of the Results

The practical significance of this research is that it can be utilized in the fields of legal academic and theoretical research, legislation and law-making activity, the practice of national security and operational law, education, political and international relations theory and research, military planning and strategy, diplomacy, and in the formulation of national security policy:

- In legal academic and theoretical research: For the development of new means, methods, and procedures for the conduct of research and analysis as it pertains to the law. While this research is focused on PIL, the theory of Malign Legal Operations can be applied to all legal domains, whether international, domestic, public, or private. Furthermore, researchers can build upon this framework to identify and attribute new cases of MALOPs for further analysis.
- In legislation and law-making activity: This research is critical for consideration by legislators and law-makers as it informs them of the potential malign motivations and methodologies of international actors, or domestic actors when representing foreign or personal interests.
- In the practice of national security and operational law: Perhaps more than in any other area, this research is critical to national security law practitioners and specialists.
- In education: Students of politics, international relations, and of course law will benefit from the understanding of this research, the tenants of MALOPs, the exploited principles herein, and the case studies that challenge traditional understandings of PIL.
- In military planning and strategy: The law, particularly PIL, is inextricably tied to military planning and strategy. Any formal military plan that does not account for the use, misuse, exploitation, and protection of legal domains is bound to fail. No amount of military force can overcome the clever, albeit malign, use of quasi-legal arguments to control and out-maneuver an adversary.
- In diplomacy: Understanding the motivations and underlying objectives of a State-party to a treaty or international agreement is critical to properly account for legal loopholes and unintended consequences. The Counter-MALOPs Toolkit offers a framework to analyze a potential agreement or diplomatic endeavor from the perspective of second- or third-parties.

- In the domain of PIL: This research provides case studies and evidence of legal manipulation of the PIL domain as a matter of state doctrine and not simply acts of convenience or matters of realpolitik. It also provides a toolkit with recommendations to detect and counter such manipulations.

Additionally, this research was published within “The Minsk Trap: Moscow’s Perversion of the Conflict Arbitration Process in Ukraine,” *Legal Journal of the National University of Kyiv – Mohyla Academy* (2019). It was also presented to the NATO Supreme Headquarters Allied Powers Europe’s Office of Legal Affairs. Following this engagement, NATO offered this author a non-resident research fellowship (2019-2021).

This research was also presented to the Legal Directorate of the Ministry of Defense of Ukraine (2020), faculty from the Baltic Defense College (2020), senior leaders from the Ukrainian Air Force (2020) and department of international cooperation (2019), numerous Ukrainian Non-Governmental Organizations (2018-present), the U.S. Institute for Security Governance (2019), the U.S. Marshall Center (2019), the Mediation and Dialogue Research Center of NaUKMA (2019), a panel discussion on lawfare and hybrid warfare during an international conference on international criminal law (2019), the Konrad Adenauer Foundation (2019), the second annual Kharkiv Security Forum (2019), the Sixth Annual International Scientific Conference on Russian Aggression towards Ukraine (2020), a guest-lecture at United States Naval Academy’s Russian Studies program (2020), the Department of Defense (2021), and a guest lecture at the German University of Saarland’s War In Ukraine: History, Politics, and Law course (2022). Finally, this research was cited by Lieutenant Colonel Sandra O’Hern in the United States Air Force Judge Advocate General Journal, *Fight Against Hybrid Threats* (25 September 2023).

## VII. Main Content and Literature of the Research

Chapter 1 explores contemporary interstate conflict, or so-called hybrid warfare, and States' employment of legal asymmetries in pursuit of geopolitical objectives. It highlights key literature surrounding treaty abuse, world order and the international legal system, gaps and unexplored spaces within PIL. Dr. Aurel Sari led an international conference in 2019 dedicated to legal resilience in the face of hybrid threats. His work focuses on international conflict and security law and the legal aspects of military operations and his contributions are critical to this research. Also critical is the work of Chinese Colonels Qiao Liang and Wang Xiangsui and their 1999 book titled *Unrestricted Warfare*. This book was a largely unnoticed warning to the world at the turn of the 21st century. It highlighted the true nature of modern warfare and the ways in which technology and globalism redefined conflict by introducing new avenues to achieve asymmetry against a larger military force, such as through the law. Lauri Mälksoo and Michael Riepl are additional key contributors to chapter 1 through their research on Russian approaches to international law and international humanitarian law (hereinafter IHL). More broadly, they explored the ways in which, as Dr. David Kennedy of Harvard Law stated, "international law is different in different places."<sup>34,35</sup>

Chapter 2 offers a discourse analysis of lawfare as it pertains to legal domains. It explores whether lawfare sufficiently captures the realities of modern legal manipulations. Varying interpretations of lawfare are explored to determine if any normative significance exists across the spectrum of definitions. This includes concepts from the United States, China, Israel, and violent extremist organizations. Ultimately, chapter 2 establishes that lawfare is an obstructive and doctrinally inappropriate term. The comprehensive discourse analysis and literature review offered in chapter 2 is influenced largely by Major General Charles Dunlap and his definition of lawfare. Despite asserting that the Academy and

---

<sup>34</sup> David Kennedy, "The Disciplines of International Law and Policy," *Leiden Journal of International Law* 12 (2008): 17.

<sup>35</sup> Michael Riepl, "Russian Contributions to International Humanitarian Law: A Contrastive Analysis of Russia's Historical Role and Its Current Practice," 2022, <https://doi.org/10.5771/9783748913214>.

operational practitioners should abandon the term lawfare in favor of Malign Legal Operations, none of this research would be possible without General Dunlap's contributions. Dr. Christi Bartman's research on Soviet lawfare is critical to this research as she offers an alternative definition of the term. Finally, Professor Odre Kittrie's book, *Lawfare: Law as a Weapon of War*, is instrumental to offering an academically robust perspective to the lawfare debate. Chapter 2 considers the term lawfare and its many definitions over the past two decades, ultimately establishing that there is no accepted definition. Chapter 2 addresses these gaps in contemporary research and discourse by asserting that law is both an instrument of interstate competition and a domain within which states compete. It is both fought-with and fought-over. With respect to legal asymmetries, the North Atlantic Treaty Organization's (NATO) Office of Legal Affairs, led by Mr. Andrés B. Muñoz Mosquera, offers critical insight into their notion of legal operations. Mr. Mark Voyger is another significant contributor through his lawfare framework that pairs areas of PIL with lawfare practices across the spectrum of hybrid warfare.

Chapter 3 formally introduces Malign Legal Operations as a novel concept to articulate the modern reality of interstate conflict within legal domains and the Russia Federation's duplicitous approach towards PIL. The tenants of MALOPs are introduced to describe both historic and contemporary examples of MALOPs. This includes the Crimean case, the Kerch Strait, the invasion of Eastern Ukraine, the South China Sea, and numerous other examples.

Chapter 4 introduces methods to identify and defend against modern MALOPs such as legal resilience, intelligence, red teaming, and integrated strategic litigation. This is done while identifying key lessons-learned for Ukraine and opportunities to increase its defense against MALOPs through a Counter-MALOPs Toolkit. The principal sources for Chapters 3 and 4 are this author's previous published work, the media and news outlets, and publicly available government reports. Finally, Chapter 5 addresses Russia's full-

scale military invasion in 2022 to highlight the legal rhetoric and Russian MALOPs used to manufacture a faux casus belli for invasion.

## **CHAPTER 1**

### **Hybrid Warfare and the crisis of Public International Law**

“[T]here is no universally agreed definition of hybrid war and there is no law of hybrid war. However, it is commonly agreed that the main feature of this phenomenon is legal asymmetry, as hybrid adversaries, as a rule, deny their responsibility for hybrid operations and try to escape the legal consequences of their actions. They exploit lacunas in the law and legal complexity, operate across legal boundaries and in under-regulated spaces, exploit legal thresholds, are prepared to commit substantial violations of the law and generate confusion and ambiguity to mask their actions.” – COE Draft Resolution 14523, 2018

#### 1.1. Introduction

The clearest example of a state utilizing the doctrine of international legal manipulation is the Russian Federation against Ukraine from 2014-present. The Russo-Ukrainian case will be revisited throughout this research to highlight Russia’s use of legal manipulation both in-lieu of aggression and to justify aggression. The Russo-Ukrainian war began in 2014 when Ukrainians refused to accept their president’s decision to forego a cooperation agreement with the European Union in favor of deeper integration with Russia. Ukraine was quickly thrust onto the world-stage with all eyes on Kyiv as over 100 lay dead in the streets amidst widespread civil unrest and government brutality. These events irrevocably changed the national landscape of Ukraine. Now, nine years later, Ukraine is locked in a bitter struggle for survival following an outright act of aggression and nearly two years of total warfare since Russia’s full invasion in 2022. When this conflict reaches a conclusion, Ukraine will either remain firmly within Russia’s sphere of influence or reposition itself within the Western order. The consequences of this geopolitical struggle were not contained to Eastern Europe, but rather had far-reaching implications for the entire Rules-Based International Order. The very landscape of international law and its mechanisms were challenged in what continues today as an existential struggle between *de facto* and *de jure*, *ex factis jus oritur* and *ex injuria jus non oritur*, and *lex ferenda* and *lex lata*. These competing principles serve as counterweights

to balance the international legal system; however, they are today misappropriated by states to not only pursue their interests, but to secure them. As a result, the proverbial dust in Ukraine has yet to settle with hundreds of thousands of casualties, tens of millions displaced, and several crippled economies. A higher-order struggle exists to define and shape the legitimacy of the conflict within the international legal system. Ukraine calls for Russian accountability under the established mechanisms of international law (*de jure*), states that Russia's legal claims cannot be based upon illegal acts (*ex injuria jus non oritur*), and that Russia must be held to account under the law as it exists (*lex lata*). Russia, however, claims that the reality of the situation creates a new precedent (*de facto*), that legal legitimacy arises from these facts (*ex factis jus oritur*), and that this reality is a shifting paradigm towards the future of international law (*lex ferenda*). It claims that a fundamental change of circumstances led to, and justified, its seizure of over 7% of Ukraine's territory from 2014-2022 and up to 27% at the height of its invasion in 2022 (*clausula rebus sic stantibus*).<sup>36</sup> Ultimately, the United Nations Human Rights Council determined days after the total invasion that Russia's use of armed force against Ukraine was an illegal act of aggression in accordance with UNGA resolution 3314 (XXIX), however Russia's crime of aggression persists well over a year later.<sup>37</sup>

The Ukrainian case must be reviewed more closely to better frame and understand the purpose of this research. In late 2013, Ukrainian president Victor Yanukovich declined to sign a long-promised free trade agreement with the European Union (EU) in favor of a more lucrative offer from Russian President Vladimir Putin.<sup>38</sup> After years seeking closer ties to the west, Ukraine faced increased dependence on the Russian economy and its sphere of influence. Ukrainians soon began demonstrating in what became known as the Euromaidan or Revolution of Dignity in 2014. Ultimately,

---

<sup>36</sup> Council on Foreign Relations, "Conflict in Ukraine," Global Conflict Tracker, accessed June 7, 2021, <https://microsites-live-backend.cfr.org/global-conflict-tracker/conflict/conflict-ukraine>.

<sup>37</sup> OHCHR, "A/HRC/52/CRP.4: Conference Room Paper of the Independent International Commission of Inquiry on Ukraine," 2022, <https://www.ohchr.org/en/documents/reports/ahrc52crp4-conference-room-paper-independent-international-commission-inquiry>.

<sup>38</sup> Center for Strategic and International Studies, "The Ukraine Crisis Timeline," 2013, <http://ukraine.csis.org/kyiv.htm#1>.

Yanukovych was impeached and fled the country with Putin's help on February 22nd. Two days prior, on February 20th, masked troops known as Putin's polite little green men<sup>39</sup> began flooding across Ukraine's porous eastern border to seize key infrastructure and strategic locations in Crimea.<sup>40</sup>

Russian soldiers wore no insignia, mercenaries from Russian Private Military Companies (PMC) conducted missions on Ukrainian territory, Cyber-attacks crippled Ukrainian infrastructure, and extremely sophisticated disinformation campaigns created widespread uncertainty and doubt. These tactics are not new, but in 21st century vernacular is most often described with the term hybrid warfare. Hybrid warfare is commonly described as the subversive blurring of diplomatic, information, military, economic, and other means to achieve geopolitical fait accompli<sup>41</sup> with minimal attribution or retribution. So-called hybrid warfare thrives on disruptive, decentralized, multi-domain operations with both kinetic and non-kinetic effects shaping the battlefield to maintain a destabilizing fog-of-war. When employed effectively, both the target-state and the international community are at odds over the antagonist's identity and motives, rendering the possibility of a measured response prohibitive.<sup>42</sup> On 18 March 2014, the Russian Federation absorbed Ukraine's Crimean Peninsula following a Russian-sponsored referendum on Crimean independence. This occurred despite a United Nations Security Council (UNSC) vote and widespread calls from the international community to refrain from meddling in Ukraine's ongoing civil unrest or violating its sovereignty. The United Nations General Assembly (UNGA) ultimately invalidated the referendum and established that, *ex injuria jus non oritur*, Crimea is Ukraine.

---

<sup>39</sup> The Russian soldiers in Crimea wore green uniforms with no insignia, claiming to be local militia forces, in an attempt to confuse the status of forces and the nature of the international armed conflict. They became colloquially known as "Putin's polite little green men."

<sup>40</sup> Michael Kofman and Matthew Rojansky, "A Closer Look at Russia's 'Hybrid War,'" *Kennan Cable* 7, no. 7 (2015).

<sup>41</sup> *Fait Accompli*: mid 19th century: from French, literally 'accomplished fact.' a thing that has already happened or been decided before those affected hear about it, leaving them with no option but to accept. - Oxford Pocket English Dictionary

<sup>42</sup> Douglas Cantwell, "Hybrid Warfare: Aggression and Coercion in the Gray Zone." *American*, *Society of International Law*, 2017, <https://www.asil.org/insights/volume/21/issue/14/hybrid-warfare-aggression-and-coercion-gray-zone>.

Russian President Putin and his government employed a series of justifications for its de facto annexation of Ukrainian territory. This included claims of humanitarian intervention, historic right, the protection of Russian citizens, the principle of self-determination, collective self-defense, and the responsibility to protect. While loosely based on legal precedent and adorned with the language of international law, these explanations failed to convince the international community. The Crimean Peninsula is still not internationally recognized as Russian despite now being a de facto Black Sea fortress of Russian air defenses, long range strike capabilities, advanced aircraft, and a now-weakened Black Sea naval fleet.

The Kremlin's unconventional position on these matters directly challenges the international status quo and the PIL at its foundation. Meanwhile, Russia openly demands respect for the rule of law, both international and domestic, and upholds the universality of the international legal system. Russia is not the only state purporting to uphold international law while simultaneously arguing against its accepted interpretations and mechanisms. China advances dubious legal claims in the South China Sea through its "9-dash line" and refuses to recognize the jurisdiction of international legal bodies. China does this while simultaneously demanding that states respect one another and their sovereignty. Even non-state entities exploit the law in pursuit of their interests. The Islamic State, for example, routinely used human shields in Syria to remain safe from airstrikes. They instrumentalized the Law of Armed Conflict (LOAC) against coalition forces as a form of asymmetry to disincentivize attack. Often, these targets were still considered lawful and proportional despite the presence of civilians. However, if the coalition attacked, the event would be released by the Islamic State on film to portray the coalition as murderous and vile. Thus, the legitimacy of the coalition is negatively shaped. This scenario is a veritable lose-lose situation despite closely adhering to the LOAC. Hamas employs similar tactics against Israel as it frequently leverages international law to create asymmetric advantages.

Some experts assert that the instrumentalization of the law is normal and highlight that the law itself is nothing more than an instrument, whether used for good or bad. Others stand firm that the law's agnostic existence as an instrument is a given. What matters, they say, is not whether the law is simply used to further one's interests (as intended), but whether it is deliberately exploited to create an asymmetric advantage for revanchists like China and Russia. The debate between use (good or bad), misuse (inherently bad), and the implications that both have on legal domains continues today. Under the umbrella of this dispute are concepts like lawfare, hybrid warfare, world order, and strategic competition. In particular, the term lawfare has been actively used for two decades to describe everything from using the law in-lieu of military force, to treaty abuse, to overzealous courtroom behavior, to undermining the rule of law in a target state.

Furthermore, the term hybrid warfare is frequently and incorrectly used synonymously with the terms gray-zone conflict and non-linear warfare. So-called hybrid warfare is an amalgamation of tactics and techniques as old as human conflict itself. While the instruments of hybrid war are identical to those of more conventional struggles, the difference purportedly lies in how they are used to circumvent international law, discredit international institutions, and to remain below the threshold of declared war to avoid retribution.<sup>43</sup> In 2007, retired Lieutenant Colonel Frank Hoffman wrote a thought-piece that significantly changed modern discourse surrounding conflict studies and explored the idea that modern conflict is made up of many modes of war.<sup>44</sup>

---

<sup>43</sup> Bradley Martin, "Book Review; Hybrid Warfare: Fighting Complex Opponents from the Ancient World to the Present.," *Journal of Military and Strategic Studies* 5., 2013, 5.

<sup>44</sup> "The blurring of modes of war, the blurring of who fights, and what technologies are brought to bear, produces a wide range of variety and complexity that we call Hybrid Warfare. Hybrid Wars can be conducted by both states and a variety of non-state actors. Hybrid Wars incorporate a range of different modes of warfare, including conventional capabilities, irregular tactics and formations, terrorist acts including indiscriminate violence and coercion, and criminal disorder. These multi-modal activities can be conducted by separate units, or even by the same unit, but are generally operationally and tactically directed and coordinated within the main battlespace to achieve synergistic effects." - Hoffman, "The Rise of Hybrid Wars."

What makes so-called hybrid conflict particularly dangerous is the unique and unrestricted access to populations, information, and technology brought on by the proliferation of accessible internet connectivity and the global economic interdependencies of the 21st century. Many experts have difficulty reconciling the concept of hybrid warfare with traditionally accepted views of international conflict and geopolitical struggle. These individuals declare that all war is all methods, and therefore there is no hybrid warfare, but rather just warfare. “Hybridity,” a historian may argue, is nothing new and existed since humans first took up arms against one another. An international relations theorist, however, might state that this thinking is dangerous because over-simplifying something so incredibly complex as war robs humanity of the opportunity to organize ideas and identify emerging threats. They feel and observe something new emerging in the realm of conflict and struggle to codify it. Simply calling it warfare indicates that nothing has changed, and this makes the casual observer uncomfortable with modern conflict because, to them, everything seems different.<sup>45,46</sup> A historian may retort that using the term hybrid as a descriptor for warfare dilutes the spectrum of conflict by essentially stating that this doctrine involves the mixture of many or all modes of war without specifying any modes in particular. One fact is certain, PIL is missing from Hoffman’s above analysis. In fact, it makes no mention of the law at all.

Hoffman’s is not the only analysis to exclude law from its conceptualization of modern conflict. Most contemporary discourse surrounding these concepts includes little to no mention of the law. In identifying this as a significant gap, this chapter explores the relationship between PIL and the evolving character of war.

This chapter asserts that terms like hybrid warfare create more confusion than clarity. There is nothing particularly novel about modern conflict aside from the disincentivization of organized violence resulting in a greater reliance on non-military

---

<sup>45</sup> Cantwell, “Hybrid Warfare: Aggression and Coercion in the Gray Zone.” *American*.”

<sup>46</sup> Dr. Damien Van Puyvelde, “Hybrid War – Does It Even Exist?,” *NATO Review Magazine*, 2015, <https://www.nato.int/docu/Review/2015/Also-in-2015/hybrid-modern-future-warfare-russia-ukraine/EN/index.htm>.

asymmetric struggle. This includes malign manipulations of the law and the exploitation of compliance-disparities in the observance of PIL. These truths are codified in the Chinese doctrine of unrestricted warfare. This research also concludes that PIL is a social construct that governs the international status quo. States like China and Russia not only employ the law as subversive instruments to achieve asymmetry, but they seek to revise the law to codify their asymmetric advantages and secure their interests. As such, legal mechanisms can be both operating domains to be fought over like territory and subversive instruments to use as weapons.

## 1.2. Origins of Hybrid Warfare and Relevance to Public International Law

What makes the extremes of modern interstate conflict possible is the civilized, organized, and economically interdependent world's 21st century efforts to deter, disincentivize, and prevent the use of force. The United Nations and its Charter, the UNCLOS, the Geneva convention, the International Court of Justice, and the European Court of Human Rights are just a few examples of post-world war attempts to organize and develop legal frameworks for international relations. This attempt to establish an international status quo is not new. In fact, every major reordering event, such as the 30-Years War, the Napoleonic Wars, World War I, World War II, and the Cold War, resulted in an international reordering and a subsequent novel status quo.<sup>47</sup> It is thanks to these ever-improving iterations that the 21st century, so far, is arguably the safest time to be alive in human history. Professor Steven Pinker argues that the 21st century is the most peaceful time since the dawn of man. He analyzes numerous datasets to prove this point while acknowledging humanity's psychological predisposition to viewing their time as the most violent. "The claim that we are living in an unusually peaceful time may strike you as somewhere between hallucinatory and obscene...I know from conversations and

---

<sup>47</sup> Henry Kissinger, *World Order* (New York: Penguin Books, 2015).

survey data that most people refuse to believe it.”<sup>48</sup> To those affected, such as the tens of thousands of dead Ukrainians and millions of displaced citizens, this assertion likely seems tone-deaf. The primary challenge is that independent nations have no obligation to recognize the domestic laws of another state. Similarly, they have no obligation to recognize the laws of international bodies created without their consent or concurrence. Even when they do consent to international laws, States may withdraw their consent at will with often little more than reputational costs. Outside the United Nations Security Council, there exists no dedicated body charged with the defense and implementation of international law. Instead, the only possible enforcement is compulsion, whether it be diplomatically through political rhetoric and negotiation, militarily through armed force, or economically through sanctions and coercion. In fact, the greatest tools for the enforcement of international law are often good faith, mutually assured success, cooperation, economic interdependence, and positive relationships.<sup>49</sup>

Given this reality, a paradigm shift in international conflict management emerged as the world stumbled into the 21st century. The United States stood as the world’s sole superpower with the world’s strongest and most advanced military. As states vied for geopolitical influence and economic prosperity, they quickly realized that the strong-man tactics of old were growing less and less palatable to the international community. Diplomacy was the weapon of the day, and negotiation was the easiest way to avoid confrontation with the international community. As a result, some nations increased efforts to exert influence in other coercive ways that circumvented the accepted international order and undermined international law. A more decentralized approach to conflict emerged that sought to achieve victory via small, seemingly disparate actions that are difficult to attribute and reside in the periphery of international legal norms.<sup>50</sup> In this

---

<sup>48</sup> Steve Pinker, *The Better Angels of Our Nature: Why Violence Has Declined* (Viking Books, 2011).

<sup>49</sup> Malcolm Shaw, *International Law, Journal of Experimental Psychology: General*, 6th ed., vol. 136 (New York: Cambridge University Press, 2008).

<sup>50</sup> Cantwell, “Hybrid Warfare: Aggression and Coercion in the Gray Zone.” *American.*”

way, revisionist states can remain part of the international order while simultaneously achieving political objectives and working to re-shape the order in its image.

In February 2013, General Valery Gerasimov, Chief of the General Staff of the Russian Federation, published a now-famous article in *The Military-Industrial Courier* titled *The Value of Science in Prediction*. He asserted that a new method of warfare exists that fundamentally changed the way the militaries are built, fielded, and utilized.<sup>51</sup> Thanks to a 2014 blog post by Professor Mark Galeotti, an international relations and Russia expert, Gerasimov's article became synonymous with hybrid warfare and what emerged was titled the *Gerasimov Doctrine*.<sup>52</sup> Gerasimov's article dominated contemporary discourse, particularly following Russia's illegal seizure of Crimea, invasion of Eastern Ukraine, and other global malign activities. Everything from Russian energy and economic coercion to information warfare, cyber-attacks, and election interference were attributed to Gerasimov's so-called hybrid war doctrine. "If you torture hybrid warfare long enough it will tell you anything, and torture it we have. The term now covers every type of discernible Russian activity, from propaganda to conventional warfare, and most that exists in between."<sup>53</sup> In reality, however, Gerasimov was simply publishing his observations of non-linear warfare and what he described as Western approaches to modern conflict. He was describing the Arab Spring and color revolutions of the preceding years and critiquing America's military adventures in Libya and Iraq.

Part of Gerasimov's contribution was a graphic that displayed what he observed to be this new way of war, and he was particularly interested in non-military methods of

---

<sup>51</sup> "In the 21st century we have seen a tendency toward blurring the lines between the states of war and peace. **Wars are no longer declared and, having begun, proceed according to an unfamiliar template**...a perfectly thriving state can, in a matter of months and even days, be transformed into an arena of fierce armed conflict, become a victim of foreign intervention, and sink into a web of chaos, humanitarian catastrophe, and civil war." - Gerasimov, "НАУКИ В ПРЕДВИДЕНИИ."

<sup>52</sup> Mark Galeotti, "The 'Gerasimov Doctrine' and Russian Non-Linear War | In Moscow's Shadows," accessed December 1, 2018, <https://inmoscowsshadows.wordpress.com/2014/07/06/the-gerasimov-doctrine-and-russian-non-linear-war/>.

<sup>53</sup> Michael Kofman, "Russian Hybrid Warfare and Other Dark Arts," *War On The Rocks*, March 11, 2016, <https://warontherocks.com/2016/03/russian-hybrid-warfare-and-other-dark-arts/>.

interstate conflict.<sup>54</sup> Gerasimov's premise was that the correlation of non-military measures to military measures was 4:1. Of all the non-military measures described by Gerasimov, the most interesting is "conducting information operations." This tool of so-called hybrid warfare is critical to note for two reasons: (1) it is the only tool that spans all phases of conflict; and (2) it is the only tool that bridges the gap between non-military and military measures. These information operations are foundational to this research because, ultimately, Malign Legal Operations amount to information operations within legal domains. The objective, in this sense, is to present information that is inaccurate, slightly inaccurate, or completely fabricated to create an environment where no information can be trusted. This chaotic information sphere is then used to create faux legal arguments, legal ambiguity, and sufficient uncertainty to justify otherwise illegal actions.

---

<sup>54</sup> See Figure 1

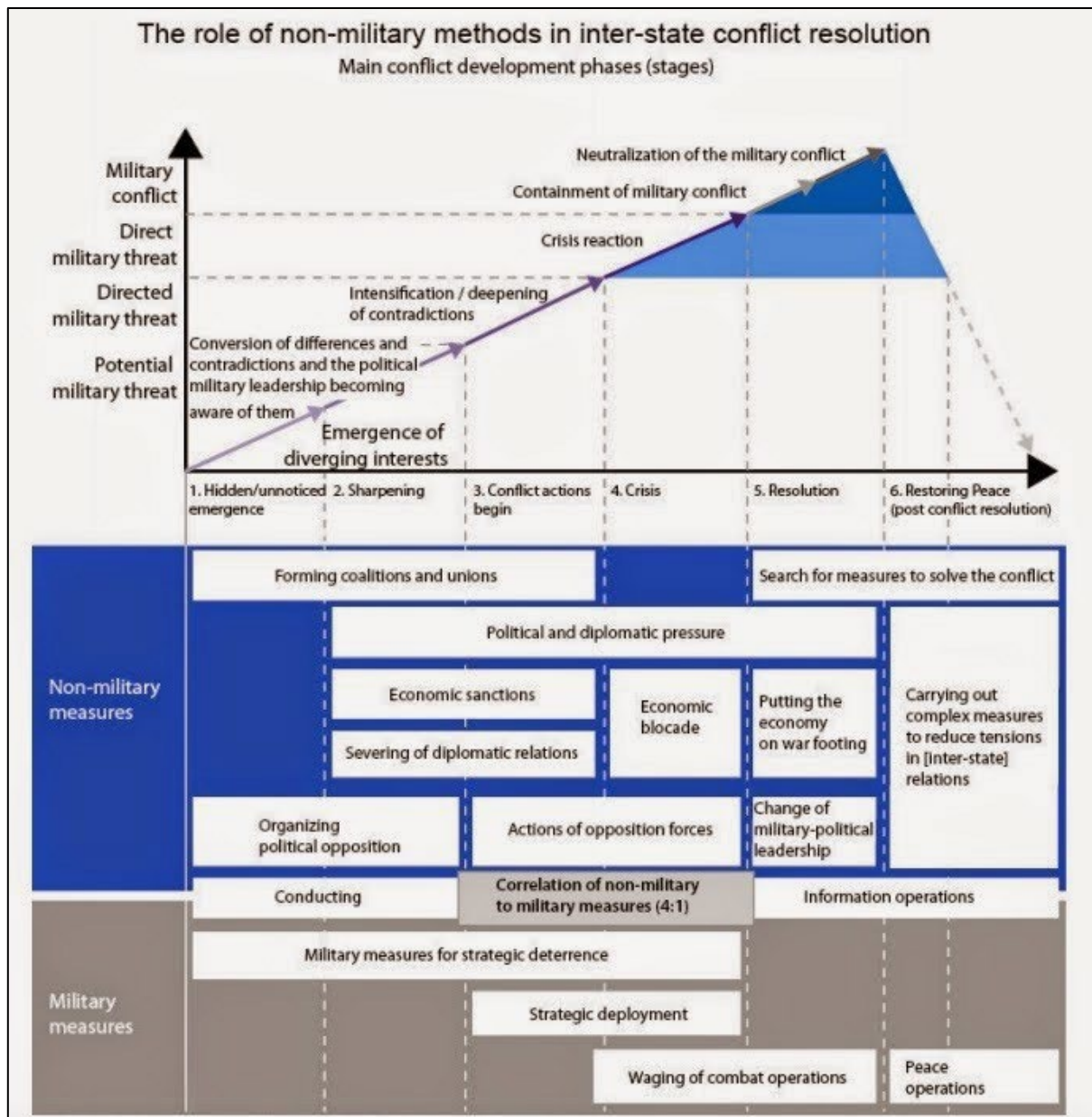


Figure 1: Gerasimov's Role of Non-Military Methods in Inter-State Conflict Resolution

The Western Academy and policy makers were quick to attribute Gerasimov's writings to a new form of Russian warfare, but he was not the only novel military thinker in Russia. General-Lieutenant Andrey Kartapolov asserted that modern warfare is comprised of hybrid methods that are 80-90% propaganda and 10-20% violence.<sup>55</sup> In 2013, Colonel S.G. Chekinov and Lieutenant-General S.A. Bogdanov coined the concept

<sup>55</sup> Ronald Spring, "Russian Operational Art, New Type Warfare, and Reflexive Control | Small Wars Journal," Small Wars Journal, 2018, <https://smallwarsjournal.com/jrnl/art/russian-operational-art-new-type-warfare-and-reflexive-control>.

of New-Generation Warfare: “A war in which a leading role is taken by the information-psychological struggle, directed to achieve superiority in the sphere of command and control, as well as to suppress the morale of the military personnel and the population of the adversary.”<sup>56</sup> New Type and New Generation warfare absolutely represent contemporary Russian strategic thought that many would consider to be doctrine. Gerasimov’s article, however, was not. Later, in 2016, Gerasimov noted there has been a 21st century shift in methods of confrontation to an “integrated application of political, economic, informational and other non-military measures, implemented with the support of military force...Their purpose is to achieve political goals with a minimal military influence on the enemy.” He ended by noting that a state-victim of these so-called hybrid methods typically “descends into a state of complete chaos, political crisis and economic collapse.”

Ultimately, Professor Galeotti released an apologia in 2018 titled “I’m sorry for creating the Gerasimov doctrine.” In it, he noted that there is not, and never was, any such doctrine. “Everywhere, you’ll find scholars, pundits, and policymakers talking about the threat the Gerasimov doctrine...There’s one small problem. It doesn’t exist. And the longer we pretend it does, the longer we misunderstand the - real, but different - challenge Russia poses.”<sup>57</sup> The true meaning of this challenge does not lie in so-called hybrid warfare, but rather in the doctrine of another critical Russian statesman originating in 1996. Former Foreign and Prime Minister Yevgeny Primakov asserted that a unipolar world dominated by the United States was incompatible with Russia’s vision for both its place in the RBIO and for international governance. Furthermore, NATO expansion was seen as an existential threat to Russia, particularly in the post-Soviet space. To counter

---

<sup>56</sup> Fridman, *Russian “Hybrid Warfare” Resurgence and Politicisation*.

<sup>57</sup> Mark Galeotti, “I’m Sorry for Creating the ‘Gerasimov Doctrine,’” *Foreign Policy*, March 2018, <https://foreignpolicy.com/2018/03/05/im-sorry-for-creating-the-gerasimov-doctrine/>.

this, according to Primakov, Russia must view an independent foreign policy and multipolarity as essential to an ordered world.

To achieve this, Russia would constrain the West through a combination of asymmetric means guaranteed by calculated risks, hard power, and the ultimate insurance of nuclear weapons. This desire, or necessity, to disrupt the existing international system is exactly why hybrid warfare is insufficient for any discussion of contemporary conflict. Hybrid warfare attempts to discuss, at the operational level, what is a conversation occurring on the strategic and even ideological level. It is the so-called Primakov Doctrine that best explains the Russian Federation's, and to a large extent China's, approaches to international law. It is the need to weaponize and manipulate the existing international system to create more favorable conditions that drive the findings in this research and the current crisis of international law.<sup>58</sup>

In 1989, retired U.S. Army Colonel Arthur F Lykke Jr. offered a short moniker to understand the principal tenets of strategy. Strategy, he argued, equals ends plus ways plus means. Ends are the ultimate goals of a strategy, ways are the actions necessary to achieve the ends, and means are the resources or tools required to carry out the means and achieve the ends. This research was seminal to international conflict studies and revolutionized military strategic thinking. When applied to hybrid warfare, however, one quickly realizes that hybrid theory is overly focused on ways and means. In fact, this theory suggests that modern conflict is an amalgamation of all ways to achieve desired ends. As Russian General Makhmut Gareyev noted; "If an employment of any non-military means is a war, then the whole of human history is war." It is no wonder that the academy has such difficulty agreeing on terms of reference for this vague theory. This myopic focus is not only unhelpful, but damaging, because it dilutes strategic discourse and creates uncertainty that benefits the adversary. Clausewitz affirmed this almost 200

---

<sup>58</sup> Eugene Rumer, "The Primakov (Not Gerasimov) Doctrine in Action," *The Carnegie Endowment for International Peace*, 2019.

years ago: “The primary purpose of any theory is to clarify concepts and ideas that have become confused and entangled.”<sup>59</sup> One thing is clear; the theory of hybrid warfare does not achieve this. Rather, it muddies concepts and further entangles ideas. As a result, legal asymmetries created and exploited by malign actors often go unnoticed or are masked by the innumerable means that hybridity fails to clarify or organize.<sup>60</sup>

### 1.3. The Legal Lacuna between War and Peace

The legal lacuna between war and peace that executors of malign legal operations exploit is unique in that it does not exist to the extent that maligners assert. While there is a great deal of unexplored space in the international legal regime, it is to the benefit of maligners to call it a gap and further confuse and blur the legal lines and scholarly assessments. International Humanitarian Law and the United Nations definition of aggression are sufficient to address much of this so-called gap. It is not legal precedent that these situations require, but rather a stronger precedent for enforcement and the political courage to confront aggressors.

One aspect of so-called hybrid warfare that most theorists agree upon is that it blurs the lines of war and peace, resulting in a so-called grey-zone of military operations that exists between the two. Frank Hoffman waded into this discussion with his own definition of gray zone tactics. “Those covert or illegal activities of non-traditional statecraft that are below the threshold of armed organized violence; including disruption of order, political subversion of government or non-governmental organizations, psychological operations, abuse of legal processes, and financial corruption as part of an integrated design to achieve strategic advantage.”<sup>61</sup> He analyzed numerous other definitions of the term, but ultimately offered his own due to concerns over too many vague and therefore

---

<sup>59</sup> Carl Von Clausewitz, *On War*, ed. Michael Howard and Peter Paret (Princeton, New Jersey: Princeton University Press, 1976).

<sup>60</sup> Arthur F. Lykke, “Defining Military Strategy,” *Military Review*, 1989.

<sup>61</sup> Hoffman, “Examining Complex Forms of Conflict: Gray Zone and Hybrid Challenges.”

meaningless descriptions of the *gray zone*. One observation is interesting because it could be just as easily applied to his concept of hybrid warfare.

“These over-wide definitions rob gray zone conflict of analytical utility, as they mask more than they reveal. Indeed, this new term captures more a failure in U.S. military and security culture than it characterizes any new method or form of conflict. The real gray zone is ‘between our ears,’ in our faulty models and education about what conflict entails.”<sup>62</sup>

However, Hoffman’s mention of the threshold of armed organized violence is critical. Ultimately, his description is addressing the legal threshold of armed attack and aggression. This is not the only seam of PIL that malign actors regularly exploit. The notions of historic right, self-determination, collective self-defense, distinction, intervention, responsibility to protect, armed attack, international and non-international armed conflicts, non-combatant and combatant, and the use of force are just a few examples of these seams. They are what Dr. Aurel Sari describes as dividing lines. These dividing lines, he stated, “presents a challenge to the rule of law...expose and deepen the international legal order’s structural weakness” and “cast doubt on the conceptual foundations of the regulatory framework of warfare, which is based on the (Admittedly problematic) distinction between war and peace.” He cited Russia’s illegal seizure of the Crimean Peninsula as an example of the modern abuses of the imprecision of international law. In this case, Russia did not simply seize Ukraine’s sovereign territory but also put forth complex legal arguments based upon these seams or dividing lines to justify its behavior.

For example, Vitalii Vlasiuk analyzed the term hybrid war and described it in much the same way as most other scholars by suggesting that it is a mix of technology, traditional tactics, and non-traditional methods. He noted that the focus of hybrid force is not to gain military victories but rather the subjugation of power. He notes the rapid changes in the status of armed combatants from state to non-state actors and back again.

---

<sup>62</sup> Hoffman.

Both Korhonen and Vlasiuk viewed the conflict in Eastern Ukraine as both an internal armed conflict (Ukraine v. Donetsk People’s Republic and Luhansk People’s Republic) and as an international armed conflict (Ukraine v. Russia). This allows victims to address violations in terms of existing mechanisms of international law (international and internal armed conflict). The problem with this approach is that dividing this situation as such creates additional seams to be exploited by the antagonist.

Russia views its approach to Ukraine as part of one concerted strategy. As U.S. diplomat and National Security Advisor Zbigniew Brzezinski said, “It cannot be stressed enough that without Ukraine, Russia ceases to be an empire, but with Ukraine suborned and then subordinated, Russia automatically becomes an empire.” Chapter 4 will further highlight methods to counter this behavior, but one key tool to countering the malign manipulation of legal domains is integrated strategic litigation or utilizing the legitimate mechanisms of legal domains to properly counter a malign adversary in conjunction with a coordinated public engagement and messaging campaign. On one hand, dividing the situation in Eastern Ukraine as both an international armed conflict and internal armed conflict allowed Ukraine’s Ministry of Justice to build cases and pursue those responsible. On the other hand, the Russian Federation modulated the management of its Russo-Ukrainian war and changed the status of forces between state and non-state at will, further confusing the facts on the ground and ensuring that disparate legal strategies were unsuccessful. The 2018 Kerch Strait incident wherein three Ukrainian naval vessels and 24 sailors were captured by Russian forces while attempting to transit the strait into the Sea of Azov is a prime example of this seam and the need for integrated strategic litigation. Ukrainian politicians claimed that the sailors must be treated as prisoners of war (POWs) and afforded the proper rights under the Geneva convention and international humanitarian law. Simultaneously, they claimed that the Ukrainian navy was exercising its right to innocent passage for military vessels under UNCLOS and should not have been stopped, rammed, fired upon, or seized. This was a failure of Ukraine’s approach to

Russia's malign manipulation of international law. If the sailors were POWs, then that means Ukraine and Russia were at war and Russia had the right to seize the ships under the law of armed conflict. If they were not at war, then there was no reason to treat the prisoners as POWs.<sup>63</sup>

Despite these challenges, it must be noted that the ambiguity which makes legal domains so susceptible to this exploitation is perhaps by-design. Law is reflective of social reality and is the formalization of politics so as to maintain a higher-order construct for interstate relations beyond diplomacy. As discussed, PIL has no true enforcement mechanism beyond the UNSC, tribunals, and ICJ participants. States remain party to the legal mechanisms to which they agreed only so long as they continue to consent. In many cases, clear and explicit language is prohibitive within international agreements simply because states parties could not fully agree on every detail. To preserve the interests of all parties, the language of the agreement is deliberately left vague. The argument is that the agreement, even if unclear in some places, is more valuable than no treaty at all. As discussed in this section, the unclear language makes these agreements rife for exploitation by states that do not agree with the international status quo and seek to challenge, undermine, and change the international order to better serve their interests. Professor Michael Newton of Vanderbilt University noted that the contested nature of legal domains in modern conflict is occasionally more consequential than the organized violence of warfare. "The paradox is that as the legal regime applicable to the conduct of hostilities has matured over the last century, the legal dimension of conflict has at times overshadowed the armed struggle between adversaries."<sup>64</sup> This fact is true even amidst Russia's full-scale invasion of Ukraine with regional referendums being more important to the Russian regime and its domestic audience than battlefield gains or losses. This

---

<sup>63</sup> James Kraska, "EJIL: Talk! – The Kerch Strait Incident: Law of the Sea or Law of Naval Warfare?," Blog of the European Journal of International Law, 2018, <https://www.ejiltalk.org/the-kerch-strait-incident-law-of-the-sea-or-law-of-naval-warfare/>.

<sup>64</sup> Michael A Newton, "Illustrating Illegitimate Lawfare," *Case Western Reserve Journal of International Law* 43, no. 1 (2010), <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1155&context=jil>.

reality is dangerous, and as Dr. Sari stated, one of the principal objectives of those who weaponize legal domains is to create legal ambiguity. He cited the 2018 NATO Brussels Summit Declaration to describe the blurring of lines separating conflict, crisis, and peace.

“International law, like any legal system, is instrumental in nature. Its purpose is to serve other ends: predictability, justice, security, the good life. However, since those ends are contested, international law itself is contestable and open to instrumentalization in the service of conflicting objectives and interests...international law is thus caught in a dynamic where the instrumental use of rules forms a core feature of the system, yet where certain forms and manifestations of instrumentalism are deeply corrosive to a rules-based international order.”<sup>65</sup>

The reason these ends are contested is that not all participants of the RBIO agree upon the value-structure, or social reality, that lies at its foundation. Many critics of PIL and international relations theorists claim that the creation of an RBIO to govern states’ behavior is a fools’ errand because international law is unenforceable. To rely upon trust and consent as the guarantors of something so critical to humanity, they might argue, is irresponsible. On the contrary, PIL has proven wildly successful at upholding an RBIO, in certain areas, since the conclusion of WWII. Every time an individual boards a ship or aircraft on international travel, for example, they are deconflicted from other vessels through international agreements and institutions. The same can be said for diplomatic engagement and the treatment of foreign dignitaries, the regulation of nuclear weapons, and numerous other areas. What, then, is the difference between international law that works and international law that is exploited as discussed up to this point? To understand the role of international law in modern conflict, it is first critical to understand whether there truly exists a Rules-Based International Order or, instead, a series of rules-based regional orders.

---

<sup>65</sup> Sari, “Legal Resilience in an Era of Gray Zone Conflicts and Hybrid Threats.”

#### 1.4. Conflicting Ideologies within Public International Law

To further complicate this discussion, it must be noted that there are as many interpretational seams within legal domains as there are technical seams. As quoted in the introduction, David Kennedy asserted that “international law is different in different places.” Namely, the Russian Federation views the purpose and utility of the law, both domestic and international, far differently than Western Civilization. The People’s Republic of China has an even dissimilar approach to legal domains. No matter the size, might, or economy of a State, the reach of international law stops at the precipice of sovereignty.<sup>66</sup> PIL is made up of treaties, agreements, and consensus-building efforts that blur the line of politics and moral-good. Nations may take it upon themselves to offer and withdraw their participatory consent to specific international treaties at their leisure. Once accepted, though, most countries keep to their word. Keeping one’s word, after all, is the basis of international law itself - *pacta sunt servanda*. The Greeks first realized the importance of this concept as the basis for all future international endeavors.<sup>67</sup>

The reality faced by the 21st century RBIO is that those who oppose the current ideological foundation know all too well that they cannot openly strike out against it, lest they be corrected by the system to preserve the status quo. That is, after all, how order works. In a 2019 article titled *Bound to Fail: The Rise and Fall of the Liberal International Order*, Professor John Mearsheimer explored the notion of international order to determine which types of international order exist and which of these make up the present international order. His criticism of liberal institutions is well known, and his positions on matters of international law and order are often aligned with those of the Russian Federation and PRC. While this author disagrees with many of Mearsheimer’s observations, it is critical to consider his analysis closely because, for the purposes of this

---

<sup>66</sup> Shaw, *International Law*.

<sup>67</sup> Shaw.

research, it closely aligns with the rationale used by the main practitioners of Malign Legal Operations (Russia and China).

First, Mearsheimer defined an order as “an organized group of international institutions that help govern the interactions among the member states.”<sup>68</sup> Interestingly, he also asserted that order does not necessarily constitute peace or stability and is not meant to be the antithesis of disorder. Henry Kissinger stated in his 2014 book, *World Order*, that there are three levels of order: world order, international order, and regional order. He surmised that no actual world order has ever existed to the extent that it was truly universal. He noted that these systems of order are based upon two components: widely accepted rules “that define the limits of permissible action” and a balance of power “that enforces restraint where rules break down, preventing one political unit from subjugating all others.”<sup>69</sup> Mearsheimer offered more details in the form of the characteristics of orders. He noted that, with regards to scope and membership, an order is either international or bounded. Furthermore, international orders can be characterized as either realist, agnostic, or ideological. In instances where there are at least two major powers in the world (bipolar or multipolar), Mearsheimer states that the only option is for those powers to behave in accordance with realist dictates and to engage in security competition. In these scenarios, bounded orders are created by major powers to strengthen their position during this security competition. NATO and the Warsaw Pact are two examples of bounded orders within a bipolar international order. Next, when there is only one major power in the world (unipolarity), it is possible for agnostic or ideological international orders to emerge. Since there is no need for security competition in a unipolar world and therefore realist systems may not exist, it is the will of the unipolar-state that determines the agnostic or ideological characteristics of the order. Ideological international orders emerge when the sole-pole takes a universalistic approach to its underlying value structures. When a communist or liberal state, for example, occupies the

---

<sup>68</sup> John J Mearsheimer, “Bound to Fail: The Rise and Fall of the Liberal International Order” 43, no. 4 (2019): 7–50.

<sup>69</sup> Kissinger, *World Order*.

sole-pole, there is a high probability that it will attempt to export its political system, and therefore its ideology. Agnostic orders emerge when the sole-pole is disinterested in exporting its ideology and instead enforces the international order for the sake of control itself. Finally, concerning breadth and depth of coverage, an international or bounded order can be thick or thin. A thick order has strong institutions that affect the behavior of the state both militarily and economically. A thin order also affects the state, but lacks significant reach or lacks a combination of both depth and breadth of international governance. This discussion on order and the international rule of law is critical to any analysis of PIL because it concerns the observance of international law and its norms. To manipulate and modify PIL is to erode the international rule of law itself.

Mearsheimer applies this framework to analyze the pre-WWII multipolar order, the post-WWII bipolar order, and the post-Cold War unipolar order to arrive at his thesis: the unipolar liberal-ideological international order is dead and we have entered a realist multipolar international order. He argued that the post-WWII order was a bipolar international order with two bounded-orders, NATO and the Warsaw pact, creating a balance of power. These bounded orders were underpinned by military power and tied to specific ideologies. The first was a Western bounded order built upon NATO and a liberal ideology focused on individual rights and connected to democratic principles. The second was an Eastern bounded order built upon the Warsaw Pact and a communist ideology focused on Marxism. The international order of that time was agnostic and thin. The UN and UNSC, nuclear arms control, the protection of global commons, and the prevention of large-scale organized violence were the tenants of the Cold War order. This structure existed until the collapse of the Soviet Union and the destruction of the Eastern bounded order.

What naturally followed was the emergence of a unipolar order wherein the ideology and values connected to the Western international system transcended its bounded order. Unable to combat this turn of events, the participants of the previous

Eastern order were forced to accept it, at least initially. The United States was positioned as the sole hegemon and the principal guarantor of the now liberal international order throughout the last decade of the 20th century and into the early 21st century. Under this liberal-RBIO, international institutions based upon individualism, human rights, and self-determination flourished. The European Court of Human Rights, the International Court of Justice, and other complex institutions sought to limit organized violence and promote human rights as part of this now-thick international order. The problem, according to Mearsheimer, was that this order was born containing the seeds of its own destruction. As democracy and capitalist economic principals flourished, so too did globalism and economic interdependencies. It became less expensive to export manufacturing and conduct business overseas, and the resulting economic disparities gave rise to a revanchist China and a revisionist Russia. These countries, often cited along with Iran, North Korea, and a few others as the greatest challengers to the liberal order, were diametrically opposed to the liberal ideology and the thickness of the international order. To them, the utility of international law, and law in general, was to support the collective over the individual, centralization over decentralization, control over accountability, and stability over transparency. This view is flawed, however the reality is that PIL relies upon the consent of participatory states. If true that Mearsheimer's view closely aligns with that of Russia, then the liberal international order must account for Russia's contrary viewpoint

By the early 21st century, China and Russia were strong enough militarily to begin asserting themselves and rebuking this system. To them, the international order is critical for stability, however, the ideology attached to it is unpalatable. Their objective is to decouple this ideology and thin-out the international order, returning to an agnostic international system focused on the basics; the UN and UNSC, nuclear arms control, the protection of global commons, the prevention of large-scale organized violence, securing their interests, and the global checks-and-balances brought about by a few powerful nations taking a realist approach to global management. By lashing out against the present

RBIO, however, they discredit and undermine the order itself, making it less likely to effectively govern the behavior of participatory states. This manifests itself in what many observe as “hybrid” warfare, legal asymmetry, and a duplicitous approach to international law. The reason that it appears duplicitous is because it is duplicative; there are multiple systems existing in unison despite the West’s occasional naivety. Russia and China truly do want to uphold the international order, but not in its present state, and this reality can be clarified by a cursory glance at their approaches to international law.

### 1.5. Hybrid Warfare and China’s Relationship with International Law

Dean Cheng described China’s approach to PIL in a 2012 article titled *Winning Without Fighting: Chinese Legal Warfare*. He stated the following: “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...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.”<sup>70</sup> Ultimately, Chinese culture takes a rule-by-law approach rather than the Western conception of rule-of-law. Law, from the rule-by-law perspective, is a tool for leaders to assert and maintain power. This perspective may argue that benevolent power is necessary to maintain order and thereby a stable peace. In the western view, the law is a tool of accountability for all. This major difference can be extrapolated to the People’s Republic of China’s (PRC) overall approach to international law and was confirmed outright in a 2021 speech by Chen Yixin, Secretary-General of the Central Political and Legal Affairs Commission of the Communist Party of China. He spoke at a study session on Xi Jinping’s policy towards the rule of law. “Competition among major powers today is mainly a competition of systems and rules. It is necessary to use Xi Jinping’s thoughts on the rule of law to better use legal tools to protect the country’s dignity and core interests in

---

<sup>70</sup> Cheng, “Winning Without Fighting: Chinese Legal Warfare.”

accordance with the law...Marxism believes that politics determines the rule of law, and the rule of law serves politics.”<sup>71</sup> By successfully establishing a more Chinese international system of rules, according to Yixin, President Xi will promote a more equitable and just international rule of law, uphold the international system with the UN and the UN Charter at its core, promote a free and inclusive international rule of law, and support a more secure and stable international order with greater cooperation and international law enforcement. In other words, this is an international system with distinctly Chinese characteristics. Ultimately, according to Chen, Chinese leaders do not see what they describe as legal warfare as a misuse of the law because the current international system, or portions of it, do not benefit the PRC. “[T]he 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.”<sup>72</sup>

The previous analysis demonstrated the West’s insufficient understanding of the role of the law in modern conflict. One significant concern identified by this analysis is that, while Western Academia squabbles over the meaning of an unhelpful portmanteau (lawfare), other nations are actively employing whole-of-government strategies of manipulation and exploitation of legal systems, both international and domestic. Dr. Bartman offered that Russian lawfare is a matter of State practice, however, neither the Soviet Union nor the Russian Federation ever overtly declared such a strategy. In China, the foundational theory that supports a strategy of legal manipulation is known as unrestricted warfare. This section will show that legal systems are not only weapons of conflict, but also the object of conflict. In this context, it is better to think of the

---

<sup>71</sup> Chen Yixin and Jian Chang, “陈一新：学深悟透习近平法治思想，推动法治中国建设迈上新台阶-中国长安网 [Chen Yixin: Learn to Understand Xi Jinping’s Thoughts on the Rule of Law and Push the Construction of Rule of Law in China to a New Level],” April 2, 2021, [http://www.chinapeace.gov.cn/chinapeace/c100007/2021-04/02/content\\_12470137.shtml](http://www.chinapeace.gov.cn/chinapeace/c100007/2021-04/02/content_12470137.shtml).

<sup>72</sup> Cheng, “Winning Without Fighting: Chinese Legal Warfare.”

manipulation of legal domains rather than of the commonly accepted vernacular, law or legal systems. Conceptualizing the law as legal domains allows one to consider that the law is actively fought over while simultaneously being fought with.

The term Unrestricted Warfare was first coined within a 1999 book by the same name and written by two Chinese Colonels in the People's Liberation Army (PLA), Liang and Xiangsui. They argued that, in modern conflict, a state must do whatever is necessary to achieve its political objectives and that every adversary has weaknesses to be exploited, regardless of its military strength. To exploit these weaknesses, they argued, one must seize every opportunity to establish control. "We find ourselves in a stage where a revolutionary leap forward is taking place in weapons, going from weapons systems symbolized by gunpowder to those symbolized by information...the best way to achieve victory is to control, not to kill"<sup>73</sup> They advocated for diverse and complex cocktails of strategies aimed at leveraging these new tools to circumvent an adversary's vastly stronger military to strike at their true weaknesses, and therefore elicit the change in behavior that would otherwise be sought via military force. They noted that these strategies are countless and can have a destructive effect equal to that of military operations, however, they specifically identified psychological warfare, smuggling warfare, trade warfare, media warfare, drug warfare, technological warfare, fabrication warfare, resource warfare, economic aid warfare, cultural warfare, and international law warfare. It is the last of the unrestricted warfares that this section intends to explore, which the authors defined as "seizing the earliest opportunity to set up regulations."<sup>74</sup>

Colonels Liang and Xiangsui did not identify international law as solely an instrument of conflict. In fact, they commended the ways in which PIL has reduced suffering, contained violent conflict, and increased international stability. "Over the last several thousand years, and especially in the 20th century, during the intervals between the fires of war, there has always been one matter pursued: making efforts to lock the

---

<sup>73</sup> Qiao Liang and Wang Xiangsui, *Unrestricted Warfare*, 1999, <https://doi.org/B 67812>.

<sup>74</sup> Liang and Xiangsui.

beast in the cage. It is for this reason that people have formulated innumerable treaties and rules...All of these regulations are gradually becoming accepted by each nation. The most commendable of these is a series of treaties on nuclear non-proliferation”<sup>75</sup> With respect to international law, Liang and Xiangsui offered transnational terrorism as an illustration of the ebb and flow of international norms. They asserted that, in the formulization and utilization of rules, terrorist organizations or weaker states “disregard and even destroy rules when the rules are not advantageous to them...The direct result of the destruction of rules is that the domains delineated by visible or invisible boundaries which are acknowledged by the international community lose effectiveness.”<sup>76</sup> These basic observations will be Chinese doctrine in a matter of years, which will be further analyzed in Chapter 3.

These observations of Russian and Chinese approaches to PIL, and their doctrines of manipulation, can be seen in recent cases where legal instruments were twisted via faux legal arguments to support illegal positions. Chapter 3 will discuss several cases, including *Philippines v China*, *Ukraine v Russia*. In *Philippines v China*, the permanent court of arbitration found that China’s island dredging activities did not result in extensions of its sovereignty. China’s principal retort was that the court lacked jurisdiction due to existing bilateral agreements between China and the Philippines. In *Ukraine v. Russia*, Russia seized Ukrainian ships conducting an innocent passage of the Kerch Strait, and Russia claimed that the court lacked jurisdiction due to UNCLOS Article 2XX, military activities. The court found Russia’s interpretations and liberal applications of UNCLOS to be outside the convention

---

<sup>75</sup> Liang and Xiangsui.

<sup>76</sup> Liang and Xiangsui.

## 1.6. Hybrid Warfare and Russia's Relationship with International Law

Russia has a storied history of interaction with international law and the RBIO. To develop any reasonable understanding of this history, or that of any other country, would require volumes of text and detailed analysis. This section, and the previous one dedicated to China, offer high-level views of perceptions towards PIL and legal domains to better understand the current crisis of international law. This modest understanding will contribute to the framing of the problem so that subsequent chapters can explore solutions.

Not including illegally annexed territories, Russia borders 14 other nations and is the largest country on the planet. It also shares oceanic borders with the United States and Japan. It is due to its massive size and geographic vulnerability that Russia has been threatened time and again throughout history by invading hords and civil strife. This was true as a Tsarist empire, as a Soviet Union, and now as a Federation. Centuries ago, as Europe began to develop the language of international law, Russia was struggling for survival. Peter Maggs, Olga Schwartz, and William Burnham described this in their book titled *Law and Legal System of the Russian Federation*. "In the 13th to 15th centuries - when Western Europe was enjoying the benefits of the European Renaissance and the scholar's resurrection of Roman law was starting in Bologna in the 11th century - Russia was under Mongol subjugation (1240-1480) and isolated from the rest of Europe."<sup>77</sup> This reality gave birth to Russia's pragmatic and collective approach to strong-man governance, and its leader's may have argued that Russia could ill afford the luxuries of western liberalism, human rights, and individualism. The brutality of Russia's numerous geographic vulnerabilities and the indefensible nature of Russia's vast expanse contributed to the country's reality of near-constant invasion or internal strife. Henry

---

<sup>77</sup> Peter B Maggs, Olga Schwartz, and William Burnham, *Law and Legal System of the Russian Federation*, Sixth (New York: Juris Publishing, Inc., 2015), [https://books.google.co.uk/books?hl=en&lr=&id=J0jwCQAAQBAJ&oi=fnd&pg=PR21&dq=Russian+Legal+System&ots=uO\\_Un7Ih5J&sig=LYkZ31kADv7Xg9KD\\_2sGzLnp0Uc#v=onepage&q&f=true](https://books.google.co.uk/books?hl=en&lr=&id=J0jwCQAAQBAJ&oi=fnd&pg=PR21&dq=Russian+Legal+System&ots=uO_Un7Ih5J&sig=LYkZ31kADv7Xg9KD_2sGzLnp0Uc#v=onepage&q&f=true).

Kissinger noted that this difficulty lies at the heart of Russia's chronic paranoia and strongman politics.

“European statesmen came to identify security with a balance of power and with restraints on its exercise. In Russia's experience of history, restraints on power spelled catastrophe...What in the West was regarded as arbitrary authoritarianism was presented in Russia as an elemental necessity, the precondition for functioning governance...Everything about Russia – its absolutism, its size, its globe-spanning ambitions and insecurities-stood as an implicit challenge to the traditional European concept of international order built on equilibrium and restraint.”<sup>78</sup>

It is for these reasons that Russia was late to the proverbial conversation as the language of international law flourished across Western Europe. As such, PIL was only international as it applied to European states. Since law is the reflection of, and built upon, social reality, the language of international law was built upon the Christian values of European society. Eventually, Russia joined the international conversation and began to employ the same international legal language of the Europeans. The problem, however, is that words have different meanings to different communicators, particularly when multiple unique cultures are involved. Russia may have used the same words, or their translations, but the cultural understandings of these words led to divergent interpretations. Lauri Mälksoo describes this phenomenon quite well. “It remains possible that when two world leaders from different regions and civilizations meet and refer in their conversations and debates to international law, they have historically and culturally different concepts and associations in mind regarding what international law implies.”<sup>79</sup> To be clear, Russia shares Europe's approach to PIL. However, Russia's traditional inclination to despotic behavior in international relations extends to PIL as well.

---

<sup>78</sup> Kissinger, *World Order*. 50.

<sup>79</sup> Mälksoo 2015, 17

Even so, Russia has significantly contributed to every major ordering, and re-ordering, event since the 1648 peace of Westphalia. Whether repelling the French and Swedish Empires or seizing Berlin and the defeat of Nazi Germany, Russia has traditionally taken on the role of maintainer of the international status quo. For example, Czar Alexander concluded the Napoleonic Wars by marching his army of to the gates of Paris and conducting a pass-and-review of 160,000 troops immediately outside the capitol. They did not seize the country or overstay their welcome, but contributed to the restoring of European order and a new status quo. This is true, however, only when that status quo benefited Russia. Even in times of peace, Russia can be seen championing efforts to avoid armed conflict as the lodestar for the notion of aggression under international law. In 1933, Russia led the Convention on the Definition of Aggression. It was agreed to by seven other nations and its text makes up most of the internationally recognized definition today. The reality is that such a definition served as an instrument of leverage for Russia and constitutes Malign Legal Operations.<sup>80</sup> Concerning international humanitarian law, Russia's approach to IHL devolved from that of a pragmatic idealist and frequent contributor in the Tsarist Era to the modern-day evasion and undermining of both IHL and legal domains writ large. From participation in the Brussels Conference, Hague Peace Conferences, and Geneva Conventions to zero contributions to the field of IHL since 1991, modern Russia now views IHL with deep skepticism and more as a lever for control than to reduce war and suffering.<sup>81</sup>

Dr. Christi Scott Bartman, previously a law professor at Bowling Green State University, concentrated her doctoral research on the Soviet Union's, and now Russian Federation's, manipulation of the definition of aggression to achieve political objectives. She referred to Russian legal scholar Grigorii Ivanovich Tunkin in a lot of her work. Tunkin was a principal Soviet researcher, negotiator, and international lawyer whose

---

<sup>80</sup> Kissinger, *World Order*.

<sup>81</sup> Riepl, "Russian Contributions to International Humanitarian Law: A Contrastive Analysis of Russia's Historical Role and Its Current Practice."

contributions made up a great deal of Soviet doctrine. Bartman referred to him as skillfully summing up the Soviet perspective on international law in 1989. “The creation of norms of international law is the process of bringing the wills of States into concordance...[a] normative system making it possible to foresee the reaction of other actors in the inter-States system to particular actions of a State.”<sup>82</sup> His observation is interesting as it expresses the belief that international law may be utilized to promote predictability. It serves to contain geopolitical rivals within the international legal system, as the USSR did against Finland and many other countries. In this regard, a sense of Russia's aforementioned strict adherence is important, because without this adherence, predictability and containment are impossible. American statesman George Kennan noted this about the Soviet Union in 1946. “Moscow has no abstract devotion to UNO [United Nations Organization] ideals. Its attitude to that organization will remain essentially pragmatic and tactical.”<sup>83</sup>

In 2007, Russian President Vladimir Putin gave a speech at the Munich Conference on Security Policy that many considered the beginning of today's aggressive, revisionist, post-soviet Russia. “We are seeing a greater and greater disdain for the basic principles of international law... it is necessary to make sure that international law have a universal character both in the conception and application of its norms.”<sup>84</sup> This call for universality is congruent with the notion that international law can be used instrumentally to accomplish political objectives by controlling or containing an adversary. Mr. Putin also focused on the benefits of multi-polarity through the perspective that, while international law and order should be universal, there can be no single hegemon. This narrative continued in 2014; “International relations must be based on international law, which itself should rest on moral principles such as justice, equality and truth. Perhaps most

---

<sup>82</sup> Bartman 2010, 428-429

<sup>83</sup> George Kennan, “The Long Telegram,” The National Security Archive, 1946.

<sup>84</sup> Vladimir Putin, “Putin Speech and the Following Discussion at the 2007 Munich Conference on Security Policy” (Munich, 2007), <http://russialist.org/transcript-putin-speech-and-the-following-discussion-at-the-munich-conference-on-security-policy/>.

important is respect for one's partners and their interests.”<sup>85</sup> This statement is difficult to disagree with, but is also precisely the type of duplicitous strategic communication that Bartman notes as critical to her definition of Russian lawfare. Perhaps the more telling comments came when Putin began to propagandistically assert that a global reckoning is on the horizon and that the present RBIO is insufficient to manage 21st century challenges.

“Today we are witnessing an almost uncontained hyper use of force, military force, in international relations, force that is plunging the world into an abyss of permanent conflicts...We are seeing a greater and greater disdain for the basic principles of international law...we have reached that decisive moment when we must seriously think about the architecture of global security...the role of multilateral diplomacy is significantly increasing.”<sup>86</sup>

Chapter 2 will explore the notion of lawfare, and Bartman's conceptualization of it, more deeply. For now, suffice it to say that propaganda lies at the heart of her understanding of Russia's approach to international law. This is because the requisite for the containment of an adversary through the law is the perception that both sides are adhering to it equally. In this case, it was not until five years later that Mr. Putin lifted the veil on the intent and extent of Russia's participation in the current international order. While long suspected, 2019 marked the officiation of the Kremlin's revanchist agenda following a Financial Times interview with Putin; “There is also the so-called liberal idea, which has outlived its purpose...the liberal idea has become obsolete. It has come into conflict with the interests of the overwhelming majority of the population.”<sup>87</sup> The Russian Federation's rejection of the liberal international order marks a turning point in that they refuse to accept the unipolar ideological international order and, because they are a nuclear power that is able to hold the unipole at risk, a multi-polar world now exists – like it or not. Given Mearsheimer's assertion that ideological international orders are incompatible

---

<sup>85</sup> Putin 2014

<sup>86</sup> Putin, “Putin Speech and the Following Discussion at the 2007 Munich Conference on Security Policy.”

<sup>87</sup> The Kremlin, “Vladimir Putin Interview with The Financial Times,” 2019, <http://en.kremlin.ru/events/president/news/60836>.

with multipolarity, the resulting international order can be nothing other than realist and thin. This is confirmed by the previously discussed revisionist Chinese approaches to international order.

Putin's reference to the present international order being obsolete, in conjunction with most other strategic messaging from the Kremlin, suggests that that he is not simply rebuking the unipole, but offering an alternative to this ideological international order, a "Russian World." It seems that that the emerging international order is thin and realist, agnostic to any particular ideology, and focused on international security, arms treaties, non-nuclear proliferation, the deconfliction of the global commons, and ensuring that international conflict resolution occurs with as little violence as possible. The United Nations is the foundation of this order and altogether it serves as an umbrella under which there are three bounded orders emerging. One is a liberal order led by the United States and primarily guaranteed by NATO. Another is an agnostic bounded order led by China and guaranteed by both China's growing nuclear arsenal and its economic coercion (Belt and Road Initiative). Finally, A third and smaller anti-liberal Russian order exists with significant overlap of the Chinese bounded order.

If true, which this research proves to be the most likely scenario, the international order has returned to a system resembling a combination of the pre-WWI order and the post-WWII order. The system is multi-polar with a realist international order to govern, or attempt to govern, states' behavior. This new international system is advantageous to revisionist powers like China, and revanchist powers like Russia, because it allows them to establish their own system of regional governance, to influence the behavior of states, and to more readily compete for economic opportunity. Furthermore, these individual bounded orders allow the Kremlin to influence the course of international law by peddling its own brand of international law using the same accepted language. This is in-line with Mälksoo's observation of the Soviet's approach to international law, wherein the USSR

claimed “a regional international law of their own, on a competing universalistic ideological basis.”<sup>88</sup>

The Western academic and policy discourse surrounding the existing international order is disjointed and inconsistent at best. Some experts talk of multi-polarity and threats to the liberal international order, but this is a counterproductive discussion. Other experts assert a desperate need to focus on great power competition or strategic competition and to counter so-called hybrid warfare to protect what remains of the liberal international order. Unfortunately, the foundational assumptions of these arguments are flawed. As this section established, those that acknowledge a multi-polar world yet also seek to maintain an ideological international order are mistaken; an admission that the United States is not the unipolar power is also an admission that an ideological order cannot exist. This is not a simple matter of semantics, and this mistake lies at the heart of this research. Many in the United States continue to operate as if the liberal universal order still exists. This naivety is why states like Russia and China are able to manipulate, shape, and exploit PIL with such ease. One must remember that international systems are either consensual or guaranteed by coercion. One cannot impose their ideology onto an international system through desire alone. The ideological differences between Western, Russian, and Chinese perceptions of international law embolden these states to not only instrumentally apply international law in a purely strategic way, but to undermine the international system itself as a way to chisel their bounded orders from the previously liberal-ideological order. To best sum up the Russian approach to PIL and the RBIO, Kissinger cited French traveler Marquis de Custine , who in 1843 described the Russian Empire as: “A monstrous compound of the petty refinements of Byzantium, and the ferocity of the desert horde, a struggle between the etiquette of the Lower [Byzantine] Empire, and the savage virtues of Asia, have produced the mighty state which Europe now beholds, and the influence of which she will probably feel hereafter, without being able to understand its operation.”<sup>89</sup>

---

<sup>88</sup> Mälksoo, *Russian Approaches to International Law*.

<sup>89</sup> Kissinger, *World Order*. 50.

These observations are important because, as Mr. Mälksoo noted, ideology and ideas precede action. This basic understanding illuminates and to some degree explains Russia and China's seemingly duplicitous approaches to PIL as it exists within the international order.

There are several concepts presented in this chapter that complicate conventional legal theories and contribute to an observed crisis of international law. From conflicting interpretations and perceptions of the law to the blurring of lines between war and peace (*jus in bello*, customary international law, and international treaties), modern legal domains face numerous conflicts in both theory and practice. This is not simply an observation, but can be seen manifested in the way that legal domains are being shaped by contemporary discourse. For example, there is a school of thought within the Russian legal academy that seeks to resurrect the Soviet notion of ideological aggression as a way to codify so-called hybrid warfare within PIL.

The notion of aggression is critical to this research because it determines whether a state should be held accountable for its behavior and also defines the legal boundaries of what constitutes a just war. If an aggressor can sufficiently blur or control the international consensus over what constitutes an act or war of aggression, then it can successfully commit these acts with impunity. Presenting an appearance of compliance to PIL and a desire to shape the state of the art allowed the Soviet Union to commit several acts of aggression without real accountability. Today, the Russian Federation's international legal academy attempts to broaden the definition of aggression through the re-introduction of ideological aggression.

In 2019, Doctor Stanislav Valentinovich Chernichenko<sup>90</sup> published a piece in the Eurasian Journal of Law titled *Ideological Aggression as the Use of Force in International*

---

<sup>90</sup> Dr. Chernichenko is a professor of law and chief researcher at the Institute of State and Law of the Russian Academy of Sciences, an Honored Scientist of the Russian Federation, a member of the Permanent Court of Arbitration in The Hague from the Russian Federation (2003), Vice-President of the Russian Association of International Law, Member of the USSR delegation to the UN Commission on Human Rights (1974-1988), and an Independent expert of the UN Subcommittee on the Prevention of Discrimination and the Protection of Minorities (1974-1988).

Law. He boasts a long and distinguished career of legal scholarship in both the Soviet Union and Russian Federation. In his article, Chernichenko recalls the USSR's critical role in establishing the definition of aggression as codified in UNGA Resolution 3314 (XXIX) of 1974. In fact, the Soviets first proposed a definition in the 1933 Convention for the Definition of Aggression in London. This was following the failure of both the 1919 Covenant of the League of Nations and the 1928 Briand-Kellogg Multilateral Treaty for the Renunciation of War to define aggression once they agreed to abolish it. The Soviet notion specified that aggression could not be justified by the internal conditions (political, economic or social structure; alleged defects in its administration; disturbances due to strikes, revolutions, counter-revolutions, or civil war) or international conduct (violation or threat of material or moral rights or interests, rupture of diplomatic or economic relations, economic or financial boycotts, frontier incidents). Ultimately, several of the USSR's neighboring nations signed The Convention. Shortly thereafter, the USSR began utilizing this new mechanism as the basis for a series of non-aggression, friendship, and good neighborliness pacts as a form of legal containment. Chapter 2 will discuss this issue in-depth with Dr. Bartman's analysis of so-called Soviet lawfare, so it is suitable to note here that the Soviet Union went on to abuse those pacts once the time was right for aggression. This is keeping with the Chinese notion of unrestricted warfare that it is imperative to be the first to establish legal mechanisms, because they are far easier to shape and control as a sponsor than as a beneficiary.<sup>91</sup>

Later, in 1950, the United Nations revisited the issue of aggression. The USSR was quick to offer its draft definition again, but the matter was deferred to the International Law Commission. This was due to several states, namely the U.S., UK, and France, being critical of the draft resolution for fear that it was overly-prescriptive and created opportunities for violations of the spirit and intent. The USSR's response was that its

---

<sup>91</sup> The Soviet Union et al, "The London Convention for the Definition of Aggression," 1933, <https://www.iilj.org/wp-content/uploads/2016/08/Convention-for-the-Definition-of-Aggression-1933.pdf>.

proposal was an “embarrassment to those who feared its adoption might tie their hands.”<sup>92</sup> The Soviet Union was critical of the decision to defer the issue to the International Law Commission because they saw it as a political matter, not a legal question. The Commission did consider aggression but failed to offer a specific definition. Later, in 1952, the UNGA established a special committee of 15 nations to produce the Report of the Special Committee on the Question of Defining Aggression. The USSR was one of these 15 nations and re-submitted its proposal, but this time with additional consideration for indirect aggression, economic aggression, and ideological aggression. The draft noted that ideological aggression included activities to: “(a) encourage war propaganda; (b) encourage propaganda in favor of using atomic, bacterial, chemical and other weapons of mass destruction; and (c) promote the propagation of fascist-Nazi views, of racial and national exclusiveness, and of hatred and contempt for other peoples.”

This issue was not entirely new and was addressed in UNGA Resolution 381 in 1950. The resolution condemned “all propaganda against peace and recommend the free exchange of information and ideas as one of the foundations of good-neighborly relations between the peoples.” Specifically, this included: (1) “Incitement to conflicts or acts of aggression; (2) Measures tending to isolate the peoples from any contact with the outside world, by preventing the Press, radio, and other media of communication from reporting international events, and thus hindering mutual comprehension and understanding between peoples; and (3) Measures tending to silence or distort the activities of the United Nations in favour of peace or to prevent their peoples from knowing the views of other States Members.”<sup>93</sup>

Several countries again opposed the Soviet proposal for ideological aggression. This included the U.S., which stated that the proposal could be manipulated as “a pretext for attacking the freedom of the press might thereby be afforded.” They argued that

---

<sup>92</sup> United Nations General Assembly, “Summary Record of the 389th Meeting, 1st Committee, 5th Session, United Nations General Assembly,” 1950, <https://doi.org/10.1017/S0020818300010821>.

<sup>93</sup> Fisher, “Ideological Aggression and International Law: Soviet and Russian Malign Influence Withing Legal Domains (MILDs).”

“aggressors undoubtedly used psychological methods. It could even be said that there was a psychological or ideological element in every aggression. The acknowledgement of such a fact did not, however, authorize anyone to state that any activity that might affect the views of men was aggression. It would be going too far to speak of ideological aggression. It would also distort the idea of aggression properly so called by weakening the scope of the term and diminish its usefulness.”<sup>94</sup> This debate continued for two more decades until the UNGA Resolution 3314 formally adopted a definition for aggression in 1974. The notion of ideological aggression was not part of the adopted verbiage. Forty-five years later, in 2019, Dr. Chernichenko resurrected the idea: “Discussing the issues of mutual penetration of ideology and politicization, we should pay attention to the problem of ideological aggression. For some period, the term has seemingly been forgotten. It is time to recall the Soviet proposal for a broad definition of aggression put forward at the UN in 1953.”<sup>95</sup>

Chernichenko stated that ideological aggression was an aggressive attack on the information security of the state, or the psychological preparation for the violation of peace. “Often its purpose is to achieve an outcome that, for whatever reason, cannot be obtained through armed aggression (e.g., destabilization of the situation in the country) or to create a moral and political climate conducive to subsequent armed aggression... Ideological pressures can be called informational encroachment on the safety of the victim, thus posing a threat to peace.”<sup>96</sup> Chernichenko specified that states must respond accordingly to different types of aggression, noting specifically that force should not be used when faced with ideological aggression, but that states should conduct “certain psychological measures of influence on the population, along with the blocking of channels of hostile information.”<sup>97</sup> He stated that ideological aggression requires a special

---

<sup>94</sup> The International Law Commission, “Report of the Special Committee on the Question of Defining Aggression,” *The United Nations Digital Library* (New York, 1953), <https://digitallibrary.un.org/record/715503?ln=en>.

<sup>95</sup> Chernichenko, “Ideological Aggression as the Use of Force in International Law.”

<sup>96</sup> Chernichenko.

<sup>97</sup> Chernichenko.

category under international law and that only the UNSC should decide whether a state has committed an act of ideological aggression as a threat to international peace.

This notion is dangerous for many reasons. While it is true that what Chernichenko, and the Soviet Union, describe as ideological aggression does occur, the U.S. retort from nearly 70 years ago remains valid today. It is particularly relevant given the global connectivity provided by the diffusion of information technology. If adopted under a revised definition of aggression under international law, states would be able to claim ideological aggression at any time. Particularly, authoritarian states would use it as a tool to silence dissidents, consolidate power, and to create a more exclusive government. Unfortunately, Chernichenko's proposal to resurrect the failed notion of ideological aggression was not dismissed wholesale. In June of 2021, an article concerning the Uyghur tribunal appeared in Chinese media and quickly spread through Chinese blogs and propaganda outlets. The Uyghur Tribunal is a UK tribunal to investigate China's alleged genocide against Uyghur, Kazakh, and other Turkic Muslim populations. The article was written by Mr. Christopher Black, an international criminal lawyer based in Toronto, Canada. He is a frequent defender and supporter of the Chinese Communist Party's questionable legal practices. He stated that the tribunal was itself a form of ideological aggression. "The 'tribunal' is part of the propaganda matrix being constructed by NATO, led by the USA and UK, which has the objective of manipulating peoples minds to generate hatred and hostility towards China to, at the least, hinder its trade and development, at worst, to prepare the minds of people for war."<sup>98</sup> He did not quote Chernichenko's article, but did recall the Soviet proposals for ideological aggression and was critical of U.S. and other criticisms of the proposal. "The west relied on arguments of 'free speech' arguments that do not hold water since war propaganda is not designed to enlighten people but to twist their minds into thoughts of hatred and war."<sup>99</sup>

---

<sup>98</sup> Christopher Black, "Ideological Aggression Against China Intensifies – The Uyghur Tribunal," New Eastern Outlook, June 10, 2021, <https://journal-neo.org/2021/10/06/ideological-aggression-against-china-intensifies-the-uyghur-tribunal/>.

<sup>99</sup> Black.

Ideological aggression is concerning from the perspective of PIL because of the way that it can be yielded freely and without verification to achieve political objectives and to shape the legitimacy of an event. In a sense, the notion of “ideological aggression” is itself a weapon of ideological aggression, and codifying it under the auspices of PIL would simply provide a new mechanism for exploitation. The primary concerns levied by supporters of this notion are already captured within the UN Charter and the 1974 definition of aggression through the inviolability of the political independence of the state. “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>100</sup> It just so happens that states are rarely willing to expend the political capital required to hold those who employ so-called ideological aggression accountable. A new term or concept will not fix this problem. It is also concerning that this notion is gaining traction amongst revisionist and revanchist states. This insidious recognition is another reminder that the crisis of international law is based upon competing visions of what it is and what it ought to be. Furthermore, this notion is well nested under the notion of so-called hybrid warfare and would be an outstanding tool for those seeking legal asymmetries to leverage against geopolitical adversaries. Chernichenko made sure to note in his article that political objectives should not be achieved through abuse; “The state’s assertion of its interests should not be carried out by perversion or violation of international law.”<sup>101</sup> However, ideological aggression would be used in exactly that way as a weapon of so-called hybrid war.

---

<sup>100</sup> UN Charter, Art 2 Para 4.

<sup>101</sup> Chernichenko, “Ideological Aggression as the Use of Force in International Law.”

## 1.7. Conclusion: Hybrid Warfare has No Relevance to International Law

“[Hybrid Warfare] loses its value and causes confusion instead of clarifying the reality of modern warfare.” - 2017 NATO Review

Carl Von Clausewitz was a nineteenth century Prussian general and military theorist. He is well known for his famous book, *On War*, which highlights many fundamental truths of warfare. One of these truths deals with the importance of the word war itself, offering that one must limit the term to an act of force and nothing else. “There is only one means in war: combat.”<sup>102</sup> Clausewitz established that “war is thus an act of force to compel our enemy to do our will.” For doctrinal purposes, it is critical to consider the term war as synonymous with the use of force. The term hybrid warfare obscures this notion. However, as Lt Col Hoffman observed, debates such as this detract from efforts to counter so-called hybrid warfare. “We are too narrowly focused on more traditional but increasingly rare modes of warfare, and overlooking the unconventional approaches used by our Russian and Chinese competitors. They do not delude themselves with neat orthodoxies about categories and Clausewitzian models about how ‘real wars’ are fought and won. Neither should we.”<sup>103</sup> Ultimately, hybrid warfare is simply a customized cocktail of means, as more accurately described by China’s unrestricted warfare, to achieve asymmetric advantages over an adversary and to maintain strategic unpredictability and surprise. As discussed, the novelty of so-called hybrid warfare is the unrestricted access to populations via globalization and the diffusion of information technology. In essence, what hybrid warfare really describes is the pursuit of asymmetric advantages over an adversary. Without question, what were once the greatest strengths of the international status quo; world order, global organization, and international cooperation, are now exploited as weaknesses; hierarchy, bureaucracy, the need for consensus, and an aversion to the use of force. It is in the seams between these

---

<sup>102</sup> Clausewitz, *On War*.

<sup>103</sup> Frank Hoffman, “On Not-So-New Warfare: Political Warfare vs Hybrid Threats - War on the Rocks,” War On The Rocks, July 28, 2014, <https://warontherocks.com/2014/07/on-not-so-new-warfare-political-warfare-vs-hybrid-threats/>.

foundational tenants that purveyors of so-called hybrid warfare thrive. It is to their great advantage to widen these cracks.<sup>104</sup>

The United States has released initial field manuals and doctrine to address these tactics,<sup>105</sup> Europe has established a Center of Excellence for countering Hybrid Threats,<sup>106</sup> the Ukrainian government acknowledges and is actively combatting these efforts since 2014 and also since the full-invasion began in February 2022.<sup>107</sup> Most importantly, the world is beginning to accept and understand the vernacular. In this sense, hybrid warfare was a successful concept when considered as a bumper sticker for use in educating societies and creating awareness to the realities of modern conflict. Beyond this, though, the concept has run its course and is obsolete. In fact, it creates more harm than good due to the lack of consensus over the term's meaning. This uncertainty is precisely due to the fact that hybrid warfare theorists are attempting to define a grand strategy by describing and categorizing its tactics (cyber, irregular, legal, unconventional, informational, etc.). This is a fruitless endeavor.

The Council of Europe offered perhaps the most articulate description of the notion of hybrid warfare to date: “the main feature of this phenomenon is legal asymmetry, as hybrid adversaries, as a rule, deny their responsibility for hybrid operations and try to escape the legal consequences of their actions. They exploit lacunas in the law and legal complexity, operate across legal boundaries and in under-regulated spaces, exploit legal thresholds, are prepared to commit substantial violations of the law and generate confusion and ambiguity to mask their actions.”<sup>108</sup> The reality is that Russia and China carefully alter the facts on the ground and build faux legal arguments in defense of illegal or quasi-legal behavior. For example, President Putin claimed that the 2014 revolution in Ukraine created an entirely new state under the same name which invalidated all previous

---

<sup>104</sup> Martin, “Book Review; Hybrid Warfare: Fighting Complex Opponents from the Ancient World to the Present.”

<sup>105</sup> U.S. Army Training and Doctrine Command, “The U.S. Army in Multi-Domain Operations 2028.”

<sup>106</sup> Hybrid CoE, “The European Centre of Excellence for Countering Hybrid Threats,” accessed January 15, 2022, <https://www.hybridcoe.fi/>.

<sup>107</sup> Ukrainian Ministry of Justice, “Lawfare: Legal Confrontation with the Russian Federation.”

<sup>108</sup> COE Draft Resolution 14523, 2018

international agreements between it and Russia while simultaneously calling on the international community to respect international agreements and uphold the notion of universality in international law.<sup>109</sup> It is no wonder that, following Russia's 15 March 2014 veto of the UNSC vote to invalidate the referendum on Crimea's independence and subsequent absorption into the Russian Federation, French ambassador Gérard Araud opined that Russia effectively "vetoed the U.N. Charter." Not only was the international legal system manipulated to accomplish a geostrategic objective, but it was done in such a way that the international legal system itself guaranteed and consolidated the manipulator's victory. Susan Tiefenbrun, whose detailed semiotic analysis of the term lawfare will be discussed in Chapter 2, noted that asymmetry, particularly legal asymmetry, is a major contributor to the developing crisis of international law. "[C]learly the use of asymmetrical warfare is in direct conflict with the concept of a 'just war,' which resides on the fundamental military principles of customary law known as 'necessity,' 'distinction,' proportionality,' and 'humanity' ...[which] not only regulate but constrain warfare, especially as it is waged today in an asymmetrical war."<sup>110</sup> She quoted a 2003 report from the U.S. Council on Foreign Relations that the law is frequently used to fight an otherwise stronger opponent asymmetrically and can be used to target domestic opinion. Asymmetrical war, she argues, is an attempt to erase two important features of declared wars war: the front line and the military uniform. In this sense, it can be said that one of the most dangerous features of both the crisis of international law and modern asymmetric conflict is the manipulation of legal domains, particularly as it relates to conflicting ideologies and competing versions of international law and order. Until now, the only concept used to describe this reality is the term lawfare, first introduced in 2001.

---

<sup>109</sup> Vladimir Putin, "Vladimir Putin Answered Questions from Journalists about the Situation in Ukraine," The Kremlin, 2014, <http://www.kremlin.ru/events/president/news/20366>.

<sup>110</sup> Susan W Tiefenbrun, "Semiotic Definition of Lawfare," *Case Western Reserve Journal of International Law* 43, no. 1 (2010), <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1142&context=jil>.

## **CHAPTER 2.**

### **Lawfare and the crisis of Public International Law**

“Lawfare has no real fixed meaning, and its distorted usage has substituted careful analysis and discourse with a fruitless - even dangerous - rhetorical debate.” - Michael Scharf and Shannon Pagano<sup>111</sup>

#### 2.1. Introduction

There is presently no scientific term, academic theory, or doctrine to codify the manipulation of legal domains in pursuit of political objectives. Until now, the only viable term or concept to partially-describe these ideas is lawfare, which its creator never intended to serve as official terminology and is a doctrinally inappropriate term. This research offers Malign Legal Operations as a wholesome and doctrinally appropriate term to describe these legal manipulations. Before formally introducing and describing Malign Legal Operations, it is first necessary to describe other terms and notions, such as lawfare, and to show why a new concept is required.

The term lawfare is a portmanteau of the words law and warfare that is used, *inter alia*, to describe the instrumental use of legal mechanisms both by state and non-state actors to achieve political or military objectives. In November 2001, General Charles Dunlap (then-Colonel) published a paper through Harvard University’s Humanitarian Challenges in Military Intervention Conference titled *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts*. General Dunlap noted that the phrase lawfare can be traced as far back as 1975, when lawyers Neville Yeomans and John Carlson published a paper identifying an increasing trend whereby legal systems are used as a “refinement of combat”<sup>112</sup> to settle disputes by word, or lawfare, rather than by

---

<sup>111</sup> Michael P Scharf and Shannon Pagano, “Foreward: Lawfare!,” *Case Western Reserve Journal of International Law* 43 (2010), <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1140&context=jil>.

<sup>112</sup> John Carlson and Neville Yeomans, “Whither Goeth the Law - Humanity or Barbarity,” *The Way Out - Radical Alternatives in Australia*, 1975, <http://www.laceweb.org.au/whi.htm>.

sword. In framing his research problem, General Dunlap asked whether the law, particularly international law, is becoming more of a problem in modern war than a solution. He cited lawyers Rivkin and Casey, who declared that a novel and fundamentally undemocratic simulacrum of international law is appearing and threatens to upend the post-Cold War international system.<sup>113</sup> International law, they asserted, is becoming one of the “most potent weapons ever deployed”<sup>114</sup> and “just as war is too important to be left to the generals, international law cannot be left solely to the lawyers.”<sup>115</sup> To address his research question, General Dunlap proposed four broad themes or assertions, the fourth of which was particularly noteworthy. “[T]here is disturbing evidence that the rule of law is being hijacked into just another way of fighting (lawfare), to the detriment of humanitarian values as well as the law itself.”<sup>116</sup> In what became the first defined instance of the term, Dunlap offered that lawfare is “the use of law as a weapon of war...the newest feature of 21st century combat...a method of warfare where law is used as a means of realizing a military objective.”<sup>117</sup>

General Dunlap gave new life to the term lawfare as a self-described educational “bumper sticker” to inform military commanders of the benefits, and dangers, of cleverly applied legal mechanisms during a time of war.<sup>118</sup> This chapter will show that, two decades after resurrecting the term, the lessons and warnings of Dunlap’s educational work are complete. The term lawfare must be decoupled from any serious conversation about the phenomena that it seeks to define to continue healthy discourse and address what is today a very real and significant threat to legal systems, particularly PIL. To demonstrate this, chapter 2 analyzes the discourse surrounding the term lawfare from the

---

<sup>113</sup> David B Rivkin and Lee A. Jr. Casey, “The Rocky Shoals of International Law,” *The National Interest*, 2000, <https://nationalinterest.org/article/the-rocky-shoals-of-international-law-523>.

<sup>114</sup> Rivkin and Casey.

<sup>115</sup> Rivkin and Casey.

<sup>116</sup> Charles J. Dunlap Jr., “Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts,” *Kennedy School of Government, Harvard University*, 2001, <http://people.duke.edu/~pfeaver/dunlap.pdf>.

<sup>117</sup> Dunlap Jr.

<sup>118</sup> Charles J Dunlap, “Does Lawfare Need an Apologia?,” *Case Western Reserve Journal of International Law* 43, no. 1 (2010), <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1146&context=jil>.

year 2001 to present, highlights academia's indecisiveness in accepting any one definition and therefore a gap in contemporary understanding, and debates the term's applicability as a descriptor for both actions that "use" and "misuse" legal systems.

In doing so, this chapter reaches three primary conclusions: (1) there is no consensus amongst practitioners or the academy as to what normative definition, if any, can be applied to the term lawfare; (2) using any single term, such as lawfare, to describe both the proper use of the law and the exploitation of the law is damaging to contemporary discourse and detracts from legitimate efforts to combat the malicious manipulation of legal systems; (3) the portmanteau of law and warfare is a contranym and therefore a doctrinally inappropriate term for use in any normative way outside General Dunlap's original "bumper sticker" intent.

## 2.2. Dunlap's Lawfare

Dunlap's 2001 article highlighted two phenomena as responsible, in-part, for lawfare becoming a particularly poignant 21st century weaponization of the law: globalization and the information revolution. His observations were particularly astute and, as stated in Chapter 1, these same characteristics are used to explain the origins of other concepts such as hybrid warfare and unrestricted warfare. These things, Dunlap stated, gave rise to a new form of international law, or at very least new approaches to it, championed by Non-Governmental Organizations (NGOs) and what Riviken and Casey called a "Global Civil Society." An example of these phenomena employed through a lawfare strategy is the widely circulated imagery of civilian fatalities following a U.S. attack on a command-and-control node in Baghdad during the First Gulf War. The families of Iraqi generals were hiding in the bunker, which was the target of a legal coalition strike under the international Law of Armed Conflict, or International

Humanitarian Law.<sup>119</sup> The Hussein regime's overzealous and ill-informed application of the LOAC (a manifestation of globalism) in conjunction with the almost immediate worldwide circulation of the disturbing images (a manifestation of the information revolution) resulted in an asymmetric application of the law during a military operation (lawfare) and resulted in a perception that coalition forces were violating international law. This resulted in additional self-imposed U.S. Rules of Engagement restrictions for strikes in Baghdad that, General Dunlap noted, the Hussein regime could never have achieved through traditional air defense systems. Another example under the same paradigm was the Taliban hiding weapons in religious sites, such as minarets and mosques that were prohibited targets under LOAC. The rest of Dunlap's 2001 academic work on lawfare is dedicated to reconciling the gap between lawyers and non-lawyers, particularly with respect to military operations, and the need to maintain international law as having a positive effect on military conflicts.

In 2005, General Dunlap re-defined the term in a speech at the Keystone Leadership Summit for the U.S. Military Judge Advocate General (JAG) Corps. His speech was subsequently published in the JAG periodical, *The Reporter*. Influenced over the course of three years of U.S. wars in Afghanistan and Iraq, General Dunlap refined the term to offer more stability to the increasingly popular lawfare discourse. "Lawfare is the strategy of using – or misusing – law as a substitute for traditional military means to achieve an operational objective."<sup>120</sup> He also revisited the notion of globalization as a foundational tenant of 21st century conflict. "Globalization has a lot to do with war because it has increased the 'legal consciousness' of the world through the need for contracts, and so forth, in global commercial transactions. This has bled over into other aspects of human existence, including war."<sup>121</sup> It was also in this speech that General Dunlap made a critical observation about abusive lawfare, noting a psychologically abusive application

---

<sup>119</sup> Also known as International Humanitarian Law (IHL). International LOAC is the preferred term in this research and will be utilized throughout.

<sup>120</sup> Dunlap, "Lawfare In Modern Conflicts."

<sup>121</sup> Dunlap.

of the law that dictates the adoption of a tactic he called the “legal preparation of the battlespace.” Furthermore, General Dunlap has by this time utilized two distinct qualifiers for the term lawfare, abusive and malevolent, yet he is clear throughout his work that lawfare is value-neutral and may be used for good or evil. This issue will be analyzed here in detail once the range of lawfare definitions is addressed.

Dunlap called upon Clausewitz, citing his notion that war is a “continuation of political intercourse, carried on with other means”<sup>122</sup> and that this notion lies at the very foundation of lawfare. Dunlap used this article to reinforce his previous assertions about the importance of lawfare and to urge military leaders to take the matter, and close adherence to legal obligations, very seriously. Lawfare practitioners, he reiterated, “cannot be permitted to commandeer it for malevolent purposes.”<sup>123</sup> Mr. Mark Voyager noted while researching lawfare as a Senior Lecturer at the Baltic Defense College that General Dunlap eventually broadened his definition of lawfare in 2017 to include “using law as a form of asymmetrical warfare.”<sup>124</sup> While Dunlap’s earlier work included mention of asymmetry, his most recent publication on the matter was a clear attempt to simplify and clarify the concept. Indeed, Dunlap ultimately broadened the term sixteen years after first introducing it. “Over time, the definition has evolved, but today it is best understood as the use of law as a means of accomplishing what might otherwise require the application of traditional military force.”<sup>125</sup> He made comparisons to Sun Tzu’s suggestion of subduing an adversary without ever fighting at all as the “supreme excellence” of war. He also adamantly reiterated, as is consistent throughout his nearly two decades of lawfare discourse, the notion that lawfare is ideologically neutral.

---

<sup>122</sup> Clausewitz, *On War*.

<sup>123</sup> Charles J Dunlap Jr, “Lawfare: A Decisive Element of 21st Century Conflicts?,” *Joint Force Quarterly*, no. 54 (2009): 34–39.

<sup>124</sup> Voyager, *NATO at 70 and the Baltic States: Strengthening the Euro-Atlantic Alliance in an Age of Non-Linear Threats*.

<sup>125</sup> Charles J. Dunlap Jr., “Lawfare 101: A Primer,” *MILITARY REVIEW*, vol. 8, 2017, <https://sites.duke.edu/lawfire/>.

### 2.3. “The Lawfare Project” and “Lawfare Blog”

The Lawfare Project is a nonprofit organization started by human rights attorney Brooke Goldstein in 2010. The purpose of this organization is to defend the rights of the Jewish community worldwide. The organization is based in the United States and boasts a global network of legal professionals that pursues three main lines of effort: promoting civil rights; advancing human rights; and fighting lawfare.<sup>126</sup> In April of 2010, Ms. Goldstein gave a speech at Fordham Law School that specifically addressed the concept of lawfare. She highlighted the legal community’s critical task of arriving at “a working and acceptable definition of lawfare so that we are all on the same page.”<sup>127</sup> Goldstein offered the following definition, which she argued was a “relatively good amalgamation of the various definitions”<sup>128</sup> and expanded upon what she characterized as a “vague” definition originally offered by General Dunlap. To Ms. Goldstein, lawfare is “the wrongful manipulation of the law and legal systems to achieve strategic military or political ends.”<sup>129</sup> The differences are subtle, however, Goldstein asserted that an activity must be wrongful to qualify as lawfare while Dunlap proposed a purely value-neutral definition. She also included the pursuit of political objectives in her definition rather than a specific focus on military applications and the LOAC.

As a result of this delineation, Goldstein’s definition created a grey-area. Observers must now distinguish “constructive, legitimate legal battle[s]” from “counter-productive lawfare.”<sup>130</sup> To highlight her point, Goldstein used examples of defamation lawsuits to deter journalists from exposing terrorist organizations, hate speech lawsuits used to silence those who discuss the threat of “radical Islam and terrorism,” and the exploitation

---

<sup>126</sup> The Lawfare Project, “What We Do,” accessed February 2, 2021, <https://www.thelawfareproject.org/whatwedo>.

<sup>127</sup> Booke Goldstein, “Speech Delivered by Brooke Goldstein at Fordham Law School on Lawfare & Combating the Goldstone Report,” The Lawfare Project, April 27, 2010, [https://www.thelawfareproject.org/analysis/2010/4/27/ispeech-delivered-by-brooke-goldstein-at-fordham-law-school-on-lawfare-combating-the-goldstone-reportibrthe-lawfare-project?rq=what is lawfare%3F](https://www.thelawfareproject.org/analysis/2010/4/27/ispeech-delivered-by-brooke-goldstein-at-fordham-law-school-on-lawfare-combating-the-goldstone-reportibrthe-lawfare-project?rq=what%20is%20lawfare%3F).

<sup>128</sup> Goldstein.

<sup>129</sup> Goldstein.

<sup>130</sup> Goldstein.

of LOAC and war crimes accusations. Throughout her writings, however, there is a very distinct theme. Lawfare and “legal jihad,” as considered by Goldstein, is a tool of radical Islam.<sup>131</sup> Goldstein ultimately elaborated on her definition by highlighting the true targets of lawfare. “[L]awfare is about more than just delegitimizing a state’s right to defend itself; it is about the abuse of the law and our judicial systems to undermine the very principles they stand for: the rule of law, the sanctity of innocent human life, and the right to free speech.”<sup>132</sup>

The Middle East Forum (MEF) is one of the organizations with which Goldstein explored and developed her idea of lawfare.<sup>133</sup> The MEF, however, was later characterized by the Center for American Progress as a “controversial far-right think tank that is known for its anti-Islam views and hawkish foreign policy recommendations.” Critics of Goldstein’s definition of lawfare suggested that it was a co-opting of the term, noting that the purely Islam-focused approach showed a neo-conservative agenda. “When references are made to the ‘hijacking’ of the term, the Lawfare Project is usually the chief culprit.”<sup>134</sup> Still, leading experts in the field of lawfare continue to cite her work in major research.<sup>135</sup> This is perhaps because, when decoupled from any particularly religious focus or conservative agenda, Goldstein’s lawfare has a heavy influence on the discussion and therefore the state of the art.

The Lawfare Blog is another authority on the subject of lawfare. The founders, Ben Wittes, Robert Chesney, and Jack Goldsmith, dedicated the website to the “nebulous zone in which actions taken or contemplated to protect the nation interact with the nation’s laws

---

<sup>131</sup> Heather Robinson, “Lawfare Conference Takes Aim at Terrorists’ Efforts to Wage ‘Legal Jihad,’” HuffPost, June 16, 2010, [https://www.huffpost.com/entry/lawfare-conference-takes\\_b\\_501381](https://www.huffpost.com/entry/lawfare-conference-takes_b_501381).

<sup>132</sup> Brooke Goldstein, “Lawfare: Real Threat or Illusion?,” The Lawfare Project, May 10, 2010, [https://www.thelawfareproject.org/analysis/2010/11/5/ilawfare-real-threat-or-illusionibrthe-lawfare-project?rq=what is lawfare](https://www.thelawfareproject.org/analysis/2010/11/5/ilawfare-real-threat-or-illusionibrthe-lawfare-project?rq=what%20is%20lawfare).

<sup>133</sup> Brooke M. Goldstein and Aaron Eitan Meyer, “‘Lawfare’ Gains Ground: U.N. Resolution on ‘Defaming’ a Case in Point,” Middle East Forum, May 19, 2009, <https://www.meforum.org/2138/lawfare-gains-ground>.

<sup>134</sup> Michael P Scharf and Elizabeth Andersen, “Is Lawfare Worth Defining - Report of the Cleveland Experts Meeting - September 11, 2010,” *Case Western Reserve Journal of International Law* 43, no. 1 (2010): 43, <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1141&context=jil>.

<sup>135</sup> F. Kittrie, *Lawfare: Law as a Weapon of War*.

and legal institutions.”<sup>136</sup> They adopted Dunlap’s definition of the term, however, they expanded upon it to suit their editorial focus on “Hard National Security Choices.” “The name Lawfare refers both to the use of law as a weapon of conflict and, perhaps more importantly, to the depressing reality that America remains at war with itself over the law governing its warfare with others.”<sup>137</sup> The result was a blog that covered a range of national security related topics. Many of these articles have little to no legal analysis or relevance to the topic of lawfare. As a result, the discourse surrounding the term has been further diluted over the past decade.

#### 2.4. A Semiotic Analysis of the Term Lawfare

Perhaps Dunlap’s simplification of lawfare in 2017 was due to the notoriety that the term enjoyed in the preceding sixteen years. It became popular and was revisited, applied to numerous concepts, and frequently redefined. This was so prevalent that, in September of 2010, Case Western Reserve University School of Law hosted a few dozen experts, to include General Dunlap, for a symposium to explore the concept of lawfare. The group started with Dunlap’s 2001 and 2005 definitions as a basis for understanding and framing the problem. This problem, they determined, was a lack of normative significance. “While lawfare does not yet appear in the Oxford Dictionary, the use of the term has proliferated exponentially in journalistic and academic circles, and so too has confusion about its meaning.”<sup>138</sup> They sought to determine the usefulness and appropriate application of the term in addition to building recommendations for its proper utilization.

In her analysis, Professor Susan Tiefenbrun offered a semiotic analysis of the word lawfare. She determined that the term is a “clever but potentially destructive play on words: both law and war enjoy power, and it is precisely this shared power that makes the

---

<sup>136</sup> Benjamin Wittes, “Welcome to Lawfare,” Lawfare: Hard National Security Choices Blog, September 1, 2010, <https://www.lawfareblog.com/welcome-lawfare>.

<sup>137</sup> “About Lawfare: A Brief History of the Term and the Site,” Lawfare: Hard National Security Choices Blog, accessed February 4, 2021, <https://www.lawfareblog.com/about-lawfare-brief-history-term-and-site>.

<sup>138</sup> Scharf and Pagano, “Foreward: Lawfare!”

use of lawfare such a dangerous weapon in modern asymmetrical warfare.”<sup>139</sup> She assessed that lawfare was a clever pun, neologism, and play on words and offered a definition of the term based generally on Dunlap’s 2001 proposal. With respect to international law, she asserted, lawfare is often described as “the abuse of the domestic and international courts in order to claim international law violations against the enemy.” She described this notion as an equally powerful and fearsome alternative to any conventional weapon of war. Within her analysis, Professor Tiefenbrun offered several techniques of lawfare, to include universal jurisdiction abuse, hate speech, libel tourism, lawfare to sway public opinion, misuse of legal terminology, and the filing of malicious lawsuits to silence the enemy. Ultimately, Professor Tiefenbrun identified sovereignty and the rule of law as the principal targets of lawfare and stated that this tactic is often used by guerillas and terrorists to gain a moral advantage, shape perceptions, or delegitimize a target state – primarily using international law.

“Domestic and international legal decisions influence public opinion, and laws of war affect the military’s entire approach to waging war. The abuse of the legal system, of human rights laws, and of humanitarian laws by lawfare undermines the overarching goal of world peace by eroding the integrity of the legal system and by weakening the global establishment and enforcement of the rule of law.”<sup>140</sup>

Professor Tawia Ansah suggested that lawfare offers practitioners the means of “interrupting and remaking the thought of law, within the shadow of the war paradigm under which we live.”<sup>141</sup> Dr. Gregory Noone analyzed the term through the paradigm of “strategic communications”<sup>142</sup> and considered Dunlap’s notion of lawfare’s ideological neutrality by exploring the existence of legitimate versus illegitimate lawfare. Other experts like Professor Leila Nadya and Jing Geng argued that “lawfare has no real fixed meaning, and its distorted usage has substituted careful analysis and discourse with a

---

<sup>139</sup> Tiefenbrun, “Semiotic Definition of Lawfare.”

<sup>140</sup> Tiefenbrun.

<sup>141</sup> Tawia Ansah, “Lawfare: A Rhetorical Analysis,” *Case Western Reserve Journal of International Law* 43, no. 1 (2010), <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1145&context=jil>.

<sup>142</sup> Gregory P Noone, “Lawfare or Strategic Communications?,” *Case Western Reserve Journal of International Law* 43, no. 1 (2010), <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1144&context=jil>.

fruitless - even dangerous - rhetorical debate.”<sup>143</sup> Georgetown law professor David Luban challenged this position when he argued that “the lawfare critique is no less abusive and political than the alleged lawfare it attacks.”<sup>144</sup> He clarified these comments by highlighting some concerns with Dunlap’s usage. “Although the term lawfare can be used purely descriptively, as General Dunlap does, it usually is not. Lawfare is a pejorative and polemical word. To accuse someone of lawfare is to accuse them of something sneaky.”<sup>145</sup>

Professor Michael Newton of Vanderbilt University contributed additional lawfare analysis. In his article titled *Illustrating Illegitimate Lawfare*, Newton investigated what Dunlap previously characterized as the abusive, malevolent, and malicious uses of the law. In other words, Newton sought specifically to address the misuse aspect of Dunlap’s revised definition of lawfare. He asserted that “the illegitimate exploitation of the law in turn permits the legal structure to be portrayed as a means of indeterminate subjectivity that is nothing more than another weapon in the moral domain of conflict at the behest of the side with the best cameras, biggest microphones, and most compliant media accomplices.”<sup>146</sup>

Ultimately, General Dunlap re-visited his term and acknowledged the controversial nature of lawfare, the arguments of its supporters and critics, and doubled-down on his conceptualization. “[L]awfare is best appreciated in the context of its original meaning as an ideologically neutral description of how law might be used in armed conflict.”<sup>147</sup> Furthermore, he added that “although law may be manipulated by some belligerents for nefarious purposes, it can still serve to limit human suffering in war.”<sup>148</sup> He concluded

---

<sup>143</sup> Leila Nadya Sadat and Jing Geng, “On Legal Subterfuge and the So-Called ‘Lawfare’ Debate,” *Case Western Reserve Journal of International Law* 43, no. 1 (2010), <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1148&context=jil>.

<sup>144</sup> Scharf and Pagano, “Foreward: Lawfare!”

<sup>145</sup> David Luban and Carl Schmitt, “Carl Schmitt and the Critique of Lawfare,” *Case Western Reserve Journal of International Law* 43, no. 1 (2010), <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1165&context=jil>.

<sup>146</sup> Newton, “Illustrating Illegitimate Lawfare.”

<sup>147</sup> Dunlap, “Does Lawfare Need an Apologia?”

<sup>148</sup> Dunlap.

that lawfare remains a useful term, particularly as intended, “to educate non-specialists how law can serve as a positive good in modern war as a nonviolent substitute for traditional arms.”<sup>149</sup>

## 2.5. Bartman’s Definition of Uniquely Russian Lawfare

Dr. Christi Scott Bartman defined lawfare as “the manipulation or exploitation of the international legal system to supplement military and political objectives legally, politically, and equally as important, through the use of propaganda.”<sup>150</sup> This definition departed from previously accepted definitions, Dunlap’s in particular, by narrowing her focus to the international legal system. However, she also broadened the criteria for lawfare by breaking from the purely military application to include the pursuit of political objectives. Finally, she was the first to mention propaganda in her definition. To explore this alternative definition of lawfare, Bartman analyzed the Soviet’s 20th century spearheading of efforts to define the notion of aggression under international law. She argued that the Soviet Union (and now Russian Federation) abused treaties as a form of state manipulation to achieve military and political objectives by justifying the use of force. “They also continued to operate on a dual front, both legally in international bodies and through international law, and illegally or quasi-legally, when they manipulated the system to supplement their military agenda.”<sup>151</sup> She surmised that, in Soviet practice, international law existed as an instrument to program the behavior of states.<sup>152</sup>

Dr. Bartman subsequently highlighted numerous non-aggression and good-neighborliness pacts between the Soviet Union and its neighbors like Finland, Latvia, and Poland in 1932. Perhaps the greatest early milestone was the previously discussed Convention for the Definition of Aggression signed in London in 1933. It formally defined

---

<sup>149</sup> Dunlap.

<sup>150</sup> Bartman, “Lawfare and the Definition of Aggression: What the Soviet Union and Russian Federation Can Teach Us.”

<sup>151</sup> Bartman.

<sup>152</sup> Bartman.

aggression with familiar terms and phrases such as declaration of war, invasion, naval blockade, and support to armed bands while stipulating that no political, military, economic, or other excuses may justify aggression. The USSR and several other nations signed this convention. Bartman then discussed how this definition was used as justification to violate these pacts by using propaganda to create a false flag *casus belli*. For example, in Finland a cross-border mortar attack was staged to justify armed intervention. Then, calling it a civil war, the USSR created and then chose to support a socialist puppet-regime within the country. The Winter War of 1939-40, as it was called, ultimately resulted in the USSR's expulsion from the League of Nations. One may consider this a victory for the international rule of law, however, Bartman adeptly noted that the USSR ultimately received everything that it wanted with 11% of Finland's territory absorbed as part of the Moscow Peace Treaty. Other faux justifications included using the Warsaw Pact to justify collective defense in Hungary in 1956, or Article 51 of the United Nations Charter to justify its invasion of Afghanistan in 1979. The verbiage of the Soviet-led definition of aggression was ultimately adopted in the 1974 UNGA resolution 3314 (XXIX), which formally defined the term. She asserted that the Soviet-led definition of aggression "codified into itself" the loopholes that it aimed to close. "[W]e face the paradox that the closing off of 'loopholes' and 'pretexts' hailed by the Soviet Union as the great achievement is precisely what the definition did not achieve...to maximize the value of the definition to themselves as an instrument to be invoked in support of their own political objectives, or to minimize its value as an instrument invoked by others against themselves. On this alternative hypothesis, the definition is envisaged, above all, as an instrument of political warfare."<sup>153</sup>

Dr. Bartman also offered an overview of lawfare practices of the Russian Federation, noting that this strategy had more in common with that of the Soviet Union than differences. For example, she noted that the Russian Federation adopted the crime of

---

<sup>153</sup> Christi Scott Bartman, *Lawfare: Use of the Definition of Aggressive War by the Soviet and Russian Federation Governments* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2010).

aggression into its national law, which allowed it to circumvent certain aspects of international law by leveraging the principle of complementarity. Rather than using socialist internationalism as a pretense for aggression as the Soviets did, the Russian Federation went on to use the protection of Russian citizens and diaspora, as it did in Chechnya, to justify aggression and avoid accountability under international law. Even this excuse, however, was the reincarnation of the Soviet playbook, which cited the protection and self-determination of “brother slavs” as justification for the 1939 invasion of Poland despite the binding Soviet-Polish non-aggression pact of 1932. In 2010, the Review Conference of the Rome Statute formally defined the term aggression as initially advocated for by the Soviet Union and ultimately adopted in UNGA resolution 3314. However, Article 17 of the Statute stipulates that the ICC may only exercise jurisdiction over a crime when the state is unwilling or unable to investigate or prosecute. Codifying aggression into its criminal code allowed the Russian Federation to claim complementarity, to “investigate” crimes of aggression, and to “prosecute” as it saw fit. In this sense, Bartman concluded that the Russian Federation pursues the same Soviet strategy of building and exploiting loopholes for international law.

## 2.6. Kittrie’s Lawfares: Instrumental and Compliance-Leverage Disparity

Professor Orde Kittrie suggested in 2010 that the U.S. is not sufficiently employing legal mechanisms against its adversaries. Kittrie subscribed to Dunlap’s definition to support his arguments, but elaborated on the concept to include two primary forms of lawfare: (1) battlefield tactics designed to gain advantage from the other side’s greater allegiance to international law, and (2) use - or misuse - of legal forums to achieve operational objectives traditionally achieved by military means. He also included a few caveats, the first being that an incident of lawfare must be the instrumental application of the law as a replacement for what would otherwise be a physical attack on a military target. The second caveat is that the lawfare practitioner must intend to “weaken or destroy

an adversary against which the lawfare is being deployed.”<sup>154</sup> One example of this narrowed definition offered by Kittrie is the MV *Alaed*, a Russian vessel dispatched to deliver attack helicopters to Syria in an effort to bolster the Assad regime during the country’s civil war. Rather than using force, which would have ended in an international incident, the United Kingdom (U.K.) elected to contact the ship’s insurance provider, London’s Standard Club. They convinced the company to withdraw coverage due to the ship’s breach of sanctions and an active arms embargo. Ultimately, the MC *Alaed* was left with no choice but to turn back towards Russia. The U.K. was successful, and Kittrie considers this to be the instrumental use of the law in-lieu of a kinetic strike on a target.<sup>155</sup>

In dissecting the first form, Kittrie noted that the advantages sought by adversaries were both tactical, by constraining the adversary, and strategic, by spreading damaging narratives in the adversary country to negatively shape public perceptions. He utilized an often-cited example of lawfare to shape his argument: non-state actors in Muslim countries firing at an enemy from a minaret or some other protected religious site. Not only do these tactics offer protection and give pause to the adversary, but imagery and subsequent public relations victories are afforded in the event of a retaliatory strike – regardless of legality under the international LOAC. He specifically addressed the notion that those who fire from amongst civilians or place civilians in cages around military targets, are simply violating international law and nothing more. Kittrie acknowledged this, but asserted that the advantage gained by manipulating an adversary’s adherence to certain self-imposed rules or norms deserved further study.

Kittrie’s second form of lawfare addressed the application of legal mechanisms such as the FARC guerilla group in Columbia accusing adversarial military commanders of human rights violations. Under Columbian law, the commander must be stripped of all responsibilities and hire their own legal counsel without government assistance. The implications are obvious, and such a system allows FARC leaders to impose significant

---

<sup>154</sup> F. Kittrie, *Lawfare: Law as a Weapon of War*. 8.

<sup>155</sup> F. Kittrie. 2.

cost and risk on the Columbian military. Another example is Hezbollah employing a policy of suing Israeli leaders wherever possible and with such frequency that the Israeli military would be left “beleaguered and perplexed.”<sup>156</sup> Hamas employed a similar tactic by leveraging domestic law in the United Kingdom. Following the 2008 Gaza war, the Israeli Foreign Minister was forced to cancel a meeting in London after Hamas utilized a legal mechanism allowing individuals to apply for arrest warrants for war crimes without legal assistance.

Kittrie elevated the discussion of holding an adversary hostage with their own principles when he established a framework to more closely study this concept. He asserts that lawfare takes two distinct forms; Instrumental Lawfare and Compliance-Leverage Disparity Lawfare. He defines the first as “the instrumental use of legal tools to achieve the same or similar effects as those traditionally sought from conventional kinetic military action,”<sup>157</sup> and the second as “lawfare, typically on the kinetic battlefield, which is designed to gain advantage from the greater influence that law, typically the law of armed conflict, and its processes exerts over an adversary.”<sup>158</sup> Dunlap’s definition sought to contain both of these concepts in one overarching term, however, Kittrie saw fit to differentiate them so as to better understand them.

Kittrie uses the PRC to illustrate compliance-leverage disparity lawfare. He highlights nuclear non-proliferation treaties as a preeminent example of the PRC’s practice of agreeing to binding legal obligations in exchange for a specific benefit while simultaneously violating the legal obligation through covert means. His primary case study is the PRC’s abuse of the Nuclear Nonproliferation Treaty (NPT). As a signatory, the PRC received advanced dual-use technologies while simultaneously selling critical materials for Iran’s uranium enrichment and missile development programs through private companies. The PRC used these private companies as plausible deniability to

---

<sup>156</sup> Orde F Kittrie, “Lawfare and U.S. National Security,” *Case Western Reserve Journal of International Law* 43, no. 1 (2010), <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1162&context=jil>.

<sup>157</sup> F. Kittrie, *Lawfare: Law as a Weapon of War*, 8.

<sup>158</sup> F. Kittrie, *Lawfare: Law as a Weapon of War*, 11.

avoid accountability to the NPT. Furthermore, Kittrie states, the PRC's purported observance of the NPT legitimizes the treaty itself, ensuring that the international legal mechanism endures as the PRC's covert violations continue.

Kittrie's work lays a critical foundation for the notion Malign Legal Operations. However, there are some concerns created by Kittrie's conceptualizations of lawfare. First, if an act must be the use of the law in-lieu of a kinetic military strike to constitute lawfare, then there must be an accurate assessment of intent. Without an admission from the practitioner, however, there can be no certainty as to whether the intent would be to engage a particular target kinetically or through numerous other methods if a specific lawfare tactic were not possible. The previous case of the PRC's manipulation of the NPT is a prime example. They manipulated the Non-Proliferation Treaty as a matter of convenience. Joining allowed them to reap the technological benefits of membership and maintain strategic predictability in their adversaries. Had this manipulation not been possible, there is no evidence that they would have resorted to violent action in order to secure the technology or to covertly provide technology to Iran. So, technically speaking, Kittrie's PRC example of lawfare does not meet his own definition. The same can be said of his chapter dedicated to U.S. financial lawfare against Iran to thwart their nuclear ambitions and deter their support to terrorist organizations. There is no undeniable evidence that the United States would have conducted military strikes against Iran had its so-called financial lawfare campaign failed. Furthermore, there are numerous alternatives to kinetic strikes in the modern military arsenal. The Stuxnet cyberweapon, for example, significantly damaged Iran's nuclear program between 2008 and 2010.

## 2.7. Value-Neutrality Conclusions: The use and misuse of lawfare

In a 2018 journal article about lawfare within military discourse, Freya Irani noted significant disagreements surrounding the definition of the term, particularly with respect to its use by liberal states in comparison to states that employ the law in an inherently

negative way. He noted that Kittrie’s compliance leverage disparity lawfare is viewed by some, including Kittrie, as just one form of lawfare. Other authors, however, view it as the one and only acceptable meaning of lawfare. “These latter writers have a narrower understanding of lawfare. For them, all lawfare is ‘designed to gain advantage from the greater influence that law and its processes exerts over an adversary’: as such, all lawfare is practiced against (more law-abiding) liberal states. For such authors, the instrumental use of law by Western states (which Kittrie would define as ‘instrumental lawfare’) should not be defined as lawfare at all.”<sup>159</sup>

As discussed, Dunlap belongs to the group that sees lawfare as a mere instrument to be used for good or evil. An example of lawfare being used as Dunlap opined, in accordance with the higher virtues of the rule of law, is the United States purchasing the commercial rights to detailed satellite imagery of Afghanistan in 2001 so that it could not be used by the Taliban or Al-Qaida in military operations. Rather than invoking shutter control procedures, which allows the U.S. government to restrict commercial uses of satellite to protect national security, the government elected to resolve the issue by contract. It purchased exclusive rights to all imagery of Afghanistan taken by Space Imaging, the operator of the Ikonos satellite.<sup>160</sup> This kept the valuable imagery out of the hands of the Taliban and Al Qaeda. Dunlap is careful throughout his literature to clarify that lawfare is not intrinsically evil, but rather it can - and should - be used as a substitute for force when appropriate. “Lawfare is much like a tool or weapon that can be used properly in accordance with the higher virtues of the rule of law – or not. It all depends on who is wielding it, how they do it, and why.”<sup>161</sup> In this sense, he suggests, lawfare is not only right, but proper.<sup>162</sup>

---

<sup>159</sup> Freya Irani, “‘Lawfare’, US Military Discourse, and the Colonial Constitution of Law and War,” *European Journal of International Security* 3, no. 1 (2018): 113–33, <https://doi.org/10.1017>.

<sup>160</sup> Duncan Campbell, “US Buys up All Satellite War Images,” *The Guardian*, 2001, <https://www.theguardian.com/world/2001/oct/17/physicalsciences.afghanistan>.

<sup>161</sup> Charles J. Dunlap Jr., “Lawfare Today: A Perspective,” *Yale Journal of International Affairs*, no. Winter Issue (2008): 146–54, <http://yalejournal.org/wp-content/uploads/2011/01/083111dunlap.pdf>.

<sup>162</sup> Brad Fisher, “The Kremlin’s Malign Legal Operations on the Black Sea: Analyzing the Exploitation of PIL Against Ukraine,” *Kyiv-Mohyla Law and Politics Journal* 5 (2019): 193–223.

Those in agreement with Dunlap believed that viewing the term as neutral allowed activities that employed the law properly, or as intended, to be considered lawfare as well. The result, they opined, was a rush to the courtroom rather than the battlefield. They purported that any semantic opportunity to disincentivize armed conflict should be embraced and widely distributed. Furthermore, viewing the term only in the context of “misuse” of the law could negatively impact public opinion of international law itself. Lawfare, they feared, would “instill fear of international law in the American public...[lawfare would] become a code word for all things bad and mushy about international law.”<sup>163</sup> Some even favored removing the word “misuse” from the definition, narrowing its scope to only the positive use of the law in-lieu of military means. “[M]isuse implies the objective or the motive of the person using it, saying that you can’t use law if you are a bad guy...bad guys can legitimately use law just like good guys can...so I wouldn’t use the word ‘misuse’ at all.”<sup>164</sup> This sentiment was later supported as several participants mostly dismissed the threat posed by the misuse of the law against military operations. “[I]f stronger international legal institutions cause militants to rush to court instead of rushing to war, then international law is successfully mitigating the violence and bloodshed of war...”<sup>165</sup> Still others clarified that “misuse” should be included in the definition, but only for contentious issues or underdeveloped areas of the law.

Those who opposed a value-neutral understanding of lawfare in favor of a purely negative connotation of the term to describe the “misuse” of the law put forth numerous arguments. It was understood that, in practice, and particularly among those that the experts deemed “hijackers” of the term lawfare, there was a common theme that the term had a distinctly negative meaning. “[T]he academy has lost the initiative and would be fighting a futile cause in trying to recapture the concept as a neutral term...‘lawfare’ has

---

<sup>163</sup> Scharf and Andersen, “Is Lawfare Worth Defining - Report of the Cleveland Experts Meeting - September 11, 2010.”

<sup>164</sup> Scharf and Andersen.

<sup>165</sup> Scharf and Andersen.

morphed into and will remain a term describing perceived wrongful uses of the law to achieve political or military ends.”<sup>166</sup> They concluded that a new term would be necessary to capture the “positive” uses of lawfare rather than maintain that the term holds a neutral meaning. Furthermore, most participants believe that the definition should revolve around how the term is used in practice, which is as a distinctly negative manipulation or exploitation of the law for strategic gain, rather than forcing the definition to conform to what the academy thought that it ought to be. To highlight this fact, the group used the example of the U.S. Treasury department undertaking complex legal outreach campaigns to disincentivize banks from cooperating with state sponsors of terrorism, such as Iran. Those in this camp questioned whether these value-positive applications of the law should be considered lawfare or if it is simply the clever application of the law. Dr. Bartman suggested the defining principle of lawfare is that it is inherently manipulative or exploitative. “Simply utilizing the international legal system to enforce valid laws would also not be considered lawfare...The state that claims the United States violated international law under a given valid circumstance would be making a legal claim, therefore not manipulating the system, but simply seeking redress for a legal wrong.” It was purely the misuse, not the use, that Bartman thought deserved a unique term and more dedicated study. “This is not the legal application of international law, this is the preemption of international law.”<sup>167</sup>

Professor Newton circumvented this debate by narrowing his focus to illegitimate lawfare, insinuating that there must be such a thing as legitimate lawfare and that they should be divided to never be confused with one another. “[T]he term ‘lawfare’ should never be automatically conflated with the legitimate use of legal forums to vindicate and validate binding legal norms when they are in danger of being overwhelmed or replaced for the sake of expediency of political convenience.”<sup>168</sup> This explanation referenced the

---

<sup>166</sup> Scharf and Andersen.

<sup>167</sup> Scharf and Andersen.

<sup>168</sup> Newton, “Illustrating Illegitimate Lawfare.”

use of the word lawfare to discredit completely legitimate legal claims, which others in the conference referred to as a hijacking of the term.

Ultimately, experts have yet to reach any definitive conclusion as to the efficacy of the term lawfare. Mr. Andres Munoz Mosquera, the principal legal advisor to NATO's Supreme Allied Commander, Europe, argues that the use and misuse of lawfare can be summarized by the qualifying adjectives zeusian and hadesian. "A parallelism may be used with the eternal fight between good and evil represented by that of Zeus and Hades. Lawfare, as the use of law as a weapon, highlights this: if used to distort the rule of law's leading principles and underpinnings, it would qualify as Hadesian, if used to reaffirm and strengthen the principles of law, it would be Zeusian."<sup>169</sup> In creating these qualifiers, Munoz Mosquera placed himself with those that believe the term lawfare, by itself, cannot be value-neutral and requires additional qualifiers. His contribution is unique because it allows lawfare to remain a viable term as long as it is qualified as either zeusian or hadesian. The problem remains, however, that zeusian and hadesian lawfare are not simply two sides of the same coin – they are entirely different paradigms. Zeusian lawfare, using Munoz Mosquera's qualifiers, would be cleverly applying existing law to achieve desired battlefield results without requiring combat operations. Not only is this preferred because it potentially prevents loss of life, but utilizing legal mechanisms in this way exercises the legal system and therefore buttresses the rule of law. Hadesian lawfare, then, is the malicious application of the law in bad faith or in ways that were not originally intended by the law. Treaty abuse is one of Munoz Mosquera's examples. In doing this, practitioners are effectively eroding the rule of law altogether.

Mr. Munoz Mosquera and a small team dedicated to studying and building awareness of lawfare offered their own definition of this phenomenon in 2019 with their conceptualization of legal operations (no relation to Malign Legal Operations): "The (ab)use of law by actors to either legitimize their own actions, positively impact their

---

<sup>169</sup> Andres B. Munoz Mosquera and Sascha Dov Bachmann, "Lawfare in Hybrid Wars: The 21st Century Warfare," *Journal of International Humanitarian Legal Studies* 7, no. 1 (2016): 63–87, <https://doi.org/10.1163/18781527-00701008>.

capabilities, or prop-up its strategic interests; or to delegitimize the actions of their opponents, negatively impact their capabilities or undermine its strategic interests.”<sup>170</sup>

This definition addresses numerous problems in the study and understanding of legal manipulation. First, it avoids the controversial term lawfare altogether, noting the impracticality of the term. “[T]his definition, which has been extensively commented on and developed in academia, does not have in itself a practical application to security and defense activities, planning and conduct of operations, neither in a conventional confrontation nor in a context of hybrid threats.”<sup>171</sup> This important step alleviates the decades of debate over the scope and scale of the term in addition to the political hijacking of the phrase over the years. Despite this, the NATO team’s vernacular still includes terms like lawfare and malign lawfare, which indicates two things. First, the team is hesitant to do-away with the term lawfare despite an apparent impression that it is unhelpful and counterproductive. Second, the team uses descriptors like malign lawfare to reinforce Dunlap’s value neutral concept of the term. This study has so far shown that there can be no normative comparison between malign legal manipulation (hadesian) and the intended use of the law (zeusian) by using the same word. This fact is precisely why NATO’s definition for legal operations was not adopted by this study.

NATO’s definition of legal operations is deliberately not used for some of the same reasons that lawfare was identified as unhelpful. As discussed, it is the neutrality of the term that weakens its utility. Furthermore, it is one simple prefix in the NATO definition that made the definition unusable to this research: “(ab)use of law.” These two things (use and abuse) should not exist under the same umbrella term, because righteous lawfare or legal operations will rarely, if ever, defeat malign lawfare or legal operations. Scrupulous actors can scarcely win a competition against unscrupulous adversaries that have no

---

<sup>170</sup> NATO ACO Office of Legal Affairs, “Exeter Conference on Legal Resilience: Decoding Gray Zone Environments and the Path to Legal Resilience,” 2019.

<sup>171</sup> NATO ACO Office of Legal Affairs.

regard for rules and established norms. As such, these behaviors should not share the same title.

The use of the law as an instrument within the confines of applicable legal frameworks and instruments is just that – using the law fully as intended. This behavior deserves no unique title or moniker and should be a critical planning factor in any military, diplomatic, or other international engagement. As a result, NATO’s definition is too broad to achieve normative significance and, effectively, any use of the law at all can be construed as legal operations. It is precisely why this study did not adopt Dunlap’s lawfare, any other conceptualization of lawfare, or NATO’s legal operations. Whether due to controversy surrounding a particular term, definitions that are broad beyond meaningful application, terms that are too narrowly scoped, or due to the unhelpful inclusion of both scrupulous applications of the law and malign manipulation under the same definition, this author was required to create a new term to address the growing conflict both with and within legal domains. As such, this study proposes the term malign legal operations (MALOPs).

Ultimately, the debate over lawfare’s value neutrality is complicated. What can be said with certainty is that the term is insufficiently defined to support Dunlap’s claim of value neutrality, and keeping it this way creates more questions than answers. Using the same word to describe both the legitimate application and malign manipulation of the law provides an incredible advantage to malign practitioners, primarily in the form of logical fallacies and linguistic traps. For example, Ukraine’s recent effort to address Russian aggression and legal manipulations through the new lawfare.gov.ua website enables Russia to accuse Ukraine of the same behavior it purports to fight against. Ukraine is attempting to employ strategic litigation and public diplomacy under the guise of lawfare, which it claims Russia employs maliciously. This is a tu quoque logical fallacy, wherein criticism is answered with criticism and an argument is turned back on the claimant. The dual-meaning of lawfare enables Russia to employ this tool effectively.

## 2.8. Conclusion: The Notion of Lawfare is Obsolete

“Lawfare fails to capture the instrumentalization of law beyond armed conflict and for purposes other than strictly military gains.”- Dr. Aural Sari <sup>172</sup>

This chapter explored the many perceptions of lawfare as the term developed from General Dunlap’s early definition in 2001 to modern conceptions of the term in 2021. It has been applied to everything from terrorist activities abroad to legitimate legal claims in courtrooms to outright violations and treaty abuse. This chapter sought to demonstrate lawfare’s inability to describe modern manipulations of legal domains, particularly as a state practice. Susan Tiefenbrun’s semiotic analysis of the term showed that the term is both a clever pun and a dangerous combination of two words that derive their meaning from power; one through order and the other violence. This detailed analysis was necessary to establish that the term was critical to elevate discourse and establish that a new paradigm is necessary to evaluate modern legal manipulations. General Dunlap laid the groundwork for decades of critical research and discussion, to include this research, yet one must also acknowledge the reason that he created the term lawfare. “I wanted a ‘bumper sticker’ term easily understood by a variety of audiences to describe how law was altering warfare.”<sup>173</sup> Now, over twenty years later, it is clear that lawfare has run its course. Dunlap was successful, as without such a term even this research would not have been possible. States and actors are vying for influence not just through clever (mis)uses of the law, but they are vying for influence over the law itself. All of this disparate research shows that there is no consensus amongst practitioners or the academy as to what normative definition, if any, can be applied to the term lawfare. It has grown to mean everything and, as a result, is diluted to the point of meaning nothing at all.

---

<sup>172</sup> Sari, “Legal Resilience in an Era of Gray Zone Conflicts and Hybrid Threats.”

<sup>173</sup> Dunlap Jr., “Lawfare Today: A Perspective.”

While lawfare is well served as a colloquial “bumper sticker” or political term to describe this phenomenon, even the term itself is a misattribution of the term warfare. As discussed in Chapter 1, Carl Von Clausewitz was a nineteenth century Prussian general and military theorist who is often cited by lawfare researchers. The same argument used against hybrid warfare in Chapter 1 with the Clausewitzian notion of war can be applied to lawfare. As a reminder, one must limit the term war as an act of force and nothing else. “There is only one means in war: combat.”<sup>174</sup> Clausewitz established that “war is thus an act of force to compel our enemy to do our will.” As such, the term lawfare is a contranym. It is a portmanteau of the words law and warfare that essentially describes the employment of legal mechanisms as a substitute for warfare. Stated more clearly, the portmanteau lawfare includes a word that contradicts the very meaning of the term. As such, this portmanteau of law and warfare is a contranym and therefore a doctrinally inappropriate term for use in any normatively significant way outside of General Dunlap’s original “bumper sticker” intent.

Finally, using any single term, such as lawfare, to describe both the proper use of the law and the malign exploitation of the law is damaging to contemporary discourse and detracts from legitimate efforts to combat the malicious manipulation of legal systems. Value neutrality has been a hotly debated subject amongst lawfare researchers since Dunlap first introduced the term. He and many others remain adamant that, like any weapon, lawfare is only bad if used badly. Others held firm that lawfare cannot describe both hadesian and zeusian acts because one upholds and strengthens the rule of law while the other undermines it altogether. Using this one term to describe the U.S. purchase of satellite imagery to keep it away from the enemy while at the same time using it to describe Russia’s employment of disinformation, faux legal arguments, and subversive legal rhetoric to build a quasi-legal case for the annexation of Crimea is disingenuous and damaging to any normative use of the term. To call both the U.S. and Russia “lawfare

---

<sup>174</sup> Clausewitz, *On War*.

practitioners” in these examples, as many continue to do, poisons the well of constructive discourse. Using this example, when illegitimate lawfare practitioners (Russia, in this case) accuse or counter-accuse legitimate practitioners (U.S., in this case) of employing the same malign tactics, it creates negative imagery in the mind of the observer. The lack of a normative definition for lawfare in conjunction with the argument that it is a value neutral term creates a scenario whereby the term can be weaponized against those who seek to employ lawfare in the zeusian sense. Perhaps Professor Newton said this best in his observation of lawfare’s inexactitude. “The concept of ‘lawfare’ remains captive to terminological imprecision that threatens to erode its utility as a guiding principle...the term ‘lawfare’ should never be automatically conflated with the legitimate use of legal forums to vindicate and validate binding legal norms when they are in danger of being overwhelmed or replaced for the sake of expediency or political convenience.”<sup>175</sup>

This chapter achieved three primary objectives to support the case for Malign Legal Operations, which in the next chapter will be established as a new and particularly effective paradigm through which to consider the fields of PIL, international relations, military theory, and diplomacy. First, it established that there is no single accepted meaning for the term lawfare. Second, it proved that even the question of value-neutrality remains unanswered, and a truly value-neutral term is counterproductive and easily misappropriated by malign actors. Finally, it showed that even the word lawfare is a non-doctrinal contranym. While Dunlap’s “bumper sticker” was critical to enabling vitally important discourse surrounding this topic over the past two decades, lawfare is no longer an appropriate term to describe these phenomena.

---

<sup>175</sup> Newton, “Illustrating Illegitimate Lawfare.”

## **CHAPTER 3.**

### **The Theory of Malign Legal Operations (MALOPs)**

#### 3.1. Introduction

The previous chapters built two very important arguments. Chapter one established that the present international status quo, which depends on the consent of powerful nations, does not align with the interests of major powers such as revisionist China and revanchist Russia. Furthermore, a majority of the neighborhood of nations refuses to accept that the RBIO has changed from the U.S.-lead post-Cold War liberal order. In a sense, much of the world is living in denial as the previous order is carved up by those in pursuit of influence and control. What exists now is a multi-polar world with several ideologically-driven bounded orders. These ideological differences are used as justification for the manipulation of legal domains to achieve political, and subsequently military, objectives. Whether jihadists utilizing human shields and shooting from protected religious sites or great powers using quasi-legal arguments to support violations of sovereignty and expeditionary operations, there exists a crisis of international law. Chapters 1 and 2 established and reinforced that the terms used to describe this reality, lawfare and hybrid warfare, are insufficient.

What is inexplicably missing today, and what Professor Bartman alluded to in her brand of lawfare, is the conceptual pivot from counterterrorism and non-state actors to the manipulation of legal domains by powerful nations, particularly those with nuclear weapons. To fill this niche, this research offers Malign Legal Operations as a theoretical model to both identify and address such behavior. Before delving into this new theory, it is necessary to first discuss a definition offered by NATO Supreme Headquarters Allied Powers Europe's Office of Legal Affairs called Legal Operations. Both of these notions fall short of providing a theoretically sound accounting of 21st century legal manipulations, however, they represent a clear departure from previous definitions and

therefore warrant exploration here in Chapter 3 as the foundation of Malign Legal Operations.

Following an assessment of these final two definitions, Chapter 3 will consider an existing, and indeed actively practiced, form of legal manipulation by the People's Republic of China known as Legal Warfare. This analysis is critical because it is an existing, admitted, and widely observable example of modern legal manipulation by a revisionist state-actor. In this case, the South China Sea example will be reviewed in-depth to identify the legal manipulations and associated disinformation. Finally, Malign Legal Operations will be formally introduced as the novel theory to account for the major concerns highlighted in Chapter 1 and major shortfalls noted in Chapter 2. This includes the six major tenants of MALOPs: disinformation; containment; legitimacy; lacunae; loopholes; and influence. With the definition of MALOPs formally presented, the final section of this chapter will explore the most common exploited principles, at least within PIL.

Chapter 3 contains one primary assertion: that Malign Legal Operations offers a consolidated theory for international legal academics, practitioners, policy experts, military leaders, and politicians to fully comprehend and account for the malign exploitation of legal domains. As such, this research suggests that no other definition fully captures the subtlety and duplicitous nature of this behavior. Some definitions are too vague or too narrowly scoped, others claim to be value-neutral when the entire nature of law rests upon certain values, and still others attach themselves to broadly defined abstracts of conflict, such as hybrid warfare, ultimately resulting in questionable theories that do more harm than good to the field of international relations and conflict studies.

## 3.2. Legal Warfare as State Doctrine

### 3.2.1. The Chinese Communist Party

In her analysis of Russian lawfare, Dr. Bartman paid special attention to Chinese unrestricted warfare and the strategy of so-called “non-military war.” She highlighted that the principle objective of unrestricted warfare is to leverage asymmetries by mitigating an opponent’s superior military advantage through the exploitation of weaknesses. Kittrie’s section on the CCP’s lawfare noted a speech from Chinese President Jiang Zemin to Chinese international law experts in 1996 wherein he reinforced that “we must be adept at using international law as a weapon.”<sup>176</sup> Kittrie aptly noted that this philosophy pre-dates unrestricted warfare by several thousand years. It was Sun Tzu that first said “defeating the enemy without fighting is the pinnacle of excellence.”<sup>177</sup> Another substantial contributor to this discussion is Mr. Andres B. Munoz Mosquera, the legal advisor to NATO’s Supreme Allied Commander and the head of NATO’s Office of Legal Affairs. He was first introduced in Chapter 2 and noted that the PRC takes a transactional cost-benefit approach to legal systems rather than pursuing some higher virtue, concluding that unrestricted warfare seeks to “remove the effectiveness of the invisible boundaries which are acknowledged by the international community – a community that abides by those rules, i.e, Rules Based International Order.”<sup>178</sup> Munoz Mosquera and his co-author, Nikoleta Chalanouli, highlighted in a 2020 post on General Dunlap’s blog Lawfire that the CPP is committed to gain “legal muscle in order to better support efforts to gain legitimacy for its views about the practice of international law and, eventually, to shape the RBIO in its favor.”<sup>179</sup> They cited Chinese legal scholars, particularly in the study of UNCLOS, who advocated the need to “actively participate in the formulation of

---

<sup>176</sup> F. Kittrie, *Lawfare: Law as a Weapon of War*. 161

<sup>177</sup> F. Kittrie. 161

<sup>178</sup> Andres B. Munoz Mosquera and Nikoleta Chalanouli, “Guest Post: Andrés Munoz Mosquera’s and Nikoleta Chalanouli’s Essay: ‘China, an Active Practitioner of Legal Warfare,’” Lawfire, February 2, 2020, <https://sites.duke.edu/lawfire/2020/02/02/guest-post-andres-munoz-mosqueras-and-nikoleta-chalanoulis-essay-china-an-active-practitioner-of-legal-warfare/>.

<sup>179</sup> Munoz Mosquera and Chalanouli.

rules to safeguard China's maritime rights and interests.”<sup>180</sup> Another example involves a position paper submitted by China to the U.N. in 2016 that referenced international law as the basis for placing oil extraction equipment within Vietnam's territorial waters. According to Mosquera and Chalanouli, the paper went unchallenged despite being well outside the bounds of UNCLOS. While China was forced to change its position, it still won a strategic victory and ever-so-slightly nudged the accepted interpretation of UNCLOS in a more favorable way for China.

This doctrine of manipulation did not develop immediately after the introduction of unrestricted warfare. In fact, it was not for several years after the book was published in 1999 that the first semblance of a strategy of legal manipulation took shape. In 2003, the PRC published a document titled “Political Work Regulations of the Chinese People's Liberation Army.” It mentioned a new PLA doctrine for non-military war called the “three warfares” (san zhan); psychological, media, and legal warfare. Dean Cheng, a senior research fellow of the Davis Institute for National Security and Foreign Policy's Asian Studies Center, offered a detailed analysis of this phenomenon in 2012. “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, and making arguments for one's own side in cases where there are also violations of the law.”<sup>181</sup> According to Chinese doctrine, the tools of this legal warfare are legislation, judicial law, legal pronouncements, law enforcement, and legal education. These tools are implemented during offensive actions, defensive actions, legal deterrence, legal counterattack, legal binding, consolidating gains made during a war, and perhaps most influential is the employment of legal warfare in preparation for hostilities. Cheng further quoted the Chinese doctrine in highlighting the importance of this legal preparation. “[S]uch a preemptive legal strike can weaken opposing 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

---

<sup>180</sup> Munoz Mosquera and Chalanouli.

<sup>181</sup> Cheng, “Winning Without Fighting: Chinese Legal Warfare.”

exciting one's own military and civilian passions and obtaining international sympathy and support.”<sup>182</sup> As stated by Colonels Liang and Xiangsui in *Unrestricted Warfare*, the objective is to seize “the earliest opportunity to set up regulations.”<sup>183</sup> Mosquera and Chalanouli reaffirmed this definition with their assertion that holding the legal initiative and shaping legitimacy are the quintessential objectives of the PRC's legal warfare. “China's strategy to conquer the perceptual domain is advanced by getting into legal disputes and engaging in legal struggles with the aim of achieving the international legal initiative. This is done with the explicit intent to achieve ‘legal principle superiority’ and moral high ground by citing legal precedents that are artificially developed and Chinese-created.”<sup>184</sup>

Another unique aspect of legal warfare is the way in which the PRC utilizes academia to shape legal domains. Mr. Cheng noted that Chinese legal experts do not just master Chinese and international law, but the laws of other nations to identify weaknesses and potential levers for exploitation. “Legal warfare has been started by China too at the courts of the United States by filing legal motions in American courts aimed at delaying any United States' denial activities of Chinese ones.”<sup>185</sup> Furthermore, China sends its legal experts abroad to participate in conferences and academic endeavors with the goal of shaping discourse, and ultimately the law, in its favor. “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.”<sup>186</sup> Dr. Ti-Chiang Chen observed this in his 1951 book titled *The International Law of Recognition*. He highlighted that international law is a projection of social reality. If social constructs can be manipulated, so too can even the most well defined international legal

---

<sup>182</sup> Cheng.

<sup>183</sup> Liang and Xiangsui, *Unrestricted Warf*.

<sup>184</sup> Munoz Mosquera and Chalanouli, “Guest Post: Andrés Munoz Mosquera's and Nikoleta Chalanouli's Essay: ‘China, an Active Practitioner of Legal Warfare.’”

<sup>185</sup> Munoz Mosquera and Chalanouli.

<sup>186</sup> Cheng, “Winning Without Fighting: Chinese Legal Warfare.”

mechanisms. China achieves this through a two-pronged approach. First, the law is repeatedly breached in support of Chinese objectives. Then, these breaches are justified through complex disinformation campaigns, faux legal arguments, and alternative interpretations of the law. Legal academics are effective weapons in the disinformation arsenal. These individuals participate in international conferences to tout alternate interpretations of legal norms. The ensuing discussion creates enough uncertainty for the PRC to continue its breaches and ultimately to consolidate its gains through military power. This may appear to be a lengthy, inefficient, and subtle process, however, Munoz Mosquera and Chalanouli highlighted that subtlety is exactly the point. “China’s legal warfare has a long-term component in its nature. China’s policies follow the ‘expert farmer’ mentality, where seeds are planted, soil is cared for and, if all goes well, the crops will be healthy and the harvest will be abundant.”<sup>187</sup> Dr. Chen summarized this perfectly. “On the one hand, the validity of law, like the validity of grammar, is not dependent upon actual observance in any particular case; on the other hand, continuous breach of the law with impunity may eventually undermine its validity. Continuous toleration of breaches of law by society is an indication that the law no longer corresponds with social facts and that a new law which sanctions the rights originating in illegality is in the making.”<sup>188</sup> The breaches are consolidated and ensured by military strength, and the toleration is made possible by introducing enough disinformation to shape the legitimacy of a complainant’s claims just enough to create uncertainty and achieve *fait accompli*.

An excellent example of the PRC’s legal warfare is its behavior in the South China Sea following World War II. The Chinese government introduced a map with an eleven-dashed line containing its audacious claims over the South China Sea. This South China Sea Islands Location Map was made possible by the regional power vacuum that emerged as the Japanese Empire fell. This map was created in response to skirmishes between

---

<sup>187</sup> Munoz Mosquera and Chalanouli, “Guest Post: Andrés Munoz Mosquera’s and Nikoleta Chalanouli’s Essay: ‘China, an Active Practitioner of Legal Warfare.’”

<sup>188</sup> Ti-Chiang Chen, *The International Law of Recognition* (New York: Stevens & Sons Limited, 1951), <https://archive.org/details/cu31924016945770/page/n7>.

troops of the Republic of China and France. France had a history of colonialization in Southeast Asia and China sought to consolidate the region under its control. They reduced this claim in 1952 by removing the two dashes encompassing the Gulf of Tonkin. The result was the infamous nine-dash line, which is the subject of much contemporary international debate. This line expanded to ten dashes in 2013 to include the PRC's additional claims over Taiwan. The PRC cites historic right and the vastness of the Ming Dynasty to justify its claims to these areas while asserting that they will accept "not one [dash] less" and that "The South China Sea, as the name indicated, is a sea area that belongs to China."<sup>189</sup> The PRC began dredging operations to create or expand islands to build-up previously insignificant reefs and archipelagos. Between December 2013 and October 2015, 3,000 acres of dredged land were added to seven coral reefs in the Spratly Island chain. This build-up resulted in a highly militarized South China Sea, with airfields and advanced surface-to-air missile systems scattered throughout. The PRC then claimed these islands to be Chinese territory and demanded that foreign nations respect its territorial seas in accordance with UNCLOS. Brunei, Indonesia, Malaysia, the Philippines, Vietnam, and other countries in the region opposed the PRC's aggressive behavior. For context, Vietnam reclaimed around 80 acres in 2015, Malaysia 70 acres, the Philippines 14 acres, and Taiwan 8 acres. Several countries made claims to South China Sea island chains to the International Tribunal for the Law of the Sea, however, China repeatedly denied these claims as they penetrated its 9-dash line.<sup>190</sup>

Both China and The Philippines are party to UNCLOS and the Permanent Court of Arbitration (PCA). The PCA was established in 1899, has 121 member states, and is has jurisdiction over matters pertaining to UNCLOS. In 2013, The Philippines requested an arbitral tribunal under Annex VII of UNCLOS to dispute the PRC's audacious claims to

---

<sup>189</sup> Franz-Stefan Gady, "Chinese Admiral: South China Sea 'Belongs to China' – The Diplomat," *The Diplomat*, September 16, 2015, <https://thediplomat.com/2015/09/chinese-admiral-south-china-sea-belongs-to-china/>.

<sup>190</sup> Matthew Southerland, "China's Island Building in the South China Sea: Damage to the Marine Environment, Implications, and International Law," April 12, 2016, [https://www.uscc.gov/sites/default/files/Research/China%27s Island Building in the South China Sea\\_0.pdf](https://www.uscc.gov/sites/default/files/Research/China%27s%20Island%20Building%20in%20the%20South%20China%20Sea_0.pdf).

the South China Sea. The Philippines offered 15 submissions to the PCA and the case spanned three years with thousands of pages of evidence. Ultimately, the PCA accepted 7 of the submissions, including: (1) China is not entitled to historic right over waters beyond the limits of UNCLOS; (2) The 9-dash line has no legitimacy under international law; (3) The islands and features cited by the PRC are not substantial enough to support its claims, regardless of dredging operations to change the facts on the ground; (4) China violated UNCLOS by infringing on The Philippines' EEZ; (5) China has irreversibly damaged the South China Sea by destroying reefs, jeopardizing endangered species, and using harmful fishing practices.

In response, the PRC claimed that the Philippines' request for arbitration was itself in violation of numerous bilateral treaties between the two countries that mandated bilateral conflict resolution.<sup>191</sup> This is an example of utilizing international law to legitimize violations while delegitimizing a claimant. A comprehensive disinformation campaign was employed to negatively shape the legitimacy of The Philippines' submissions while reinforcing positive perceptions of China's defense.<sup>192</sup> In reality, the Philippines spent the preceding years seeking bilateral compromise with the PRC - in accordance with their shared treaties - over the South China Sea with little progress. This included numerous communiques, recalling the Chinese ambassador, and requests for clarification of Chinese activities within the Philippine EEZ. Specifically, China claimed that the Philippines were in violation of the 2002 declaration between China and the Association of South East Asian Nations, which stipulated that disagreements will be handled bilaterally. In 2011, Manilla submitted a complaint to ASEAN to formally request an explanation from the PRC. In response, China responded with a reciprocal complaint against the Philippines.<sup>193</sup> This counter-accusation is itself a form of legal manipulation,

---

<sup>191</sup> TREATIES

<sup>192</sup> Michael D Swaine, "Chinese Views on the South China Sea Arbitration Case between the People's Republic of China and the Philippines," *The China Leadership Monitor*, no. 51, accessed May 2, 2021, <https://carnegieendowment.org/files/CLM51MS.pdf>.

<sup>193</sup> Yann-huei Song and Keyuan Zou, *Major Law and Policy Issues in the South China Sea: European and American Perspectives* (London and New York: Routledge, 2014).

as is the PRC's refusal to negotiate with the Philippines only to claim that the Philippines violated its treaties by not resolving issues bilaterally. In essence, this constitutes gaslighting at the international level.

The PRC subsequently refused to acknowledge the PCA's 2015 decision to accept jurisdiction over 7 of the 15 Philippine submissions. Ultimately, the PCA ruled in favor of the Philippines in 2016. It stated that China was in violation of UNCLOS and that it had no legal claim to the South China Sea or 9-dash line outside of the scope and entitlements contained within UNCLOS, that the PRC's claims of historic right, sovereignty, or jurisdiction over territory beyond the scope of UNCLOS and have no lawful effect. Of particular importance to the PCA's ruling were Articles 121(1) and 121(3) of UNCLOS, which deal with naturally formed areas of land, surrounded by water, which are above water at high tide. Article 121(3) notes that rocks which cannot sustain human life on their own do not enjoy an EEZ. Under the auspices of this Article, Mischief Reef, Second Thomas Shoal, Gaven Reef (North), McKennan Reef, Johnson Reef, Cuarteron Reef, Fiery Cross Reef, Scarborough Shoal, and the Spratly Islands are all considered rocks with no EEZ. Furthermore, the PCA ruled that both Mischief Reef and the Second Thomas Shoal fall clearly within the Philippine EEZ. The PCA also found the PRC to be in violation of UNCLOS Articles 77, 56, 58(3), 192, 194(5), 192, 194(1), 194(5), 197, 123, 206, 60, 80, and 94. The aforementioned violations include, inter alia, China's dredging and reclamation activities at Subi Reef, Mischief Reef, Jognson Reef, Hughes Reef, Gave Reef, Cuarteron Reef, and Fiery Cross Reef.

This example shows China's duplicitous approach to international law and supports the notion of a concerted effort to shape, and distort, the legitimacy and facts of the case. Cheng highlights this hypocrisy in his research on China's legal warfare. "[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...”<sup>194</sup> The PCA decision is no different. The PRC refused to acknowledge the ruling and continues its aggressive behavior in the South China Sea today despite demanding universality and compliance with respect to the behavior of other states. In the PCA’s 501-page ruling, Chinese officials were quoted on numerous occasions making statements that were incongruent with its behavior. “In the course of these proceedings, China has on a number of occasions commented on the importance of good faith and the duties incumbent on States Parties pursuant to the Convent [UNCLOS].”<sup>195</sup>

For example, the Chinese Ambassador to the Netherlands stated in February 2015 that “China has made consistent and steadfast efforts to uphold and contribute to the international rule of law. To uphold the international rule of law, it is essential to adhere to the fundamental principles of international law, including the principle of respecting state sovereignty and territorial integrity, which are also enshrined in the Charter of the United Nations.”<sup>196</sup> The Chinese government also published a position paper in 2014, stating that “China believes that the nature and maritime entitlements of certain maritime features of the South China Sea cannot be considered in isolation from the issue of sovereignty.” The PRC also stated that Manila’s submission was a “deliberate act of bad faith” in violation of *pacta sunt servanda*, that Manila “camouflaged its submissions” to the tribunal, that the submissions go against “widely recognized international law,” and that the proceedings are “an abuse of the UCLOS dispute settlement procedures.”<sup>197</sup> Vice Foreign Minister Zhang summarized the PRC’s position: “the Arbitral Tribunal in the South China Sea arbitration established at the Philippines’ unilateral request has, [from

---

<sup>194</sup> Cheng, “Winning Without Fighting: Chinese Legal Warfare.”

<sup>195</sup> Thomas A Mensah et al., “PCA Case N° 2013-19 IN THE MATTER OF THE SOUTH CHINA SEA ARBITRATION-before-AN ARBITRAL TRIBUNAL CONSTITUTED UNDER ANNEX VII TO THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA-between-THE REPUBLIC OF THE PHILIPPINES-and-THE PEOPLE’S REPUBLIC OF CHINA,” 2016, <https://www.pcacases.com/pcadocs/PH-CN - 20160712 - Award.pdf>.

<sup>196</sup> Mensah et al.

<sup>197</sup> Mensah et al.

the beginning], no jurisdiction, and awards rendered by it are null and void and have no binding force.”<sup>198</sup>

The above examples demonstrate the PRC’s legal warfare in practice. Munoz, the legal advisor to NATO’s Supreme Allied Commander, reiterated in his article on Chinese legal warfare that these tactics are part of the legal preparation of the battlefield. “Legal warfare for China, like artillery, prepares the ‘terrain’ for further action. Chinese legal warfare is designed to weaken the will of domestic and foreign populations, and to diminish their trust in law as well as in their leaders – all with the purpose of building support for China’s interests. China’s long-term approach is effective in building its narratives and furthering its efforts to achieve legitimacy.”<sup>199</sup> Cheng reiterated this point; “legal warfare, from the Chinese perspective, must focus on a conflict’s political objective...pre-war ‘preparation of the battlefield’ and post-conflict legal maneuverings that, like wartime legal warfare activities, are aimed at fulfilling larger strategic goals.”<sup>200</sup>

The PCA published its ruling in 2016. Unsurprisingly, the Chinese Ministry of Foreign Affairs declared that the ruling is “null and void and has no binding force.”<sup>201</sup> The Chinese government also reiterated its “territorial sovereignty and maritime rights” and stated that it seeks to “resolve the relevant disputes peacefully.”<sup>202</sup> Caitlin Campbell and Nargiza Salidjanova of the U.S.-China Economic and Security Review Commission published an issue brief in 2016 detailing just how damaging this duplicitous approach to international norms can be. “The extent to which China abides by the ruling in the long term, and to which the international community supports and seeks to enforce the ruling, will have consequences for the utility of international law as a tool to ensure the peaceful, stable, and lawful use of the seas going forward... if the ruling fails to alter China’s

---

<sup>198</sup> Swaine, “Chinese Views on the South China Sea Arbitration Case between the People’s Republic of China and the Philippines.”

<sup>199</sup> Munoz Mosquera and Chalanouli, “Guest Post: Andrés Munoz Mosquera’s and Nikoleta Chalanouli’s Essay: ‘China, an Active Practitioner of Legal Warfare.’”

<sup>200</sup> Cheng, “Winning Without Fighting: Chinese Legal Warfare.”

<sup>201</sup> Caitlin Campbell and Nargiza Salidjanova, “South China Sea Arbitration Ruling: What Happened and What’s Next?,” 2016, <http://www.andrewerickson.com/wp-content/uploads/2016/07/PH-CN->

<sup>202</sup> Campbell and Salidjanova.

behavior in the longer term, it would send a signal to the rest of the world that adherence to international law is optional. This would degrade the viability of international maritime law as a tool to ensure the peaceful, stable, and lawful use of the seas.”<sup>203</sup> Five years have passed since the PCA ruling and China continues its aggression in the South China Sea and double-dealing in international norms unabated. The PRC’s brand of legal warfare, it seems, is proving quite effective.

One may wonder how effective these strategies are when, seemingly, no legal victories have been won. In fact, the international community has rebuked the PRC for its aggressive behavior and there are few states that support Chinese claims to the 9-dash line. How, one might ask, can legal warfare be considered effective? The answer lies in the purpose and intent of strategies that rely upon the revisionist exploitation of legal domains: military force. Cheng wades into this debate with a sobering viewpoint. “Chinese writings specifically note that the purpose of legal warfare is to obtain military, and not legal, victory...legal disputes and proceedings in a non-military context are not legal warfare...Legal warfare, therefore, is not decisive on its own—it must be backed by military capability.”<sup>204</sup> Mr. Derek Grossman illuminated this reality as a Senior Defense Analyst for the military think tank, Research and Development (RAND). “Beijing has fortified multiple forward operating bases with anti-ship cruise missiles (ASCMs) and surface-to-air missiles (SAMs) along with underground storage facilities, hangars, radars, and sensor arrays.”<sup>205</sup> Case-in-point, the PRC deployed HQ-9 missile batteries to Woody Island in February 2016, just months before the PCA delivered its ruling. For context, the HQ-9 is a modern SAM with a 180 kg warhead that is capable of flying 4.2 times the speed of sound up to 30 km into the sky and with a maximum range of 200-230 km.<sup>206</sup> Furthermore, the PRC capitalized on its many thousands of acres dredged through land

---

<sup>203</sup> Campbell and Salidjanova.

<sup>204</sup> Cheng, “Winning Without Fighting: Chinese Legal Warfare.”

<sup>205</sup> Derek Grossman, “Military Build-Up in the South China Sea,” RAND, January 22, 2020, [https://www.rand.org/pubs/external\\_publications/EP68058.html](https://www.rand.org/pubs/external_publications/EP68058.html).

<sup>206</sup> Globalsecurity.org, “HQ-9,” accessed May 2, 2021, <https://www.globalsecurity.org/military/world/china/hq-9.htm>.

reclamation efforts by building airfields on the Fiery, Mischief, and Subi reefs in the Spratly Islands. These airfields are capable of handling advanced combat aircraft and bombers. The PRC's Navy is the largest in the indo-pacific and their Southern Theatre Navy boats well over 100 ships, including ballistic missile submarines, destroyers, frigates, corvettes, and missile patrol craft. Additionally, the PRC boasts a massive "Maritime Militia" fleet of armed fishing vessels that clears swaths of ships belonging to other nations – often times in that nation's EEZ – for Chinese economic exploitation. These capabilities, when spread across the South China Sea, create a veritable shield around the region known as "anti-access, area denial" (A2AD). This is further bolstered by batteries of anti-ship ballistic missiles, anti-ship cruise missiles, land-attack cruise missiles, mines, advanced electronic warfare capabilities, and highly capable intelligence, surveillance, and reconnaissance technology. The legal warfare employed by the PRC in the South China Sea is not intended to win a righteous campaign in defense of international norms, peace, and security. The intent is to support and enable a fait accompli in the region. In the PRC's eyes, the PCA's ruling is irrelevant because it is unenforceable. China's legal warfare was able to shape and control the legitimacy of the case sufficiently enough to change the facts on the ground and consolidate gains through military force.

### 3.2.2. The Russian Federation

Unlike the PRC, the Russian Federation has no public or published doctrine of legal manipulation. Realistically speaking, however, examples of this behavior can be seen almost daily. This disparity between word and action is misleading and a deliberate part of Russia's grand strategy of information dominance. A close analysis of relevant strategic documents offers important insight into the high-level guidance that fuels Russia's Malign Legal Operations. The 2016 Foreign Policy Concept of the Russian Federation (hereinafter Foreign Policy Concept), the 2014 Military Doctrine of the Russian Federation (hereinafter Military Doctrine), and the 2017 Fundamentals of the State Policy

of the Russian Federation in the Field of Naval Operations for the Period until 2030 (hereinafter Naaly Strategy) together build a picture of Russia's strategic approach to legal manipulation.

The Foreign Policy Concept highlights that there are many factors used by States to influence international politics and these methods are taking center stage: economic, technological and information technological, and legal capabilities. "Using these capabilities to pursue geopolitical interests is detrimental to efforts to find ways to settle disputes and resolve the existing international issues by peaceful means on the basis of the norm of international law."<sup>207</sup> Much like General Gerasimov's so-called observations of hybrid warfare discussed in Chapter 1, these documents continuously observe and condemn legal manipulations and reinforce the importance of universality and respect for international legal norms. Simultaneously, however, the Russian Federation contradicts these statements as evidenced by continuous behavior that is inconsistent with the UN Charter and international norms. As with General Gerasimov and the so-called Gerasimov Doctrine, Russia defends its behavior with doublespeak, claiming that it is consistent with international law and that it was simply observing Western tactics. The Foreign Policy Concept goes on to specify that "Russia consistently advocates strengthening the legal foundation of international relations and complies with its international legal obligations in good faith... maintaining and strengthening the international rule of law is among its priorities in the international arena."<sup>208</sup> To accomplish this, Russia proports to do the following:

- "To counter attempts by some States or groups of States to revise the generally accepted principles of international law...[those who] arbitrarily interpret the fundamental international legal norms and principles;
- Counter attempts to represent violations of international law as 'creative' applications of such norms;

---

<sup>207</sup> The Ministry of Foreign Affairs of the Russian Federation, Foreign Policy Concept of the Russian Federation.

<sup>208</sup> The Ministry of Foreign Affairs of the Russian Federation.

- To facilitate progress in the development of international law and its codification, primarily undertaken under the auspices of the UN, as well as the inclusiveness of international UN treaties, and their uniform interpretation and application.”<sup>209</sup>

It is Russia’s behavior abroad that attempts to revise international law and to employ it in “creative” ways. In its discussion of military risks and threats, the 2014 Military Doctrine committed to “create conditions to reduce the risk of using information and communication technologies for the military-political purposes to undertake actions running counter to international law, directed against sovereignty, political independence or territorial integrity of states or threatening international peace and security.”<sup>210</sup> Furthermore, the Naval Strategy of 2017 claims that legal pressure against the Russian Federation is intended to reduce the efficiency of its maritime activity. In response, the Naval Strategy asserts that it employs “a set of interrelated political, diplomatic, legal, military, economic, information, and other measures.”<sup>211</sup> To achieve this, Russia will make “improvements” to the international legal framework to provide “favorable conditions for protecting the national interests of the Russian Federation and its allies.”

212

Russia is successful in masking its doctrine of legal manipulation when these strategies are read and considered independently. It is only after conducting a derivative analysis of these nested strategies that one can see such a doctrine exists through small inconsistencies. In essence, these strategies together state that Russia will work to revise the international system for its political benefit. It also acknowledges that legal capabilities are used by states to achieve their objectives. Finally, when considered

---

<sup>209</sup> The Ministry of Foreign Affairs of the Russian Federation.

<sup>210</sup> Ministry of Defense of the Russian Federation, The Military Doctrine of the Russian Federation.

<sup>211</sup> Ministry of Defense of the Russian Federation, “The Fundamentals of the State Policy of the Russian Federation in the Field of Naval Operations for the Period Until 2030” (2017).

<sup>212</sup> Ministry of Defense of the Russian Federation.

together with Russia's behavior abroad, there can be no question that there exists such a doctrine.

### 3.3. The Definition of Malign Legal Operations

The practitioners of Malign Legal Operations (MALOPs) abuse and/or revise the law to achieve political objectives in Machiavellian fashion, whether on the battlefield, at the UN, diplomatically, or otherwise. They seek, create, and employ legal asymmetries to affect strategic outcomes. In some cases, the law is the instrument of manipulation, and in other cases it is the target of the manipulation. More often than not, however, both are true. These activities can span a range of actions from exploiting International Humanitarian Law (shooting from protected religious sites during armed conflict) to offering perverted interpretations of international instruments (misinterpreting UNCLOS to justify the seizure of ships and legitimizing illegal territorial claims). Ultimately, MALOPs practitioners seek to exploit legal domains by employing disinformation to shape legitimacy, justify violations, escape legal obligations, contain adversaries, or to advantageously revise the rule of law. This behavior typically takes the form of faux legal arguments, perverted interpretations of the law, legal asymmetries, and minimum viable arguments that present sufficient uncertainty to maintain a destabilizing fog of war. The list goes on, but one of the most common attributes of those who practice MALOPs is a duplicitous approach to legal domains whereby the law is overtly praised as universal while covertly abusing it to achieve objectives and undermine legal systems altogether. Like any scam artist, it benefits the MALOPs practitioner to ensure a wide subscribership to maintain an expansive locus of control.

- MALOPs is comprehensive in scope. One of the most distinct differences between MALOPs and terms like lawfare and legal gamesmanship is the acknowledgement of legal manipulation at the strategic, operational, and tactical levels whereas most other terms employ a narrowed scope focused on specific, tactical operations. For example, most early-21st century conceptualizations of lawfare take a myopic view, such as legal activities in-lieu of kinetic military strikes or legal abuse by terrorist

organizations and non-state actors. These narrowed scopes artificially restrict the useability, and clarity, of the term.

- MALOPs acknowledges that the law, international and domestic, is both an instrument and an operating domain for modern conflict. Actors can navigate the legal domain to their advantage, through use or abuse, by utilizing legal instruments. These same actors can, independently or simultaneously, work to revise the legal domain itself through repeated breaches and the slow progression of customary law, through influence within academia or amongst practitioners, or by asserting differing interpretations of legal instruments.
- MALOPs focuses on the abuse of the law. Most other terms take either a value-neutral or value-negative approach to legal instrumentalism.
- The malign qualifier in MALOPs concerns the abuse of the spirit and intent of a particular legal instrument, theory, or concept. It does not inherently constitute a value judgement.
- MALOPs does not attempt to parse or determine perceived good versus perceived evil. These characteristics are interpreted based on competing value structures. For example, the previously cited case of the United States purchasing satellite imagery of Afghanistan to keep it from the Taliban and Al Qaeda likely led to more Taliban and Al Qaeda deaths and fewer U.S. casualties. A Westerner might argue that this was good lawfare, however, Taliban fighters may beg to differ. The important distinction is that the U.S. used the law as intended and did not manipulate - twist - the law to achieve asymmetry or to pursue political objectives. The righteousness or goodness of the act is irrelevant to MALOPs, as long as it uses the law as intended.
- MALOPs encourage the clever application of legal domains in-lieu of kinetic action or combat, and also encourages the use of legal domains to counter the abuse of the law. However, the law itself is typically insufficient to deter a targeted MALOPs campaign against an adversary. The proper or intended application of the law is not considered MALOPs.
- A challenge is that the notion MALOPs is itself susceptible to abuse by actors with differing interpretations of a given legal instrument, treaty, or mechanism. These differing interpretations are typically the result of revanchist or revisionist approaches to legal domains. This behavior would allow a MALOPs practitioner to claim that it is the target of MALOPs and/or that another actor is conducting MALOPs. This role

reversal is unavoidable and, in fact, constitutes information operations and is a foundational tenant of Malign Legal Operations.

### 3.4. The Tenants of MALOPs

#### 3.4.1. The Foundation: Information Operations

“Information wars are waged by a direct influence on the public consciousness, on the souls of people.” – Russian Professors Lisichkin and Shelepin

In 2020, the U.S. Congressional Research Service released a Defense Primer bulletin on the concept of Information Operations. This document clarified and cataloged the many disparate concepts of so-called information warfare. The Primer noted that the term information warfare – as of December of 2020 – had no official U.S. government definition but is commonly understood as a “strategy for the use and management of information to pursue a competitive advantage, including both offensive and defensive operations.”<sup>213</sup> In modern military doctrine, strategy is the summation of ends, ways, and means. Militarily speaking, “operations” are the activities that link strategy to specific tactics. In this case, the information operations are what links information warfare to strategy.

In the United States’ Joint Publication 3-13, information operations, the Secretary of Defense defines the term as “the integrated employment, during military operations, of information-related capabilities in concert with other lines of operation to influence, disrupt, corrupt, or usurp the decision making of adversaries and potential adversaries while protecting their own.”<sup>214</sup> Other definitions within the information operations umbrella are as follows:

- Propaganda: “This means the propagation of an idea or narrative that is intended to influence, similar to psychological or influence operations. It can be misleading but true, and may include stolen information. A government communicating its intent,

---

<sup>213</sup> Theohary, “Defense Primer: Information Operations.”

<sup>214</sup> Theohary.

policies, and values through speeches, press releases, and other public affairs can be considered propaganda.”<sup>215</sup>

- Misinformation: “This is the spreading of unintentionally false information. Examples include Internet trolls who spread unfounded conspiracy theories or web hoaxes through social media, believing them to be true.”<sup>216</sup>
- Disinformation: “Unlike misinformation, disinformation is intentionally false. Examples include planting false news stories in the media and tampering with private and/or classified communications before their widespread release.”<sup>217</sup>

There is no specific term above that completely translates to what MALOPs intends to describe. For example, the Western definition of the term information warfare itself is flawed because it runs counter to the previously discussed Clausewitzian notions of warfare. It is specifically intended to describe activities “during military operations.” Much like Dunlap’s original definition lawfare and Kittrie’s stipulations that an activity must take place in-lieu of kinetic operations to be considered lawfare, this military-only stipulation to information operations makes is unsuitable for consideration with Malign Legal Operations. MALOPs takes place across the spectrum of conflict and, above all, is a political tool intended to have a political influence. In many cases, the military is one tool that could be utilized to achieve these political objectives; however, this is not always the case. Therefore, the U.S. notion of information operations is overly restrictive for use in this study. Ultimately, contemporary Western discourse surrounding this term is muddy with numerous overlapping and contradictory terms.

The Russian Federation also utilizes the term information operations but does not stove-pipe the term to strictly military operations. This is no surprise, as the manipulation of information, the management of perceptions, and the control of public opinion was the bedrock of Soviet policy and continues today with the Russian Federation. Igor

---

<sup>215</sup> Theohary.

<sup>216</sup> Theohary.

<sup>217</sup> Theohary.

Nikolaevich Panarin, a PhD in psychology and member of the Military Academy of Science of the Russian Federation, summarized information warfare in a more holistic way, stating that the term constitutes:

“a type of confrontation between parties, represented by the use of special (political, economic, diplomatic, military and other) methods [based on different] ways and means that influence the informational environment of the opposing party [while] protecting their own [environment], in order to achieve clearly defined goals. [Therefore] The major dimensions for waging informational-psychological confrontations [are] political, diplomatic, financial-economic, [and] military...[it] aims to interrupt the balance of power and achieve superiority in the global information dimensions [by targeting] the decision-making process of the adversary.”<sup>218</sup>

This combining of military and non-military methods creates a Whole-Of-Government approach that more accurately aligns with the information manipulation observed by Malign Legal Operations. To reiterate this point, other Russian military academics and theorists conceive information warfare as “influencing the consciousness of the masses as part of the rivalry between the different civilizational systems adopted by different countries in the information space by use of special means to control information resources as ‘information weapons.’”<sup>219</sup> Russian General Gerasimov, whose contributions to so-called hybrid warfare were discussed at length in Chapter 1, touched on the significance of information operations and how effective they are at achieving political objectives in modern conflict.

“Analysis of the nature of modern warfare has shown a significant increase in the importance of such a sphere of confrontation as information. The new reality of the wars of the future will include the transfer of hostilities to this sphere. Thus information technologies become, as a matter of fact, one of the most perspective kinds of weapons. The information sphere, not having pronounced national borders, provides possibilities of remote, secretive influence not only on the critical information infrastructures, but

---

<sup>218</sup> Fridman, *Russian “Hybrid Warfare” Resurgence and Politicisation*.

<sup>219</sup> Darczewska, “The Anatomy of Russian Information Warfare: The Crimean Operation, A Case Study.”

also on the population of the country, directly influencing the National security of the State.”<sup>220</sup>

Contemporary Western views of information warfare are plagued with some of the same problems as Western views of lawfare and hybrid warfare: stove-piped within a neat, albeit nonexistent, catalogue of conflict. This study rejects the myopic notion that information operations occur strictly during military operations. Instead, this study accepts a more Eurasian perspective that the manipulation of information seeks to achieve political objectives, including military activities, in pursuit of a grand political strategy.

The objective, after all, is to weaken, strengthen, create, or otherwise shape the perceived legitimacy of a particular action from the legal perspective. There can be no better way to do this than by seeking legitimacy under established legal mechanisms. As Dr. Ti-Chiang Chen wrote in his 1951 book titled *The International Law of Recognition*, “International law is based upon social reality. On the one hand, the validity of law, like the validity of grammar, is not dependent upon actual in any particular case; on the other hand, continuous breach of the law with impunity may eventually undermine its validity. Continuous toleration of breaches of law by society is an indication that the law no longer corresponds with social facts and that a new law which sanctions the rights originating in illegality is in the making.” All one needs to do is justify breaches until clever manipulation becomes custom.

For example, on March 4th, 2014, President Putin claimed that “Russia has not deployed any troops in Crimea.” And that the “little green men” were simply “local self-defense forces.” Just a few weeks later, on April 17th, his narrative changed. “Crimean self-defense forces were of course backed by Russian servicemen.” Then, on April 17th, he claimed that Russia was not involved in the emerging Donbas conflict. “It’s all nonsense, there are no Russian units, Special Forces, or instructors in the east of Ukraine.”

---

<sup>220</sup> Valery Gerasimov, “Russian Def. Min.: We Must Act Quickly To Preempt The Enemy,” MEMRI, March 2, 2019, [https://www.memri.org/reports/russian-first-deputy-defense-minister-gerasimov-our-response-based-active-defense-strategy#\\_edn1](https://www.memri.org/reports/russian-first-deputy-defense-minister-gerasimov-our-response-based-active-defense-strategy#_edn1).

A year and a half later, on December 17th, 2015, he again changed the narrative. “We never said there were not people there who carried out certain tasks including in the military sphere.” Figure 3 below provides a visual example of Russian propaganda and disinformation leading up to the May 11th referendum on the status of Donetsk and Luhansk oblasts and the creation of so-called independent republics. The left side represents Ukraine and alludes to Nazi ideology, fascism, violence, and is designed to elicit a fearful response. The option on the right, with a positive green check mark, represents independent republics of Donetsk and Luhansk with the image of a happy, positive, and productive working man.



Figure 2. Russian Disinformation and Propaganda in Donetsk, Ukraine, leading up to the referendum on May 11th, 2014. Translation: "MAKE YOUR CHOICE! The 11th OF MAY, FROM 0900 TO 2200."

Perhaps one of the most illuminating examples of information operations as it pertains to Malign Legal Operations is from 18 March 2014, when Putin addressed the world from the Kremlin to discuss the Russian seizure of Crimea. He stated that Russian forces enabled “Crimeans to decide upon their own future” and that “we had to help create conditions so that the residents of Crimea for the first time in history were able to peacefully express their free will.” He repeatedly employed an irredentist approach by citing Crimea’s historic, ethnic, and language ties to Russia, all building a case to claim historic rite. These are examples of basic information operations, in this case propaganda and disinformation. However, there is a point at which President Putin’s information operations cross a clear line to become Malign Legal Operations due to his use of the language of international law. He goes on to state that “a referendum was held in Crimea on March 16th in full compliance with democratic procedures and international norms” and suggests that Crimea, among other regions, was only part of Ukraine due to “outrageous historical injustices” during the Soviet era.<sup>221</sup> As previously discussed, the Soviets perfected the art of manipulating information to shape the legitimacy of Soviet actions under international law, and they benefited greatly from Western naivety to the reality that international law is not viewed, applied, or respected universally. As Mälksoo noted, “Western scholarship on Soviet approaches to international law has to some extent fialed because it has taken Soviet declarations about international law too easily at their face value. The official rhetoric about international law can also have deceptive qualities when the purpose mmay be to mislead the other or to trump him with his own weapon.”<sup>222</sup> To further explore the use of information operations as part of MALOPs, appendix b contains a table of quotes taken directly from Putin’s speech along with a very brief analysis of how these information operations amount to Malign Legal Operations.

---

<sup>221</sup> The USSR voted to transfer Crimea to Ukraine on February 29th, 1954

<sup>222</sup> Mälksoo, *Russian Approaches to International Law*.

### 3.4.2. Contain the Adversary

Perhaps one of the most common forms of MALOPs is the manipulation of legal domains to achieve containment, or predictability. The very nature of the law is to create standards for individuals within a society, or within groups of societies, to exist within an established and accepted status quo. If one wished to operate outside of that status quo, then it would be imperative to maintain a high subscribership to that system to maximize their ability to operate at the fringes. The most stunning example of this is Russia and China's common rhetoric in support of universality in international law. It is a common talking point for Putin. "It is necessary to make sure that international law have a universal character both in the conception and application of its norms." At the same time, however, the law is used as a weapon to control states that participate in this so-called universal system. Scholar Zon Wenshen asserted that Legal Warfare is "controlling the enemy through the law, or using the law to constrain the enemy."<sup>223</sup> Furthermore, Chinese Unrestricted Warfare reminds us that "the best way to achieve victory is to control, not to kill"<sup>224</sup> and to be the first to establish legal regulations to guarantee control as a sponsor rather than as a beneficiary.

The unconditional support for universality is done to propagate and incentivize a status quo, or international system, so that the practitioner of MALOPs can set about revising it without alerting its naïve participants. This study previously cited Soviet legal scholar Grigorii Ivanovich Tunkin, a principal Soviet researcher, negotiator, and international lawyer whose contributions made up a great deal of Soviet doctrine. Tunkin had a heavy influence on Soviet behavior and his comments about predictability, or containment, were particularly appropriate for this discussion. "The creation of norms of international law is the process of bringing the wills of States into concordance ...[a]

---

<sup>223</sup> Zong Wenshen, *Legal Warfare: Discussion of 100 Examples and Solutions* (Beijing: PRC: PLA Publishing House, 2004).

<sup>224</sup> Qiao Liang and Wang Xiangsui, *Unrestricted Warfare*, 1999, <https://doi.org/B 67812>.

normative system making it possible to foresee the reaction of other actors in the inter-States system to particular actions of a State.”

The perfect example of legal containment as it pertains to MALOPs is the Soviet “friendship treaty” or “Pact of good neighborliness.” The Soviet Union sponsored and entered numerous such agreements as methods of containing neighbors until the time was right to violate sovereignty. Finland, Hungary, and Afghanistan are perfect examples. The Russian Federation is no different, as seen with numerous friendship treaties with Georgia and Ukraine prior to the Russian invasion of both. Dr. Bartman’s thesis stated that the Soviets championed the definition of aggression for the purpose of containing others. Russia’s behavior is no different as it cleverly applies information operations to violate sovereignty while dancing around a definition of aggression that was largely developed from Soviet proposals. These are the same “deceptive qualities” that Mälksoo meant when he opined that the very purpose of one’s engagement with international law may be to “mislead” or “trump” an adversary without their awareness.

This concept is exactly what Professor Kittrie conveyed through his discussion of compliance-leverage disparity lawfare. Re-stated more simply, there is a form of leverage to be gained over an adversary through a manufactured disparity between compliance and feigned-compliance. To create this disparity without an adversary’s awareness is a form of legal asymmetry. This is perfectly in-line with the Chinese notion of unrestricted warfare and legal warfare.

Another example of legal containment is the leveraging of international humanitarian law by non-state actors or terrorist organizations. The abuse of protected religious sites, protected symbols such as the red cross and red crescent, and the use of human shields all fall under Malign Legal Operations as legal containment in pursuit of legal asymmetry. Not only does legal containment create strategic predictability, but it can create exponential results when utilized in conjunction with other tenants of MALOPs. For example, a legal target utilizing a human shield is still a legal target as long

as proportionality is applied. Still, history shows that human shields pause or deter strikes against otherwise legal targets. If the legal target is eliminated along with the human shield, MALOPs practitioners may release footage and graphic imagery of the strike. This imagery may be manipulated to show civilian casualties and shape the legitimacy of the conflict in their favor by submitting this media as evidence of war crimes.

### 3.4.3. Shape Legitimacy

Twenty first century geopolitical struggles can be characterized by battles fought over legitimacy as much as, or more than, battles over territory. Law is the quintessential precept of legitimacy, which underscores sovereignty, and is therefore the subject, or territory, of modern conflict. Doctor Sari asserts that “law has become a vernacular for debating the legitimacy of war. Not only has the density of legal regulation increased, but legal processes now play a far more prominent role in warfare than they ever did before.”<sup>225</sup> Only with the successful control or disruption of the legitimacy underpinning a conflict can one proceed to seize the physical aspects of the political objective, such as territory.

Legitimacy shaping operations are the manipulation of perceptions concerning a given act or fact, specifically through the lens of domestic or international law, in the eyes of the public or specifically targeted audiences. Information operations, as the foundation of MALOPs, are the most critical aspect of legitimacy shaping and utilize traditional media, modern information technology, and social media. The primary aspects of legitimacy shaping operations are: to manufacture uncertainty around a target’s legitimate legal claim or position; to wrongly claim, deny, or accuse a target of legal violation or manipulation; to prop up one’s own duplicitous approach to legal domains; to portray oneself favorably, or as adherent to legal principles, despite ongoing MALOPs; to

---

<sup>225</sup> Aurel Sari, “Legal Aspects of Hybrid Warfare,” Lawfare: Hard National Security Choices Blog, 2015, <https://www.lawfareblog.com/legal-aspects-hybrid-warfare>.

characterize one's own malign behavior as justified or innocent. These activities should not be underestimated, and a simple allegation – regardless of legitimacy – can cause immense damage to an individual, organization, or to the national security of a State. “While it is self-evident that the legitimacy of legal claims labeled “lawfare” must be determined on a case-by-case basis, it is likewise clear that the “sting” of an allegation of illegality can immediately and often irreparably diminish the perceived legitimacy of national security related actions in the eyes of governmental officials as well as their constituents. Therefore, regardless of their ultimate resolution, the underlying claims can instantaneously result in varying degrees of national security “cost” to the extent that they succeed in increasing skepticism of or opposition to the national security interests...”<sup>226</sup>

An example of using allegations to shape legitimacy and achieve political objectives are the Russian Federation's widespread use of Interpol Red Notices to target dissidents and to create plausible deniability for extradition. Another example is the defamation lawsuit, which is used to disincentivize journalists, critics, and researchers. The result is an exorbitant amount of court and legal fees, time, and administrative overhead. This is often sufficient to create exhaustion or bankruptcy, effectively bending an adversary to one's political will.

In 2014, President Putin claimed that “[Ukraine has] demonstrated a large-scale crisis of the international law, basic norms of the Universal declaration in human rights and the convention to prevent genocide.” This statement is an excellent example of Russian legitimacy shaping against Ukraine. From human rights, violations of international law and basic norms, to outright genocide – Putin left little to the imagination. Despite being completely lacking in evidence; these accusations are damaging enough the whip up domestic support for Putin and were used to support Russia's continued intervention in Ukraine. As Professor Newton opined, there exists a “very real danger that the media can be manipulated and used to mask genuine violations

---

<sup>226</sup> Robert De Tolve, “At What Cost? America's UNCLOS Allergy In The Time of ‘Lawfare,’” *Naval Law Review* 61 (2012), <http://www.jag.navy.mil/documents/navylawreview/NLRVolume61.pdf>.

of the law with spurious allegations and misrepresentations of the actual state of the law.”<sup>227</sup>

Another example is Putin’s comments on the situation in Ukraine from March of 2014. “We see the rampage of reactionary forces, nationalist and anti-Semitic forces going on...if we see such uncontrolled crime spreading...and if the people ask us for help, while we already have the official request from the legitimate president, we retain the right to use all available means to protect those people. We believe this would be absolutely legitimate.”<sup>228</sup> Putin’s comment about the president’s request for assistance comes from a 1 March letter from Yanukovich, however, he was deposed by Ukraine’s parliament on February 22nd and the request was not, in fact, legitimate.<sup>229</sup>

Similarly, one can also use legitimacy shaping to positively portray oneself while simultaneously using it to discredit others. For example, following the aforementioned Kerch Strait incident in 2018, Russia’s Ministry of Foreign Affairs claimed that its act of aggression was actually compliant with international norms. “The detention of the Ukrainian naval ships and their crews was carried out by our border officers in full conformity with the norms of international law...The Ukrainian sailors later publicly admitted the provocative character of the incident that had been organized with their participation.”<sup>230</sup> They also coerced quasi-confessions out of their prisoners and utilized those to frame their aggression as a Ukrainian provocation.

Another typical behavior of MALOPs practitioners is the manipulation of historicity in what is commonly called irredentism. In these cases, practitioners claim historic right or cite historic examples to support their faux legal claims. For example, Putin claimed in a March 2014 speech that Crimea is a historically Russian land. “More

---

<sup>227</sup> Newton, “Illustrating Illegitimate Lawfare.”

<sup>228</sup> Kathy Lally and Will Englund, “Putin Says He Reserves Right to Protect Russians in Ukraine - The Washington Post,” The Washington Post, March 4, 2014, [https://www.washingtonpost.com/world/putin-reserves-the-right-to-use-force-in-ukraine/2014/03/04/92d4ca70-a389-11e3-a5fa-55f0c77bf39c\\_story.html](https://www.washingtonpost.com/world/putin-reserves-the-right-to-use-force-in-ukraine/2014/03/04/92d4ca70-a389-11e3-a5fa-55f0c77bf39c_story.html).

<sup>229</sup> Louis Charbonneau, “Russia: Yanukovich Asked Putin to Use Force to Save Ukraine | Reuters,” Reuters, March 3, 2014, <https://www.reuters.com/article/us-ukraine-crisis-un-idUSBREA2224720140304>.

<sup>230</sup> TASS, “Moscow to Respond to EU Sanctions Due to Kerch Strait Incident - Russian Foreign Ministry - Russian Politics & Diplomacy,” Russian News Agency, March 16, 2019, <https://tass.com/politics/1048969>.

than 82 percent of the electorate took part in the vote. Over 96 percent of them spoke out in favour of reuniting with Russia. These numbers speak for themselves. To understand the reason behind such a choice it is enough to know the history of Crimea and what Russia and Crimea have always meant for each other.”<sup>231</sup> It is widely accepted that the Crimean referendum was fabricated and coerced, and the United Nations invalidated the referendum less than two weeks later. Figure 5 shows an example of Russian legitimacy shaping (disinformation and propaganda) leading up to the referendum. The image on the left represents Crimea staying with Ukraine and references Nazi ideology, barbed wire, and violence. The image on the right shows Crimea draped in the Russian flag, indicating that Crimea’s declaration of independence would certainly mean annexation by the Russian Federation.

---

<sup>231</sup> Vladimir Putin, “Address by President of the Russian Federation,” March 14, 2014, <http://en.kremlin.ru/events/president/news/20603>.



Figure 3. Russian Disinformation leading up to the Crimean Referendum on March 16th, 2014. Translation: "16 March We Will Choose [Left] or [Right]."

This irredentism is a form of legitimacy shaping and allows one to put forth excessive claims, typically in pursuit of expanded sovereignty and territorial entitlements. Of course, historical claims may be legitimate, so careful analysis and legal debate is first required to determine whether this behavior constitutes MALOPs. Perhaps the most obvious example already discussed in this study is the South China Sea Arbitration wherein the court determined that China's claims to the 9-dash line were excessive. As U.S. Admiral Harry Harris noted in 2015 that China is "changing the facts on the ground [by] essentially creating false sovereignty."

Another MALOPs case of legitimacy shaping through irredentism is Putin's illegal seizure of Crimea. As previously discussed, there is no shortage of examples wherein Putin references Crimea's historic importance to Russia. He also frequently references the

“Russian World” and ethnic Russians or Russian speakers. The notion of “responsibility to protect,” when abused to violate, seize, diminish, or manipulate sovereignty, is another form of legitimacy shaping. In the case of Russia, it has repeatedly served as a *casus belli* for intervention in its near-abroad and former Soviet states.

#### 3.4.4. Probe Legal Lacunae

As discussed in Chapter 1, the ambiguity that makes legal domains so susceptible to exploitation is perhaps by-design. Specifically, international law is reflective of social reality and is the formalization of politics to maintain a higher-order construct for interstate relations. Unambiguous language is often prohibitive within international agreements simply because minute details cannot be agreed upon in-full. To preserve the interests of all parties, the language of an agreement is deliberately left vague or is simply not comprehensive. Unclear or incomplete language can then be used by MALOPs practitioners to shape contemporary discourse, and therefore shape the evolution of customary international law, to influence the international status quo in their favor. These gaps can effectively be probed to measure the resolve of both the target and the international community.

Perhaps the most informative example of this behavior is Russia’s blurring of war and peace under international law. As reviewed through an analysis of hybrid warfare in Chapter 1, this blurring of lines may exist through an international relations perspective, however, no such thing exists in the international legal domain. The current academy of PIL only addresses armed conflict (international or internal) and the conduct of states once the *jus in bello* regime is entered. There is little recourse outside the UNSC against aggressors that use covert action, false-flag operations, and political subterfuge to avoid the entry of *jus in bello* altogether. In fact, this issue is even more complex in practice. For example, Russia did not deny the existence of an armed conflict in Ukraine from 2014-2022, but instead shaped its legitimacy as an internal armed conflict fully contained

within Ukraine. To this end, Russia exploited the so-called internal armed conflict (civil war) as justification for further intervention as a self-proclaimed guarantor of regional security and through their declared responsibility to protect. Meanwhile, Russia fueled the conflict by supplying troops and directing combat operations.

This blurring of legal status allows Russia to covertly participate in the conflict while modulating tensions, like a rheostat, to directly control the arbitration process and regional tensions. This is not the first recent case of Russia employing such a strategy. The same thing occurred in 2008 during Russia's aggression against Georgia. "Moscow used negotiations as a platform for political pressure against Georgia, maintaining a steady stream of largely unfounded accusations against Tbilisi while ignoring even the most egregious separatist violations. Moscow, on whom the separatists were existentially dependent in virtually every respect, never brought the slightest pressure to bear on them to compromise or work toward restoration of Georgia's territorial integrity. Indeed, Russian 'peacekeepers' were collaborating hand-in-glove with the separatists, training, equipping and even commanding separatist forces"<sup>232</sup> In the case of Ukraine, despite it being the only mechanism for negotiation and conflict arbitration, the instrument for manipulation is the Minsk Accords.

On 21 February 2014, then-President Yanukovich signed The Kyiv Agreement after months of protests in Kyiv during Ukraine's Revolution of Dignity. The EU and Russia mediated this agreement between the Yanukovich Administration and his parliamentary opposition. It included a re-balancing of power between parliament and the president and a return to the 2004 constitution. Furthermore, new presidential elections would occur after the constitution was rearranged. Russia refused to sign this agreement as it weakened the Kremlin's grip on Ukraine. Protests continued, Russia seized Crimea, the UNGA rebuked the territorial aggression by invalidating the sham referendum, and hostilities began in the Donbas. On 17 April, the U.S., Ukraine, the EU, and Russia met

---

<sup>232</sup> Kirk Bennett, "The Minsk Trap," The American Center for a European Ukraine, 2015, <http://www.europeanukraine.org/home/2015/09/the-minsk-trap/>.

and released the Geneva Statement. This document called for: (1) an OSCE Special Monitoring Mission; (2) a refrain from violence; (3) amnesty for protestors that did not commit capital crimes; and (4) the disbanding of illegal armed groups and the vacation of seized or occupied territory. When this failed to contain hostilities, France, Germany, Ukraine, and Russia met on 6 June in what became known as the Normandy Format. They established a Trilateral Contact Group for conflict mediation that consisted of Ukraine, Russia, and the separatists with participation and mediation from the OSCE. This Group signed the Minsk I protocol with twelve points on 5 September. These points ranged from external monitoring, a ceasefire, amnesty for participants, humanitarian assistance, the withdrawal of armed opposition groups and foreign mercenaries, a ban on offensive operations, a ban on combat aircraft, and the creation of a 30 KM buffer zone for the use of heavy weaponry and artillery. Eleven days later, President Poroshenko signed document 1690-VII, the law “On Special Self-Governance Procedure in Separate regions of Donetsk and Luhansk Oblasts.” The law contained ten articles, nine of which were pulled from points of the Minsk I protocol. The remaining four Minsk I points were not addressed in the law because they were diplomatic or bilateral in nature and not enforceable through domestic law. Despite this effort, Russia and the leaders of its “Separate Areas of Donetsk and Luhansk Oblasts” (hereinafter using the Ukrainian acronym ‘ORDLO’) did not abide by the ceasefire, heavy weapons ban, withdrawal of armed groups or mercenaries,<sup>233</sup> or the return of the Ukrainian border to Ukraine. Even the humanitarian aid clause is suspected of abuse to ferry weapons from Russia to the ORDLO<sup>234</sup> and OSCE monitors were attacked to prevent their access to conflict areas.<sup>235</sup> “Russia continues to fund, support, and arm separatists in eastern Ukraine. They, in turn, continue to dismiss, distract, and deny the work of the Organization for Security and

---

<sup>233</sup> The Warsaw Institute, “Russian ‘Contractors’ In the Service of the Kremlin,” 2019, <https://warsawinstitute.org/russian-contractors-in-the-service-of-the-kremlin/>.

<sup>234</sup> EuroMaidan Press, “The Hidden Invasion: Russia’s Military Convoys to Ukraine since 2014,” 2018, <http://euromaidanpress.com/2018/11/06/the-hidden-invasion-russias-military-convoys-to-ukraine-since-2014/>.

<sup>235</sup> Chargé d’Affaires a.i. Kate M. Byrnes, “Ongoing Violations of International Law by the Russian Federation in Ukraine,” 2017, <https://osce.usmission.gov/ongoing-violations-international-law-russian-federation-ukraine-2/>.

Cooperation in Europe (OSCE), which is supposed to monitor the implementation of the agreement.”<sup>236</sup> Ultimately, this agreement failed to contain hostilities and the 13-point Minsk II Agreement was signed on 12 February 2015.

Minsk II was a continuation of the status quo because Russia refused to acknowledge its role as party to the conflict. In fact, Russia continued the legitimacy-shaping information operations by reinforcing its role as a mere “guarantor”<sup>237</sup> of security rather than as aggressor, stoked and led the violence, and then maintained a steady flow of disinformation highlighting Ukraine’s so-called Minsk violations. A careful observer could clearly see the slow transition from conflict arbitration to a Russian attempt to codify a legally recognized frozen conflict in Ukraine. “While Minsk II remains unimplemented, its provisions clearly signal the extent to which Russia’s position had shifted within a year—from a negotiated transition of uncertain outcome to a situation in which a fundamental territorial and political re-organization of the Ukrainian state, quasi-constitutionally empowering and entrenching a strongly pro-Russian entity within Ukraine, was agreed in an ad hoc international negotiation format.”<sup>238</sup> Thankfully, that ad-hoc format has no locus standi within PIL because the Minsk accords did not satisfy the Vienna Convention on the Law of Treaties. Article 7 states that the agreement must be signed by a head-of-state, which Minsk was not,<sup>239</sup> and Article 8 states that the signed treaties must be confirmed or ratified by the states, which Minsk was not. Regardless, Ukraine still finds itself under the reflexive control of the Russian Federation through the leveraging of quasi-legal instruments (Minsk). “This reality constitutes an attempt by Russia to ensnare Ukraine in this ‘Minsk trap’ by manipulating international and

---

<sup>236</sup> Andrew Foxall, “The Ceasefire Illusion: An Assessment of the Minsk II Agreement Between Ukraine and Russia,” no. 8 (2015), <https://henryjacksonsociety.org/wp-content/uploads/2015/12/Minsk-II-FINAL-For-Website.pdf>.

<sup>237</sup> Sputnik News, “Russia Guarantor of Ukraine Settlement, Not Party Fulfilling Deal - Kremlin,” 2015, <https://sputniknews.com/politics/201502131018209668/>.

<sup>238</sup> Tatyana Malyarenko and Stefan Wolff, “The Logic of Competitive Influence-Seeking: Russia, Ukraine, and the Conflict in Donbas,” *Post-Soviet Affairs* 34, no. 4 (2018): 191–212, <https://doi.org/10.1080/1060586X.2018.1425083>.

<sup>239</sup> Minsk II was signed by a representative of the OSCE, a former President of Ukraine, and the so-called leaders of the self-proclaimed Luhansk and Donetsk People’s Republics.

Ukrainian domestic law to manufacture a resolution that is favorable to Moscow and built upon its terms...It allows Russia to avoid fulfilling the same requirements as any other state party. This strategy also forces the government of Ukraine to negotiate with the self-proclaimed republics as if they were recognized state entities, which permanently shapes the legitimacy of these entities in a way that is favorable to Moscow.”<sup>240</sup>

The result is a concerning manipulation of the seam between war and peace, otherwise understood as the exploitation of a legal lacuna in international legal understanding. Carl Nilsson highlighted this problem in 2015 through the Center of Strategic and International Studies, well before Russia’s motives were fully understood. “A strategic pattern has emerged whereby Russia, as a perpetrator of and party to a conflict, dictates the conditions of the cease-fire, and then actively pursues the violation of the same agreement for its own political, military, and territorial gain. This serves a dual function: it undermines the international legal norm of cease-fires and provides a diplomatic ‘process’ whereby eventually the international community loses interest and focus in resolving the conflict, allowing the freeze to be controlled by the Kremlin.”<sup>241</sup>

### 3.4.5. Exploit Legal Loopholes

On 14 March 2019, the Russian submarine “Krasnodar” transited the Turkish Straits, its crew sailing south from their Crimean port in Sevastopol and into the Mediterranean Sea. The Krasnodar is one of six improved Kilo-Class diesel-electric submarines and it joined the Russian Federation’s Black Sea fleet in 2017. Rather than executing a starboard turn for repairs in Saint Petersburg’s drydocks as expected, the submarine turned to port. It eventually arrived at the floating-dock at the Russian naval base in Tartus, Syria, to participate in combat operations supporting the Assad regime in the country’s proxy civil war. What followed over the next two weeks was a combat

---

<sup>240</sup> Nadia Volkova, “The Minsk Trap: Moscow’s Perversion of the Conflict Arbitration Process in Ukraine” 131 (2019): 73–82, <https://doi.org/10.18523/2617-2607.2019.4.73-82>.

<sup>241</sup> Carl Hvenmark Nilsson, “Revisiting the Minsk II Agreement,” 2016, [www.csis.org](http://www.csis.org).

rotation of cruise-missile wielding Kilo-Class diesel-electric submarines. Two combat-weary submarines sailed north through the Straits from Tartus while two replaced them from Sevastapol.

The Montreux Convention Regarding the Regime of Straits of 1936 (hereinafter Montreux Convention) dictates the legal use of the Bosphorus and Dardanelles straits, hereinafter the Turkish Straits, and restricts the passage of ships to and from the Black Sea. It was intended to maintain Turkish control over the straits, to restrict the navies of Black Sea nations from utilizing the Sea as an expeditionary launching-pad, and to satisfy the West by containing the Soviet Union to the Black Sea. The Convention specifies when submarines belonging to Black Sea nations may transit the straits; “Black Sea Powers shall have the right to send through the Straits, for the purpose of rejoining their base, submarines constructed or purchased outside the Black Sea, provided that adequate notice of the laying down or purchase of such submarines shall have been given to Turkey. Submarines belonging to the said Powers shall also be entitled to pass through the Straits to be repaired in dockyards outside the Black Sea...”<sup>242</sup> Turkey is not a signatory member of UNCLOS, therefore the Montreux Convention is the only international governance structure for the use of the straits.

This case is an example of the Russian Navy manipulating the aforementioned article 12 of the convention. By claiming that two of its submarines required repairs, the Russian navy was able to weaponize the convention, utilizing it as a force multiplier to bring more firepower to bare in their Syrian combat operations. The Kalibr sea-launched missile carried by these ultra-quiet diesel electric submarines has a range of approximately 2,500 Kilometers. It was actually ten months later, in January of 2020, that the Krasnodar planned to sail to St. Petersburg for proper repairs. Alexander Shishkin, a Russian naval engineer, suggested a year earlier that this manipulation could allow such combat rotations. “Probably, if you wish, you could find loopholes that allow bypassing the

---

<sup>242</sup> League of Nations, “1936 Montreux Convention,” 1936, [http://sam.baskent.edu.tr/belge/Montreux\\_ENG.pdf](http://sam.baskent.edu.tr/belge/Montreux_ENG.pdf).

provisions of article 12. Say, notify Turkey of the urgent need to repair the black sea boats at Tartus, in Cyprus or in Egypt due to congestion of the Crimean ship repair yards.”<sup>243</sup> He went on to warn, however, that the West would never allow such brazen behavior. Flash forward a year, and Russia not only openly manipulated the convention, but its perversion of international law went largely unnoticed by the international community.

Then, on April 27th of 2020, Russian State Media claimed that “The Black Sea Fleet’s Project 636.3 diesel-electric submarine ‘Rostov-on-Don’ has embarked on its deployment in distant waters and will soon join the Russian Navy’s permanent Mediterranean task force...The submarine is expected to transit the Black Sea straits this evening.”<sup>244</sup> As announced, this is a clear violation of the Montreux Convention. The truth, however, is much different than announced by the Russian news agency. It was an additional two months before the the “Rostov-on-Don” actually transited the Turkish Straits southbound on 23 June.<sup>245</sup>

Unlike the grandiose announcement on 27 April, the actual transit was accompanied by a largely unnoticed 2-sentence press release to backtrack on the April statement; “The submarine “Rostov-on-Don” of the Black Sea Fleet passes the Black Sea straits as part of the ongoing transition to the ship repair plant of Northwest Russia for planned ongoing repairs. In the passage of torrential zones, the submarines of the Black Sea Fleet, along with surface ships and security vessels, operate in strict accordance with international law.”<sup>246</sup> The mention of repairs is an attempt to comply with article 12 of the Montreux Convention. This is a clear example of MALOPs, particularly exploiting legal loopholes and shaping legitimacy through information operations.

---

<sup>243</sup> Alexander Shishkin, “Russian Submarines Are Prevented from Operating in the Mediterranean Sea,” *Vzhlyad*, 2018, <https://vz.ru/world/2018/5/28/924562.html>.

<sup>244</sup> TASS, “Russian Navy Sub Embarks on Deployment to Mediterranean Sea,” Russian News Agency, April 27, 2020, <https://tass.com/defense/1150089>.

<sup>245</sup> H Sutton, “Russian Submarine Transits Bosphorus In Move That Raises Questions Under International Treaty,” *Forbes*, June 23, 2020, <https://www.forbes.com/sites/hisutton/2020/06/23/image-shows-russian-submarine-appearing-to-break-international-treaty/?sh=1f49568e57b8>.

<sup>246</sup> Министерство обороны Российской Федерации, “Подводная Лодка «Ростов-На-Дону» Черноморского Флота Проходит Черноморские Проливы ,” June 23, 2020, [https://function.mil.ru/news\\_page/country/more.htm?id=12298689@egNews](https://function.mil.ru/news_page/country/more.htm?id=12298689@egNews).

The Russian Federation exercised disinformation by claiming that the submarine would transit the Turkish straits on April 27th in what would be a blatant violation of international law. Given the grandiose nature of the announcements, this is easily interpreted as a rebuke of international norms. In other words, Russia was touting its naval prowess. However, the submarines did not transit the straits until sufficient notification was given to Turkey under international law and the satisfaction of article 12, by stating the need for repairs in “strict accordance with international law,”<sup>247</sup> rather than the original “deployment to distant waters.”<sup>248</sup> These two announcements, separated by two months, were likely insignificant to the untrained observer. To a student of MALOPs, however, they constitute a clear manipulation of a loophole in international law. The exploited legal loophole was article 12 of the Montreux convention and the shaping of legitimacy was the blatant attempt to portray the Russian Navy as a strong and expeditionary naval power while simultaneously releasing a meager announcement wherein the Rostov-on-Don required repairs in St. Petersburg. On its surface, this example highlights a violation of the spirit and intent of an international agreement without necessarily violating the black-letter of the law. In the end, the convention fails to specify any time-frame for seeking repairs, and also does not prohibit nations from participating in military operations in-transit to or from repair facilities. This is perhaps why this situation, contrary even to what Russian experts believed, was ignored by the international community.

Another example of the exploitation of legal loopholes is the abuse of Article 58 of the OSCE’s Vienna Document of 2011 to conduct troop movements and intimidate other countries. This was discussed during the earlier review of Voyger’s matrix of hybrid warfare and legal domains. Such snap exercises are able to cause significant harm when employed with malign intent. For example, the €550 million NordBalt project was an underwater cable from Sweden to Lithuania that was completed in 2015. Since the Baltic

---

<sup>247</sup> Министерство обороны Российской Федерации.

<sup>248</sup> TASS, “Russian Navy Sub Embarks on Deployment to Mediterranean Sea.”

States were heavily reliant upon Russia for energy, and this 453 Kilometer cable would satisfy approximately half of Lithuanian electricity needs, it was in Russia's interests to deny or delay the project. At the time, Lithuania was dependent upon Russia for 35.5% of its energy needs. Russia responded by conducting snap naval exercises within Lithuania's EEZ, closing parts of the Baltic Sea, and demanding that the cable-laying ship cease operations and depart the area due to the protection of "military exercise zones." Article 58 of UNCLOS discusses the management of EEZs and the rights of States in these zones. Article 88 stipulates those foreign states operating within another state's EEZ must do so for peaceful purposes. According to the Swedish Ministry of Foreign Affairs, "[The vessel] was asked by the Russian Navy to leave its position in Lithuania's exclusive economic zone, where it had a legitimate right to be, according to international law." Russia's Navy conducted four of these exercises in a relatively short period, costing unknown time and resources. At a rate of €675,000 Per Undersea Kilometer, even the slightest delay likely proved costly for the Lithuanian project. The Lithuanian Ministry of Defense made several statements to stop this disruptive behavior. "Such activity by the Russian Federation...is in breach of the United Nations Convention on the Law of the Sea and the principles of good neighborhood."

These same tactics are also used against Ukraine and the United States in the Black Sea. In July of 2019, Russia attempted to close 8,000 Sq Km of sea to the west of Crimea. This was at the same time as the annual U.S.-Ukrainian Naval exercise titled "Sea Breeze." Then, between July 24th and August 19th, Russia attempted to close 118,570 Sq Km for another snap exercise. This effectively blocked 25% of the Black Sea and closed international shipping routes used by Bulgaria, Georgia, Romania, and Ukraine. Russia claimed that these five "warning areas" included naval combat training and posed a danger to navigation, however, insufficient commitments from its Black Sea Fleet meant that many of the areas were empty for the over three weeks that they were closed. The Ukrainian military saw this behavior for what it was: "these actions should be considered

as another act of hybrid aggression at sea, now not only on Ukraine, but also in other countries of the Black Sea region.”

As highlighted above, the manipulation of legal loopholes is a major tenant of MALOPs. Often referred to as treaty abuse, there is no shortage of relevant examples. Considered as a single tactic, the abuse of legal loopholes has utility in achieving small tactical objectives or imposing cost and risk on an adversary. However, as part of a concerted MALOPs campaign in conjunction with limited military force, one can quickly imagine just how effective this can be in achieving major geopolitical objectives.

#### 3.4.6. Abdicate Legal Obligations

The denial of legal obligations is a critical tool for the MALOPs practitioner. One can make the argument that the abdication of obligations is part of legitimacy shaping or legal containment. It can also be said that the abdication of legal obligations is a principal objective of MALOPs and not necessarily a tenant. These assertions are both true; however, it is such an important aspect of MALOPs that it requires a dedicated tenant. Furthermore, these activities are often not the goal, but simply a stepping-stone to future transgressions or the legal and informational preparation of the so-called battlefield. When a MALOPs practitioner is successful in shaping the legitimacy of a conflict or situation and achieves sufficient legal containment over an adversary, they can begin to abdicate legal obligations to justify follow-on actions – perhaps a military intervention or illegal incursion. For example, President Putin made a dramatic assertion about Ukraine in 2014 in an effort to de-legitimize Ukraine’s sovereignty despite the UN Charter, Alma-Ata accords, Budapest memorandum, and numerous treaties on friendship, cooperation, and partnership to include military cooperatives. “[I]f it's a revolution, what does that mean? It is difficult for me then to disagree with some of our experts who believe that there is a new state in this territory. Just as it was after the collapse of the Russian Empire, after the Revolution of 1917, a new state emerges. And with this state and in relation to this state,

we did not sign any binding documents.”<sup>249</sup> This powerful example of propaganda, disinformation, and legitimacy shaping shows the lengths to which a MALOPs practitioner will go to achieve a political objective. Another example is from then-Russian President Medvedev in 2008 when he justified the Russian interventions in South Ossetia and Abkhazia. “[T]he aggression and genocide unleashed by the Saakashvili [Georgian President] regime have changed the situation...We therefore had no choice but to take the decision to recognize these two subjects of international law as independent states [South Ossetia and Abkhazia]...in order to prevent the killing of people and a humanitarian catastrophe, in order for justice to triumph and for these peoples to realize their right to self-determination, we have recognized their independence. No two cases are alike in international law.”<sup>250</sup> These concerning examples are carefully crafted and utilize the language of international law to feign, or shape, legitimacy. Then, pro-Russian media outlets (some government controlled) propagate these talking points in concerted misinformation campaigns. This effectively amounts to information laundering and eventually results in non-affiliated media outlets sharing the misinformation without understanding the underlying malign influence.

Another variation on the abdication of legal obligations is Russia’s complex use of previous illegalities to justify future transgressions. One way to consider this is through the concept of malign legal layering. Professor Stefan Halper of the University of Cambridge, previously cited in this Chapter, states that legal layering consists of: “Leveraging a set of rotating arguments, with several legal justifications in play allows for movement from one legal argument to another should the previous suffer flaws in legal validity. Thus, if one argument fails, others can be swiftly leveraged to create, in the aggregate, an overall plausible legal case.”<sup>251</sup> In the case of malign legal layering, the objective is to create enough uncertainty through sheer volume of faux- and quasi- legal

---

<sup>249</sup> Putin, “Vladimir Putin Answered Questions from Journalists about the Situation in Ukraine.”

<sup>250</sup> BBC News, “Interview with BBC Television - President of Russia,” The Kremlin Website, 2008, <http://en.kremlin.ru/events/president/transcripts/1228>.

<sup>251</sup> Halper, “China: The Three Warfares.”

positions and information operations that observers begin to question the situation. For example, the Russian Federation is engaged in combat operations in Eastern Ukraine while simultaneously claiming it to be a purely Ukrainian civil war. It is participating in the Minsk mediation process as a “guarantor” of regional security while concurrently thwarting OSCE monitors and actively enabling violence by arming and training separatists. It claims that Ukraine must negotiate with the non-recognized separatist republics of Luhansk and Donetsk while simultaneously giving these citizens Russian passports and reinforcing them with Russian soldiers-for-hire through Kremlin-linked Private Military Companies. It claims a right to stop Ukrainian military vessels transiting Ukraine’s treaty-protected access to the shared Kerch strait while evoking the United Nations Convention on the Law of the Sea, which is a claim that the United Nations itself does not recognize due to Russia’s illegal possession of the territorial waters that Russia purports to protect. It claims that the Sea of Azov is a shared-border bay and then, once no longer beneficial, demands that its illegally-claimed territorial waters be respected. Then, when the adjudicating tribunals of these institutions rule against Russia, the Kremlin refuses to recognize their jurisdiction at all and moves unapologetically to its next endeavor.

This tenant can be considered the penultimate in information operations as it pertains to MALOPs. Legitimacy is shaped to the extent that a practitioner can openly announce that the law is no longer recognized, and that a new precedent governs a given scenario under the law. The goal, as discussed, is not for this behavior to go entirely unnoticed, but to create enough uncertainty and doubt that there is sufficient time to use hard power – military force – to consolidate the gains made through manipulations of the law.

### 3.4.7. Malign Influence Within Legal Domains (MILDs)

What makes MALOPs different from other, similar, concepts are the commitment to the malign qualifier. In terms of international relations, Anton Shekhovtsov of the Free Russia Foundation defined Malign Influence as “soft coercion, sharp power, mimetic power and dark power with the intent to mislead and confuse democratic nations and their leadership, hence the influence emanating from these approaches is inevitably negative in the normative sense and is termed here as malicious.”<sup>252</sup> With respect to the law, and in this case PIL, malign influence can be considered as “a dual or mimetic application; the first is a seemingly genuine effort to uphold and support the international norms and institutions that comprise international order. The second to be observed is a simultaneous and malign effort to subvert and exploit these same norms and institutions for geopolitical gain.”<sup>253</sup> Since the United Nations is an institution that was admittedly built upon democratic principles, one must accept that malign influence can occur not only against individuals, nations, and states, but against international institutions.<sup>254</sup> As this author established in a previous study on the Soviet concept of ideological aggression, “it can be said that Malign Influence within Legal Domains (MILDs) is the malicious, coercive, subversive, or duplicitous behavior of a state or entity within or against the domestic or international legal domains concerning a target state, individual, organization, or international institution.”<sup>255</sup> Put another way, this is corruption and coercion within legal domains.

In its publication titled *The Kremlin Playbook: Understanding Russian Influence in Central and Eastern Europe*, the Center for Strategic and International Studies asserts that

---

<sup>252</sup> Anton Shekhovtsov, “Conceptualizing Malign Influence of Putin’s Russia in Europe,” 2020, [https://www.4freerussia.org/wp-content/uploads/sites/3/2020/04/Maligh-Influence\\_web\\_eng-5.pdf](https://www.4freerussia.org/wp-content/uploads/sites/3/2020/04/Maligh-Influence_web_eng-5.pdf).

<sup>253</sup> Fisher, “Ideological Aggression and International Law: Soviet and Russian Malign Influence Withing Legal Domains (MILDs).”

<sup>254</sup> The United Nations, “Democracy and the United Nations,” accessed May 4, 2020, <https://www.un.org/en/sections/issues-depth/democracy/index.html>.

<sup>255</sup> Fisher, “Ideological Aggression and International Law: Soviet and Russian Malign Influence Withing Legal Domains (MILDs).”

Russia has cultivated an “opaque network of patronage” that it uses “to influence and direct decision-making.”<sup>256</sup> They assert that this web resembles a network-flow model, which can be best described as an unvirtuous cycle of corruption and malign influence. “These Russian networks constitute a vital element of Russia’s doctrine of New Generation Warfare, which ‘is primarily a strategy of influence, not of brute force,’ and its primary goal is ‘break[ing] the internal coherence of the enemy system-and not about its integral annihilation.’”<sup>257</sup> This concept is well nested within the notion of MALOPs and is evident in recent examples such as the 2018 Kerch Strait case before the International Tribunal for the Law of the Sea (ITLOS), Russia’s repeated abuse of their permanent place and veto-power on the UNSC, and China’s Confucius institutes and active revisionist influence within international legal academia.

The specific notion of coercion, which in the case of MALOPs constitutes the threat of quasi- or faux-legal action in exchange for concessions, is a difficult concept to quantify from the perspective of international law. Tom Farer, a well know international law scholar, warned in 1985 the challenges of using the word coercion in the context of international law.

“The nub of the matter is that the word ‘coercion’ has no normative significance; there is nothing illegal about coercion. Coercion is normal in all human relationships, including those between lovers. It’s part of life. So is cooperation. Indeed, every human relationship is some mixture of coercion and cooperation. So to say that a particular relationship is coercive is to say nothing at all about its legitimacy.”<sup>258</sup>

While very true, it is critical to identify the coercive use of PIL. For example, following Russia’s illegal ramming, shooting, and seizing of three Ukrainian naval vessels and 24 sailors on 25 November 2018, Ukraine built a case and submitted it to the ITLOS.

---

<sup>256</sup> Heather A. Conley et al., *The Kremlin Playbook* (Center For Strategic and International Studies, 2016).

<sup>257</sup> Conley et al.

<sup>258</sup> Tom J. Farer, “Political and Economic Coercion in Contemporary International Law,” *American Society of International Law* 79, no. 3 (1985): 406.

Russia refused to acknowledge Ukraine's right to innocent passage of the Kerch straight or numerous international agreements guaranteeing the ships safe passage through the strait. In order to strengthen its faux international legal argument that the Russo-Ukrainian was, in fact, an internal armed conflict, Russia refused to partake in any discussion of international humanitarian law and charged the sailors as criminals under domestic Russian law: "conspiracy by a group of persons or an organized group to illegally cross the border using violence or the threat to use violence," (Part 3 of Article 322 of the Russian Criminal Code). They faced up to six years in prison if convicted. This is another excellent example of malign legal layering, legitimacy shaping, and abdication of legal obligations. The tribunal decided 19-1 that Russia must return the sailors and vessels. The single dissenting vote was a Russian Judge that argued in favor of UNCLOS article 298, paragraph 1(b), which excluded military activities and therefore meant that ITLOS had no jurisdiction over the Kerch incident. Russia claimed that the sailors were seized in a law enforcement operation, would not treat them as prisoners of war, and charged them as criminals under domestic Russian law while simultaneously arguing before the tribunal that their activities included a mix of law enforcement and military vessels, meaning that their military activities did not fall under the purview of ITLOS. This is a perfect MALOPs example of a duplicitous approach to international law with Russia arguing publicly that it was a criminal operation and legally that it constituted military activities. Furthermore, the single Russian judge's support of this baseless argument illuminates the importance of Malign Influence within Legal Domains as a key tenant of MALOPs.

Similarly, and as discussed, China argued that UNCLOS and the Permanent Court of Arbitration (PCA) had no jurisdiction over the Philippines v. PRC case in the South China Sea because there were numerous agreements between the two countries mandating that disagreements be handled bilaterally. This is despite the PRC's refusal to negotiate with the Philippines in good faith when approached to address Manila's complaints. Another example of the PRC's Malign Influence within Legal Domains is its "Confucius

institutes” and aforementioned attempts to shape international law in its favor by employing an army of academics to speak at international conferences and to shape discourse such that the law is revised, by custom, in its favor. To reiterate a comment by Dr. Chen from an earlier discussion: “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.”<sup>259</sup> Furthermore, Chinese legal experts do not just master Chinese and international law, but the laws of other nations to identify weaknesses and potential levers for exploitation.

Malign influence, or corruption, within legal domains is a key tenant of MALOPs because it provides a critical legal asymmetry to be used in achieving political objectives for the benefit of the MALOPs practitioner. In the ITLOS example, the lone dissenting Russian judge may have been inconsequential to the overall ruling, however, his position was broadcast over Russian media, social media, blogs, and periodicals. His talking points were all the Kremlin needed to shape the legitimacy of the case, at least domestically, and to ignore the ruling altogether.

### 3.5. Law, De Facto: The Exploited Principles of Public International Law

With the tenants of Malign Legal Operations established, the scope of this section will narrow to demonstrate how the underlying principles of PIL are manipulated to make these tenants possible. While MALOPs applies to all legal domains (domestic and international law), this study is focused on PIL and therefore this section will delve into the theory behind the rhetoric, propaganda, disinformation, misinformation, and legitimacy-shaping that has been presented thus far. Many of the principles discussed here revolve around the differences between what is and what ought to be. While these principles are likely common knowledge to many international legal scholars and

---

<sup>259</sup> Cheng, “Winning Without Fighting: Chinese Legal Warfare.”

practitioners, this study proposes a new theoretical framework to consider legal domains in the context of international conflict (MALOPs). It is therefore necessary to dwell briefly on these principles for the sake of non-legal scholars; military professionals, policy makers, politicians, etc.

Before reviewing six individual principals, it is first necessary to explore the spirit of international law itself. There is no singular codex of principles, however, there is a 50-year-old document that captures intent: The Declaration on Principles of International Law, Friendly Relations, and Cooperation Among States in Accordance with the Charter of the United Nations, signed October 24th, 1970, in UNGA resolution 2625 (adopted without vote). The Declaration notes that the good faith fulfillment of obligations is of the greatest importance for the maintenance of international peace and security and notes that any form of interference violates the spirit and letter of the UN Charter. It also reiterates the duty of States to refrain from all forms of “coercion aimed against the political independence of territorial integrity of the State.” This includes “reprisal” involving the use, or threat of use, of force and “partial or total disruption of the national unity” of a State. Furthermore: “no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist, or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.” These principals, in addition to those outlined in the Charter, remove all doubt as to the spirit and intent of PIL. States are sovereign, judicially equal, and are obligated to respect the personality of other States. With these things in mind, the first principal for review is perhaps the most foundational to PIL: *pacta sunt servanda*.

### 3.5.1. *Pacta Sunt Servanda* versus *Clausula Rebus Sic Stantibus*

*Pacta sunt servanda* translates to “agreements must be kept” and is perhaps the most basic principle of international treaty law. It was initially defined in Article 26 of the Vienna Convention on the Law of Treaties, which stipulates that “Every treaty in force is

binding upon the parties to it and must be performed by them in good faith.” While very simple, this principle becomes weaponized when MALOPs practitioners employ the tenant of legal containment. This is done by codifying, via treaty, a set of circumstances that is not in the best interests of at least one party. It is perhaps the epitome of reflexive control because it not only results in an adversary state taking action against its own interests, but captures this action within a legally binding document that can later be politically leveraged against the target. By championing “universality” and the importance of observing international legal obligations, the MALOPs practitioner reinforces its own duplicitous legal containment efforts. Then, through legitimacy shaping and the informational/legal preparation of the battlespace, the MALOPs practitioner can abdicate legal obligations and achieve decisive victories against an opponent which, by that point, has been sufficiently labeled the aggressor or violator. By seizing the legal initiative, MALOPs practitioners can effectively shape a conflict on their terms.

*Clausula Rebus Sic Stantibus* translates to “things thus standing” and is captured in Article 62 of the Vienna Convention. It stipulates that a treaty may be terminated, or modified, by one or more parties following a “fundamental change of circumstances.” However, the Convention stipulates that Article 62 may not be invoked for treaties concerning geographic boundaries or “the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.” The key to Article 62 is that the change in circumstances must occur with regard to circumstances that existed when the treaty was originally concluded and that the change must concern an “essential basis of the consent of the parties.” Colloquially, Article 62 of the Vienna Convention is often referred to as an “escape clause” for international law. Specifically, it is an escape clause for *pacta sunt servanda*. Articles 42 and 43 state the circumstances under which a treaty can be terminated under normal conditions and Article 65 offers a procedure for treaty termination, however, Article 62 is the most ripe for manipulation due to the legal gap in

the definition of the “fundamental change” necessary to employ *clausula rebus sic stantibus*.

Rather than debating their merits, this analysis simply presents the conflict between *pacta sunt servanda* and *clausula rebus sic stantibus*, specifically to highlight the conflict’s utility to MALOPs practitioners. Those concerned by the existence of *clausula rebus sic stantibus* state that it nullifies the purpose of international treaty law altogether. Those concerned by the lack of *clausula rebus sic stantibus* consider it a violation of the supremacy of state sovereignty. MALOPs practitioners, however, see it as an opportunity to contain adversaries until the time is right for exploitation. There are numerous legitimate examples throughout history when *clausula rebus sic stantibus* was evoked, typically unsuccessfully. For example, the Russian Empire stated that a *clausula rebus sic stantibus* change in circumstances occurred and in 1870 which nullified its obligations to the 1856 Treaty of Paris governing military shipping on the Black Sea. Russia had promised to refrain from basing a navy in the Black Sea, but later announced that it would no longer abide by the treaty. In 1886, Russia stated that it would also not recognize the 1878 Treaty of Berlin, which committed Russia to not militarizing the harbor of Batum on Georgia’s Black Sea coast. Famed statesman and professor James Bryce noted in his 1922 book titled “International Relations” that “both these treaty obligations had been imposed upon Russia at a time when the forces arrayed against her were too strong to be resisted. She accepted them willingly under a sort of duress!”

What is unique about modern international conflict is that doctrine like *clausula rebus sic stantibus* are not declared by name. The problem with combatting Malign Legal Operations is that it is employed politically, not legally. In this sense, *clausula rebus sic stantibus* is utilized as a part of information operations – in the court of public opinion – but not in a proper courtroom, tribunal, dialogue, or otherwise. The Putin and Medvedev quotes used to articulate the MALOPs tenant of abdicate legal obligations are perfect examples. To refresh: “[I]f it's a revolution, what does that mean? It is difficult for me

then to disagree with some of our experts who believe that there is a new state in this territory. Just as it was after the collapse of the Russian Empire, after the Revolution of 1917, a new state emerges. And with this state and in relation to this state, we did not sign any binding documents,”<sup>260</sup> and “[T]he aggression and genocide unleashed by the Saakashvili [Georgian President] regime have changed the situation...We therefore had no choice but to take the decision to recognize these two subjects of international law as independent states [South Ossetia and Abkhazia]...in order to prevent the killing of people and a humanitarian catastrophe, in order for justice to triumph and for these peoples to realize their right to self-determination, we have recognized their independence. No two cases are alike in international law.”<sup>261</sup>

Claiming that Ukraine is a “new state,” offering several faux examples that run contrary to established international legal precedent and the UN Charter, and then stating that there are no binding documents with this new state is effectively claiming *clausula rebus sic stantibus*; a fundamental change in circumstances and escape clause to *pacta sunt servanda*. The same can be said for the Medvedev quote, using language of international law with words like aggression, genocide, self-determination, and independence to claim that the situation has changed. Not only do these so-called fundamental changes in circumstances seek to justify armed aggression, but the behavior is supported by claiming that the aggressor had no choice due to humanitarian catastrophe.

### 3.5.2. Ex Factis Jus Oritur versus Ex Injuria Jus Non Oritur

Ex factis jus oritur is a primordial Roman legal principle that translates to “the law arises from the facts.” Its counter-principle is ex injuria jus non oritur, which translates to “legal rights cannot arise from wrongdoing.” Christopher R. Rossi, Adjunct Faculty at the University of Iowa College of Law, published an article concerning these conflicting

---

<sup>260</sup> Putin, “Vladimir Putin Answered Questions from Journalists about the Situation in Ukraine.”

<sup>261</sup> BBC News, “Interview with BBC Television - President of Russia.”

notions titled “Ex Injuria Jus Non Oritur, Ex Factis Jus Oritur, and the Elusive Search for Equilibrium After Ukraine.” Rossi argued that there is an ongoing struggle to “balance countervailing interests in legitimate governance and effective rule grounded in social fact.”<sup>262</sup> On the one hand, the international community refused to recognize Russia’s unauthorized referendum in Crimea. The UN characterized the referendum as “having no validity, [thus] cannot form the basis for any alteration of the status.”<sup>263</sup> Therefore, if the referendum is not recognized, then Russia cannot legally annex the territory because it remains Ukrainian. On the other hand, Russia occupied Crimea with tens of thousands of soldiers. The facts may place the region squarely in Russia’s grasp, however, the activities leading to these facts were based entirely upon illegalities. “Russia’s aggressive fait accompli in Crimea attacks the validity of the principle through its seizure of territory by means of threats, use of force, and a widely perceived sham referendum.”<sup>264</sup>

Most legal scholars agree that a constant struggle for equilibrium between these principles is necessary. Without *ex injuria*, injustice and coercive power will dominate the international landscape. Without *ex factis*, there can be no true or effective international order. Rossi quotes several international legal scholars in concluding that, more often than not, *ex factis* is victorious. Rossi also quotes Gerard Kreijen’s analysis of decolonization of sub-saharan Africa to show that *ex injuria* is doctrinally beneficial, however, it lacks “institutional and executive machinery to guarantee the enforcement of legal rules,” noting the role of “established facts as decisive for the determination of legal title.” (Gerard Kreijen, *State failure, sovereignty and effectiveness: legal lessons from the decolonization of sub-Saharan Africa* 2005) In 1998, the Canadian Supreme Court stated that “an illegal act may at some later point be accorded some form of legal status” when considering the potential secession of Quebec. Ultimately, the struggle between *ex factis*

---

<sup>262</sup> Christopher Rossi, “Ex Injuria Jus Non Oritur, Ex Factis Jus Oritur, and the Elusive Search for Equilibrium After Ukraine,” *Tulane Journal of International and Comp. Law*, 2015, 143–73

<sup>263</sup> G.A. Res. 68/262, ¶ 5 U.N. Doc. A/RES/68/262, Mar. 27, 2014.

<sup>264</sup> Rossi.

and *ex injuria* can be reduced to the positivist notion that possession is nine tenths of the law or the Melian lesson which states that might makes right.

With respect to MALOPs, *ex factis* is the doctrinal foundation to legitimacy shaping and the abdication of legal obligations. Once the goal of a particular MALOPs campaign is reached via *fait accompli*, military force is used to secure those gains and present an irreversible fact until the international community has no choice but to accept the new facts on the ground. Eventually, future behavior stemming from the original illegality is deemed acceptable. The U.S. Army introduced a term in 2018 called the *fait accompli* attack: “to achieve military and political objectives rapidly and then to quickly consolidate those gains so that any attempt to reverse the action would entail unacceptable cost and risk.”<sup>265</sup> This discussion perfectly represents the manipulation of *ex factis*, however, the U.S. Army did not consider the legal domain as the ultimate target, or mechanism, to achieve objectives in the long term. Through MALOPs, the illegally seized objective is eventually legitimized, thus completing the *fait accompli* attack.

An example of this notion in action is the Kerch Strait. Russia sponsored a sham referendum in Crimea, annexed the territory, illegally claimed 12 nautical miles of territorial waters per UNCLOS, built the Kerch bridge from Russia to Crimea, and began illegally restricting passage between the Black and Azov Seas through the Strait. This culminated in the previously discussed Kerch Strait incident of 2018, which received significant media attention and analysis in this study. On December 10th, 2021, Russia again accused Ukraine of a provocation near the Strait. This time the Ukrainian Naval vessel *Donbas* was sailing near the Strait and was approached by Russian FSB vessels. They claimed that the *Donbas* failed to seek permission to pass through the Strait and that it refused to allow the FSB to board and search the vessel, causing significant commercial shipping delays. Russian media labelled the incident a Ukrainian aggression, despite Ukraine stating that the *Donbas* had no intention of passing through the Strait and

---

<sup>265</sup> U.S. Army Training and Doctrine Command, “The U.S. Army in Multi-Domain Operations 2028.”

therefore was not bound by reporting or boarding requirements. The Russian victory was Ukraine's acknowledgement and legitimization of Russia's laws and requirements governing the Strait. Slowly, since 2014, Russia's de facto ownership of Crimea is becoming de jure.

### 3.5.3. Lex Lata versus Lex Ferenda

These principles translate to “the law as it is” and “future law” or “the law as it should be.” In practice, this is the struggle between adopting normative considerations, incorporating contemporary discourse, and violating the existing body of international law. These principles, like those previously discussed, suffer from the same search for equilibrium between legal positivism and natural law theory. With respect to this research, a MALOPs practitioner will favor natural law theory when the status quo, whether domestic or international, benefits their interests for a given legal mechanism or treaty. For legal instruments that do not contribute to the practitioner's political objectives, they will attempt to change the status quo, or the social facts at its foundation, in order to create a more favorable situation. China's Confucius institutes and armies of academics are a perfect example of the weaponization of lex ferenda through malign influence. This is part of the same narrative consistently presented throughout this research: the practical application of a revisionist or revanchist agenda towards the international legal domain. “[L]egal experts—both military lawyers and a cadre of internationally recognized legal scholars—whose opinions will carry influence abroad as well as at home.”<sup>266</sup>

### 3.5.4. Jus Ad Bellum versus Jus In Bello

These principles will not be addressed in detail as they are the subject of much discussion in previous chapters. These principles translate to the “Right to War” and

---

<sup>266</sup> Cheng, “Winning Without Fighting: Chinese Legal Warfare.”

“Justice in War” respectively, and form the dividing line between so-called war and peace. In the case of conduct on the seas, for example, there exists a body of international law that governs behavior during peace as well. Governed by UNCLOS during peace, just ad bellum as a conflict escalates, and jus in bello, or international humanitarian law, or the law of naval warfare, once hostilities erupt. As stated in Chapters 1 and 3, the MALOPs practitioner blurs these lines and injects uncertainty into deliberations sufficient to achieve *fait accompli*. The revisionist PRC appears to take care not to risk much activity in this regime, however, Russia has demonstrated a willingness – on multiple occasions – to blur even the lines of war and peace under international law in what is an aggressive revanchist campaign.

### 3.6. Conclusion: Malign Legal Operations is a Novel Theory of Legal Domains in Modern Conflict

This chapter asserted that the novel concept, Malign Legal Operations, offers a consolidated theory for international legal academics, practitioners, policy experts, military leaders, and politicians to fully comprehend and account for the malign exploitation of legal domains. This research has thus far demonstrated that no other definition fully captures the subtlety and duplicitous nature of this behavior. Furthermore, this chapter identified how other states employ MALOPs to great effect, and how the foundational principles of PIL are politicized in pursuit of revisionist and revanchist agendas. The Chinese Communist Party accomplishes this through well researched theories of Legal, Media, and Psychological Warfare. They pursue political objectives by openly and confidently abusing legal mechanisms. The Russian Federation achieves the same effects with strategic communications and pervasive information operations. The results are obvious to even the most casual observer, but one will scarcely find reference in Russian doctrine to shaping the legal domain in pursuit of national interests.

This chapter also explored modern efforts, beyond the notion of lawfare discussed in Chapter 2, to combat this behavior. Ultimately, Malign Legal Operations can be considered a new and modest step forward in the discourse surrounding this critically important topic. However, this research would be insignificant if it did not discuss ways to counter MALOPs practitioners and their underhanded approach to international law.

## **CHAPTER 4.**

### **The Counter-MALOPs Toolkit**

#### 4.1. Introduction

This study so-far established that there exists a crisis of international law due competing concepts of what international law is and what it ought to be. This has always existed, and this search for equilibrium is indeed necessary for any international system to exist. However, to reiterate Dr. Kennedy, “international law is different in different places.” Many nations, particularly in the West, are working to uphold a post-Cold War universal order that is ideologically liberal while China, Russia, and others reject the ideological aspects of this order. It does not align with their interests as authoritarian collectivist states. With these powers becoming more economically self-sufficient and militarily capable in the 21st century, they are more actively working to re-shape the world for their benefit. As discussed, one can change this order diplomatically, by coercion (force, economically, etc.), or by custom. A declared war is unpalatable with the advent of nuclear weapons and the near-guarantee of mutually assured destruction if two or more powerful states engage in an international armed conflict. Small or proxy wars, however, allow revisionist or revanchist actors to achieve limited political victories. Diplomacy, while effective in the short term, is also mostly unpalatable because the Western and Eastern notions of order are mutually exclusive aside from arms control and a few other thinly overlapping interests. They instead established bounded orders in direct conflict with these liberal features, which the sponsors of the liberal system are often unable, or unwilling, to acknowledge. To reiterate Chapter 1, a single nation – or group of nations – cannot declare a universal ideological order when not all participatory states consent. Particularly when the sponsors of the universal order cannot, or will not, enforce it. This is typically because the non-consenting states are powerful ones, militarily, economically, or otherwise. Finally, changing the international status quo and its underlying body of international law can be done through custom. This is by repeatedly behaving in a way

that is inconsistent with the present order while employing Malign Legal Operations to conceal, deceive, justify, or support the transition from *de facto* to *de jure*. In this sense, MALOPs constitutes a slow march of concessions and political pragmatism towards the adoption of a simulacrum international system that may appear the same or similar to what once was. There is no better example than Crimea. Ukraine and its supporters continuously tout “Crimea is Ukraine.” This is true, *ex injuria*, particularly under the current body of international law. *Ex factis*, however, Crimea is now *de facto* Russian. This is supported by a conflicting Russian (and Chinese) concept of international law and order.

Malign Legal Operations are a cornerstone of modern interstate conflict and constitute change through a malign combination of coercion, diplomacy, and custom. Whether a non-state jihadist organization is manipulating international humanitarian law with human shields to achieve legal asymmetry on a distant battlefield, or a powerful nation employs disinformation and propaganda to shape the legitimacy of an upcoming act of aggression in its favor, there is an aspect of MALOPs in all international conflict. The Counter-MALOPs toolkit will offer a modest approach for nations, organizations, and individuals to consider future challenges differently, to incentivize the operationalization of the lawyer and legal scholar, and to see the MALOPs challenge for what it is: a political problem, not a legal one, that cannot be resolved without a firm understanding of the modern weaponization of legal domains.

This toolkit identifies three necessary actions: identify MALOPs, disrupt them, and then present an enhanced defense against them. The identification stage includes: (1) raising MALOPs literacy; (2) gathering and sharing MALOPs intelligence; and (3) operationalizing the legal domain and its operators. The disruption stage includes: (1) integrated strategic litigation; (2) combatting the litigator’s dilemma; (3) illuminating MALOPs; and (4) increasing accountability. Finally, the defensive stage includes: (1)

build legal resilience and a deterrent posture; (2) red teaming and war gaming; and (3) close gaps, loopholes, and vulnerabilities.

## 4.2. The Identification Stage

### 4.2.1. MALOPs Literacy

Developing MALOPs literacy is paramount to offering any defense against this subversive behavior. As stated in the previously published work of this study, “understanding the nature of the problem and making diplomats, lawmakers, peacebuilders, politicians, commanders, and other government servants aware of the issue is the first and most important step of this process.”<sup>267</sup> A concerted awareness campaign is required before literacy can be achieved. In Ukraine, this is not a new concept. Media literacy has been an important and widespread undertaking since the debilitating information operations employed against Ukraine leading up to Russia’s ongoing invasion. From phone applications and games to in-school instruction for children and mandatory employee training, media literacy is recognized as an important tool to defending against information operations. In the case of MALOPs, literacy is perhaps more important for the developers and executors of policy than it is for the public. When the target is the legal domain, MALOPs defenders can piece together what exactly the MALOPs practitioner intends to achieve. Effectively, MALOPs literacy is required to know when such a thing is occurring. This study seeks to achieve MALOPs literacy by defining the term and offering a framework for understanding why this issue is so important and deserving of additional study. This can be best achieved through literature such as this, through university courses and certificate programs, and through international conferences dedicated to exploring these issues and advancing contemporary discourse on the matter.

---

<sup>267</sup> Fisher, “The Kremlin’s Malign Legal Operations on the Black Sea: Analyzing the Exploitation of PIL Against Ukraine.”

An excellent example of MALOPs literacy is a relatively new program currently available in Ukraine at the National University of Kyiv – Mohyla Academy. The certificate program was established in 2020 and is titled “Lawfare and the misuse of international law.” The program covers the abuse of international law, the politics of international law, collective memory and its role in the law, and numerous other topics. More programs like those, offered more broadly, are critical to achieving sufficient MALOPs literacy to begin defending the rule of law against malign influence.

#### 4.2.2. MALOPs Intelligence

MALOPs intelligence is the second and perhaps most difficult aspect of the identification stage. “MALOPs, by nature, are inherently overt. The true intent of the behavior may be mired in secrecy, but legal exploitation and manipulations can be seen well in advance.”<sup>268</sup> To offer an example from the Ukrainian case, Russian parliamentarian Sergey Mironov introduced draft law 462741–6 on February 28th, 2014. This draft law allowed for the annexation of territory in another state. Specifically, paragraph 2.1 stated:

“When it is not possible to conclude an international treaty because of the absence of efficient sovereign state government in the foreign state, whose duty it is to protect its citizens, observe their rights and freedoms, enabling actual permanent and peaceful exercise of state functions, the admission to the Russian Federation of a part of the foreign state in the capacity of a new subject may take place on the basis of a referendum conducted in accordance with the legislation of the reign state in the territory of the relevant part of the foreign state, if its accession to the Russian Federation was approved, or on the basis of request of state authorities of the said part of the foreign state.”

This piece of legal or MALOPs intelligence would have been critical information for the international community if it had only been paying close attention. Just 17 days

---

<sup>268</sup> Fisher.

later, on March 20th, Crimea was absorbed following the so-called referendum. This draft law was not required because, according to the Russian Federation, Crimea declared independence from Ukraine and “efficient sovereign state government” emerged for Russia to then annex by Crimea’s request. Regardless, the draft law can be seen as a “plan B” for annexation had Russia not been successful in achieving *fait accompli* following what the UNGA declared was a sham referendum. This same thing can be said of Russia’s approval for the use of force on March 1st. Ultimately, Russia was going to pursue its geopolitical interests regardless of the law, however, these examples show Russia’s MALOPs campaign to legitimize the behavior, create uncertainty, and justify aggression. Effectively, it was the legal preparation of the battlespace – and this can be seen in advance with a watchful eye. This example happens to be dramatic, but not all MALOPs intelligence is so revealing. Another form of MALOPs intelligence gathering is through the simple observation of evolving discourse in academia. Russia and China’s revisionist contributions at international conferences should be closely analyzed to determine the most current legal narratives. This can illuminate the present direction and existence of MALOPs campaigns. Finally, since much of what can be collected through MALOPs intelligence is publicly available, the use of automated web-scraping technology in conjunction with data analytics could provide a daily gazette of both ongoing and potential cases of MALOPs.

Regardless of the source of MALOPs intelligence, it will be useless if not shared widely. Preventing the use of MALOPs to justify or excuse aggression or some other illegal behavior is extremely difficult to do unilaterally. This is precisely why sharing MALOPs intelligence is a critical part of the identify stage – it allows the United Nations and other international organization to employ existing accountability mechanisms, to include political and economic pressure, against the MALOPs practitioner. In this same arena is the need for rapid declassification of certain secret information. Every government, particularly their security services, collects and analyzes information that it

deems secret and potentially dangerous to national security if released. The necessity for classification is often to protect the sources and methods used to obtain the information, and not necessarily the information itself. Still, the desire to protect data often results in the over-classification of information. Data that would otherwise be harmless or helpful in the public domain is kept secret due to bureaucratic red tape. It is critical to overcome this tendency in the fight against MALOPs, because security services often have incredibly useful information for use during the disruption stage.

#### 4.2.3. Operationalizing MALOPs Defenders

A universal understanding must be adopted to acknowledge that the law, particularly PIL, is not only an instrument of interstate conflict, but an operating domain to be fought over as with a piece of territory. Those who seize the legal initiative can instrumentally employ the legal domain itself, as a weapon, in-line with the tenants of MALOPs. Changing the legal culture and mindset to recognize this reality, not just in legal circles but amongst politicians, commanders, and diplomats, will do wonders to bring about the necessary MALOPs literacy needed to fully operationalize the legal domain.

Furthermore, legal professionals and operational lawyers are too often tasked to support leaders strictly with the legalities of decision making. They analyze long texts and policies in search of legal concerns or potential impropriety to protect the leader and the organization. As Chen noted, “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.”<sup>269</sup> In fact, one of the earliest uses of the term legal operations was the 1991 U.S. Army Field Manual 100-70, which describes the following: “the operations of JAGC [Judge Advocate General Corps] units and personnel within a theater of operations. Legal operations must be

---

<sup>269</sup> Cheng, “Winning Without Fighting: Chinese Legal Warfare.”

flexible and responsive to the demands of unit commanders at all echelons and throughout the operational continuum, requiring legal leaders to anticipate, initiate, and provide needed legal services.”<sup>270</sup> Primarily, this doctrine takes a very inward-leaning approach to the legal practice and operational law. Supporting military commanders, maintaining unit legal readiness, personal legal services, and law of war tasks during conflict are the primary focus areas of the document. One task that is relevant to countering modern-day MALOPs is the requirement for military JAG to:

“...ensure that contingency and operations plans and orders comply with domestic and international law; review relevant treaties for issues affecting deployment and military operations overseas; review rules of engagement (ROE); provide required training on the law of war and ROEs; and determine when waivers of peacetime legal restrictions should be requested and initiate appropriate requests for waivers. During conflict, JAGC personnel provide advice on lawful targets, weapons, stratagems and reprisals; the investigation and disposition of violations of the law of war...”<sup>271</sup>

Of note is the review of contingency and operations plans, review of treaties, and advice to commanders on stratagems and reprisals. The review of treaties and contingency and operations plans, which is extremely important for Countering MALOPs, will be covered in the last section of this chapter, the defensive stage. Advice to commanders on stratagems and reprisals, however, is an important part of operationalization and is only mentioned once in the 68-page field manual. A stratagem is an “artifice or trick in war for deceiving and outwitting the enemy...a cleverly contrived trick or scheme for gaining an end.” This could be extrapolated to include analyzing adversary stratagems, which translates well to interpreting adversary MALOPs strategies.

This Field Manual, and most like it, are insufficient as an inclusive reference for MALOPs Defenders in 21st century interstate conflict. Legal professionals must be engaged up and down the organization to advise leaders how legal domains are contested,

---

<sup>270</sup> Department of the Army Headquarters, “Legal Operations, FM 27-100,” September 3, 1991, [https://www.loc.gov/rr/frd/Military\\_Law/pdf/legal\\_operations.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/legal_operations.pdf).

<sup>271</sup> Headquarters.

what specific adversaries are doing in the legal domain, how they are advantageously shaping legitimacy, how MALOPs are being employed, and to create plans to disrupt MALOPs. This is naturally a very uncomfortable place for many lawyers, because it strays from black-letter legal analysis and puts them in a politically ambiguous position. As General Dunlap calls it, modern legal specialists must be legal knife fighters. Voyager would argue that these are called lawfare defenders. Regardless of their title, these individuals must not only be prepared to undertake counter-MALOPs activities, but they must cleverly apply legal mechanisms to impose cost and risk on an adversary while taking care to avoid becoming MALOPs practitioners themselves (the use versus misuse of legal domains). In many cases, this will require a paradigm shift in the cultures of operational and national security legal practitioners, academics, and theorists.

### 4.3. The Disruption Stage

#### 4.3.1. Integrated Strategic Litigation

The disruption stage of the Counter-MALOPs toolkit involves synchronizing responses and publicly highlighting MALOPs as they emerge. This begins with integrated strategic litigation. According to the European Center for Constitutional and Human Rights, Strategic Litigation “aims to bring about broad societal changes beyond the scope of the individual case at hand. It aims to use legal means to tackle injustices that have not been adequately addressed in law or politics...successful strategic litigation brings about lasting political, economic or social changes and develops the existing law. Public outreach materials accompanying the case can help to explain the context of the proceedings.” This step is critically important because it adds a public engagement element that can be used to counter adversary information operations while simultaneously taking legal action against the MALOPs practitioner. While there is a very real legal case to be argued, there is also an information operations campaign to contend with. As seen repeatedly throughout this study, the legal case is typically secondary to the

information victory. To win a case through arbitration is of course penultimate in pursuit of legitimacy, however, it is not necessary. One simply needs to discredit, deny jurisdiction, and offer faux- or quasi- legal arguments or minimally plausible counter-interpretations to create uncertainty and maintain legitimacy shaping efforts even after a legal failure. A public engagement plan, to include social media, is essential to re-introduce truth to public narratives. The reason that this study adds the term integrated to the phrase integrated strategic litigation is because the successful disruption of a MALOP requires a whole-of-government or whole-of-organization approach.

For example, Ukraine's then-President Poroshenko, government officials, and the international community demanded that the 24 Ukrainian sailors seized during the 2018 Kerch Strait incident be treated as Prisoners of War rather than as criminals. Simultaneously, and during Ukraine's ITLOS request for relief several months later, the Ministry of Justice claimed that the sailors were illegally detained while conducting an innocent passage with ships that enjoyed military immunity. This may seem harmless, but the damage done to Ukraine's MALOPs defense because of these inconsistencies was considerable. To claim that the sailors were prisoners of war is to acknowledge that the two countries are at war and that international humanitarian law applies to the situation. In this case, the Ukrainian sailors were legal targets and were foolish to be sailing anywhere near Russian-claimed waters or the Kerch Strait. To claim that the sailors were conducting an innocent passage of Russia's territorial waters was another catch-22, because that claim legitimizes Russia's ownership of Crimea by acknowledging its 12-mile territorial waters. These inconsistent public messaging campaigns bolstered Russia's legitimacy shaping efforts surrounding its aggression against Ukraine. Poroshenko should have instead taken an integrated approach by consulting specialists, the Ministry of Justice, the Legal Department of the Ministry of Defense, and the National Security and Defense Council to develop a single concerted approach to the management of the legal domain and public engagement through integrated strategic litigation.

In 2020, Ukraine’s Ministry of Justice launched a new website located at [www.lawfare.gov.ua](http://www.lawfare.gov.ua) dedicated to “legal confrontation with the Russian Federation.” According to the MOJ, “The legal front is inconspicuous, but extremely important. Its key feature is that there is no noticeable disproportion in weight with the enemy. It is not subject to force-sharing agreements. Where there are no weapons, there is international law, sanctions and a tribunal... We are moving from the sometimes-chaotic ad hoc tactics to a well-thought-out, comprehensive and coordinated legal defense of our rights and interests.”<sup>272</sup> This website, however, has not been updated in over a year – despite numerous emerging cases, it was likely paused due to the 2022 invasion. This MOJ lawfare effort had a tumultuous beginning due to a lack of consensus over what so-called lawfare is. The MOJ eventually settled on a narrower scope to consolidate all legal activities against/from Russia in a single information space. This effort focused on strategic litigation, but failed to achieve integration or, despite producing an attractive website, any measurable success with public engagement or countering Russia’s information operations. Part of the problem is the term lawfare itself. The Ukrainian MOJ adopted this term due to its popularity in Western legal circles, however, [lawfare.gov.ua](http://lawfare.gov.ua) was perhaps the first time a government has taken an official stance, formally adopted the term, and attempted to employ it. This word, which General Dunlap himself admitted is simply a bumper-sticker term, is now part of a state’s legal doctrine. The problem, as discussed at length in this research, is that the term lawfare lacks normative significance and creates more confusion than clarity. There is no agreement over what the term actually means, there is no theoretical framework or body of work that defines its uses. Moving forward, Ukraine will be well served to revitalize its [lawfare.ua.gov](http://lawfare.ua.gov) effort and begin a public awareness campaign aimed at spreading the message and countering Russian MALOPs rather than simply describing its activities within the legal domain.

---

<sup>272</sup> Ukrainian Ministry of Justice, “Lawfare: Legal Confrontation with the Russian Federation.”

Simultaneous to the MOJ's lawfare project is an effort by the Ukrainian Ministry of Defense's legal directorate to establish a Center of Excellence dedicated to the protection of civilians and legal operations. After much development and numerous proposals, President Zelenskyy signed Presidential Decree 203/2020 on May 26th, 2020. It directed the government to "Establish and ensure the functionality of a Center of Excellence for the Protection of Civilians during Armed Conflict and Counteracting Hybrid Aggression by Legal Means (Center of Excellence for Protection of Civilians during Armed Conflict and Legal Operations) (Deadline 2020)." This is an important step for Ukraine and could be a key element in the development of future MALOPs identification, awareness, disruption, and defense. Furthermore, it utilizes the NATO term "legal operations," which is a critically important departure from lawfare but falls short of fully implementing the notion of malign legal operations. Unfortunately, the President's 2020 deadline was not met due to the global COVID-19 pandemic and subsequent full Russian invasion, however, Ukraine is engaged with the international community, to include USAID and the U.S. Defense Institute for International Legal Studies (DIILS) for advisory support.

#### 4.3.2. Combatting the Litigator's Dilemma

Part of the challenge of countering MALOPs, both in and out of the courtroom, is the intrinsic need for lawyers to present a fully developed body of evidence. This is necessary for many reasons – first and foremost to uphold the integrity of the practice of law altogether. The MALOPs practitioner, however, is concerned only with shaping the legitimacy of a particular behavior in-line with the tenants of MALOPs. They only need a sliver of truth to fabricate an information operations campaign in support of a particular MALOP. This challenge can be referred to as the litigator's dilemma, which is the balance between addressing MALOPs at the speed of relevance and the need to build thorough legal arguments for submission to formal tribunals and courts. While the scrupulous

litigator is conducting research and building a reputable case, for example, like Ukraine spending nearly five months building and submitting a request for ITLOS relief under the auspices of UNCLOS following the Kerch Strait incident, the MALOPs practitioner is already moving on to develop the next faux- or quasi- legal argument in what was introduced in Chapter 3 as malign legal layering. Ultimately, the ITLOS ruling had no impact on Russia returning Ukraine's sailors and ships. It was an extrajudicial political settlement brokered by President Zelenskyy, which inadvertently legitimized Russia's declaration that ITLOS lacked jurisdiction and strengthened Russia's MALOPs against Ukraine. Instead, the victim of MALOPs may benefit from a two-phased approach to integrated strategic litigation to combat the litigator's dilemma. The first part of the team conducts legal business as usual and, in the case of the Kerch incident, would proceed with its ITLOS submission as done in 2019. The second part of the team focuses on public diplomacy and countering Russia's legitimacy shaping and information operations. This approach would have helped Ukraine to win its case not just before the tribunal, but also before the court of public opinion.

#### 4.3.3. Increase MALOPs Accountability

Accountability is not always possible, legally or politically, but should be done in all instances where mechanisms for accountability exist. The ITLOS ruling itself is an excellent example of increased accountability. Few experts would have predicted that Russia would return the Ukrainian sailors or ships because of any favorable ITLOS decision. This is unfortunate; however, the case did successfully correct the legitimacy of the incident under the auspices of international law as established by UNCLOS. This ruling reinforced the RBIO, even if Russia did not respond as desired. It cemented the international rule of law, labeled Russia the violator of international law, and reinforced that Russia cannot unilaterally enforce its own simulacrum of PIL. A major objective of the MALOPs practitioner is to create enough uncertainty and doubt that the victim does

not seek restitution or correct the legitimacy of a given situation. In this sense, the ITLOS ruling was a success as it imposed reputational cost and increase the risk for Russia to employ MALOPs in the future. An example where accountability was not pursued is the Russian manipulations of the Montreux Convention of 1936 to execute a combat rotation of diesel-electric submarines.

As discussed, Russia manipulated a legal loophole in Article 12 of the Montreux Convention to create a rotational system whereby some submarines are moored in the Black Sea port of Sevastopol while others are participating in combat operations in Syria or in expeditionary activities in the Mediterranean Sea. These activities outside the Black Sea are only permitted for the submarines to be “repaired in dockyards outside the Black Sea.”<sup>273</sup> While this is a manipulation rather than a blatant violation, there are still mechanisms to be used in holding Russia accountable and to inflict cost and risk to deter future MALOPs. “[T]he treaty allows for the revision of Article 12 given that it is initiated with agreement from at least two high-contracting parties to the treaty. In this example, verbiage could be included indicating that submarines undergoing repair must sail directly for their intended point of dry dock and the conduct of combat or purely military operations during this process will result in violation of the treaty. Even if it is not politically possible to close this loophole, it should not preclude affected parties from attempting to remedy this abuse.”<sup>274</sup> Even if this effort was unrealistic and legally unsuccessful, the public diplomacy benefits would be significant as it would bring awareness, literacy, and illumination to the situation and further highlight an ongoing MALOP. Expanding on the Montreux example from Chapter 3, an integrated media campaign could have countered Russia’s claim on April 27th, 2020, which stated that the submarine Rostov-on-Don “has embarked on its deployment in distant waters and will soon join the Russian Navy’s permanent Mediterranean task force.”<sup>275</sup> This Counter-

---

<sup>273</sup> League of Nations, “1936 Montreux Convention.”

<sup>274</sup> Fisher, “The Kremlin’s Malign Legal Operations on the Black Sea: Analyzing the Exploitation of PIL Against Ukraine.”

<sup>275</sup> TASS, “Russian Navy Sub Embarks on Deployment to Mediterranean Sea.”

MALOP media and public diplomacy campaign could have reminded the international community that Russia's claim was in violation of Article 12 of the Montreux Convention and PIL because a Black Sea submarine can only transit the Turkish Straits for repairs that cannot be made in Sevastopol. Then, when Russia did make an announcement two months later stating that the Rostov-on-Don was executing a "transition to the ship repair plant of Northwest Russia for planned ongoing repairs," the Counter-MALOP campaign could continue by reminding the international community of the earlier announcement from April 27th, which told a much different story, and illuminated Russia's information operations and legitimacy shaping efforts. As one can see, increasing accountability does not mean taking every case to arbitration, a tribunal, or the ICJ. If politically inexpedient or unrealistic, there is still a Counter-MALOPs victory to be had in illuminating the behavior and countering the information operations. It is critical to keep in mind that a blatant violation of the law is not MALOPs, rather MALOPs constitute the activities and information operations dedicated to concealing or justifying a violation or the shaping of legitimacy of either the target or practitioner.

The Tallin Manual 2.0 concerns the mechanisms of international law applicable to cyberspace and is an "objective restatement of the *lex lata*."<sup>276</sup> First published in 2013 and then updated in 2017, the manual contains detailed legal analysis of cyber incidents that fall below the thresholds of the use of force. It was developed by NATO's Cooperative Cyber Defence Centre of Excellence. The document notes that certain cyber operations, what many would classify as hybrid warfare, may constitute the unjustified use of force if they can be directly linked to the armed forces of a state or if the impact of these activities are the same as produced by a conventional military attack. While this is simply an interpretation of the current body of international law through the perspective of modern information technology and "does not represent progressive development of the law,"<sup>277</sup> the Tallinn Manual does show that contemporary discourse and modern

---

<sup>276</sup> "Tallinn Manual on the International Law Applicable to Cyber Warfare," 2017.

<sup>277</sup> "Tallinn Manual on the International Law Applicable to Cyber Warfare."

international law is adapting to the realities of 21st century conflict. When possible, MALOPs Defenders should rely on advancing discourse such as this to establish new ways to defend against MALOPs, particularly through existing legal mechanisms.

#### 4.4. The Defensive Stage

##### 4.4.1. Build Legal Resilience and a Deterrent Posture

Dr. Sari introduced the notion of legal resilience as a measure to combat legal exploitation. “Legal resilience is concerned with the resistance of legal systems to change and their capacity to adapt in response to disturbances.”<sup>278</sup> He notes that a tree regains its original function following a storm by either swaying with the wind or regrowing once a branch is broken off. This corresponds to resistance, adaptation, and recovery and translates well into modern manipulations of legal domains. Most literature on this subject focuses on the social resilience that is developed by and through the law. The economy, security, and virtually every other facet of a society is enhanced and becomes more resilient because of a healthy rule of law. However, in this case of legal resilience, an additional concern is the resilience of the rule of law itself. Both forms of legal resilience are imperative to maintaining a status quo. Sari offers several recommendations for a nation or international system to become more resilient, namely to adopt a mindset or perspective of resilience and to operationalize legal practices. This study offers its own recommendations for operationalization; however, a perspective of legal resilience is an important addition that this research borrows for inclusion in the defensive stage.

There are no specific steps that one must take to be deemed legally resilient, rather it is a perspective guide for decision making so that legal decisions are developed with resilience in mind. “Legal resilience highlights the contribution that international law can make to render societies more resilient against hybrid and gray zone threats and that the

---

<sup>278</sup> Sari, “Legal Resilience in an Era of Gray Zone Conflicts and Hybrid Threats.”

international rule of law itself must be strengthened to withstand the kind of subversion associated with these concepts.”<sup>279</sup>

China, as a comparative example, does not utilize the term legal resilience in any doctrine, however, it does utilize legal binding and legal protection, suggesting that the legal domain is employed defensively and offensively. These concepts do not account for readiness or preparedness, so one can conclude that Chinese MALOPs are mostly employed offensively. The same can be said for Russia, which does utilize legitimacy shaping and legal containment for defensive purposes but has no such concept of legal resilience.<sup>280</sup>

The bi-product of a legal resilience perspective is the creation of a credible legal deterrence. “Legal Resilience projects a desired posture, which discourages the opponent from using Lawfare partially or totally. The mere understanding by the opponent that a robust Legal Resilience guards the ‘legal front’ will make Lawfare meaningless or at least a non-primary option in Gray Zone environments.”<sup>281</sup> This legal posture and the subsequent deterrent effect is critical to reminding the MALOPs practitioner that, not only will MALOPs be illuminated and pursued, but the behavior will not have the desired impact. The rule of law, the RBIO, and the societies kept resilient because of the law will adapt and return to a state of equilibrium. “Operations that seek to deliberately undermine and revise the rule of law must be met with elastic institutions that can recover to their neutral positions without forced revision or capitulation. This legal resilience is a philosophy as much as it is a key task for MALOPs defenders.”<sup>282</sup>

---

<sup>279</sup> Sari.

<sup>280</sup> Munoz Mosquera and Chalanouli, “Guest Post: Andrés Munoz Mosquera’s and Nikoleta Chalanouli’s Essay: ‘China, an Active Practitioner of Legal Warfare.’”

<sup>281</sup> Mosquera and N. Chalanouli, “Decoding Gray Zone Environments. Legal Resilience.”

<sup>282</sup> Fisher, “The Kremlin’s Malign Legal Operations on the Black Sea: Analyzing the Exploitation of PIL Against Ukraine.”

#### 4.4.2. MALOPs Red Teaming and War Gaming

As mentioned in the section dedicated to Operationalizing MALOPs Defenders, it is critical for military JAGs to “...ensure that contingency and operations plans and orders comply with domestic and international law; review relevant treaties for issues affecting deployment and military operations overseas.”<sup>283</sup> This was the norm for 1991 when FM 27-100 was published, however, today requires a much closer review, to include consideration for political and informational aspects. Furthermore, this does not just apply to military JAGs, but to all legal professionals, commanders, diplomats, politicians, and so on. One additional way to build a defense against MALOPs is to red team as early and often as possible. “This process involves the creation of independent teams within an organization with the goal of thinking and acting like the adversary in order to identify what legal gaps, loopholes, and mechanisms are ripe for exploitation. This includes the manipulation of specific cultural and societal norms within disinformation campaigns against a legal position or the rule of law.”<sup>284</sup> According to the Chairman of the U.S. Joint Chiefs of Staff manual on Cyber Red Team Certification and Accreditation, a red team is made up of the following: “personnel (military, civilian, contractor) authorized and organized to emulate a potential adversary’s exploitation or attack capabilities against a targeted mission or capability. DoD Cyber Red Teams operate to identify exposed information and vulnerabilities of the target’s security posture; support information assurance readiness; create a degraded, disrupted, or denied cyber environment...”<sup>285</sup> While this definition applies strictly to cyber capabilities, one can easily see the utility for MALOPs Defenders. Using this definition as a guide, one could say that MALOPs red teaming is the emulation of a potential adversary’s malign legal capabilities against a targeted entity. MALOPs red teams operate to highlight an adversary’s ability to: (1)

---

<sup>283</sup> Headquarters, “Legal Operations, FM 27-100.”

<sup>284</sup> Fisher, “The Kremlin’s Malign Legal Operations on the Black Sea: Analyzing the Exploitation of PIL Against Ukraine.”

<sup>285</sup> “Department of Defense Cyber Red Team Certification and Accreditation,” CJCSM 6510.03 § (2013), [www.dtic.mil/cjcs\\_directives](http://www.dtic.mil/cjcs_directives).

identify vulnerabilities of the target's legal or informational posture; (2) expose legal lacunae or loopholes for exploitation; (3) positively shape the adversary's legitimacy while degrading that of the target; (4) evaluate the target's susceptibility to legal containment; and (5) justify the abdication of legal obligations. In doing so, legal red teams seek to: (1) build legal resilience and a posture of legal deterrence; (2) support MALOPs literacy, intelligence, illumination, and accountability; and (3) foster the development of integrated strategic litigation approaches and best practices.

According to a 2008 report by the U.S. Defense Science Board on "Capability Surprise," red teaming is the process by which red teams produce useful output for consumption by decision- and policy-makers. "Red teams can fulfill various roles: playing the adversary, inventing plausible threats, challenging assumptions, serving as devil's advocate, and offering alternative approaches. Red teaming is especially important in today's security environment. Nimble adversaries, with access to global technology markets, are very difficult targets for intelligence."<sup>286</sup> These activities should be deliberate and exhaustive. A more productive use of this concept for organizations that already utilize red teaming is to add MALOPs Defenders to the existing red team. These individuals understand the legal domain, its role in each scenario, the adversary's legal system and how it might be employed, and how the law may be manipulated to create asymmetries in a potential conflict. Of course, this is only possible for those few organizations that already employ red teams. Regardless, red teaming works at all levels and for any conceivable scenario within legal domains: predicting how a competitor, or close ally, will approach a draft treaty; estimating how an adversary will respond to a tribunal's decision so that plans can be developed for the political aftermath and the eventual legitimacy shaping that will follow; preparing for an adversary's response to a MALOPs illumination campaign on social media to develop talking points and counter-evidence; preparing for an adversary's response to a domestic MALOPs literacy

---

<sup>286</sup> Defense Science Board, "Capability Surprise Volume I: Main Report," September 2009, [http://www.projectwhitehorse.com/pdfs/Ed9/4\\_Capability\\_Surprise\\_Vol\\_I\\_DSB-2009.pdf](http://www.projectwhitehorse.com/pdfs/Ed9/4_Capability_Surprise_Vol_I_DSB-2009.pdf).

campaign, or even a literacy and illumination campaign targeting the MALOPs practitioner's own population. The scenarios are endless, and the logical next step is to also develop a sound legal wargaming strategy.

A war game is “a simulated battle or campaign to test military concepts and usually conducted in conferences by officers acting as the opposing staffs.” These activities are critical to successful military operations and to imagining the incredible range and scope of possibilities once hostilities initiate. While one can never totally predict how an armed conflict will play out, significant advantages can be developed by conducting scenario-based war games to identify previously unknown capability or resource shortfalls or strategic advantages to be leveraged. The difference between red teaming and war gaming is subtle but important. A red team looks for vulnerabilities and weaknesses by thinking like the adversary while a war game employs both a red team and a so-called blue team (friendly forces) to test or exercise a specific scenario. In this sense, red teams are critical parts of a war game. It should be no mystery just how beneficial legal war gaming can be when attempting to build a defense to ongoing MALOPs and legitimacy shaping. Scenarios for war games come about in any number of ways, and are often the result of red teams identifying particular scenarios that, following a throughout exercise, will yield tremendous lessons. For example, if a MALOPs Defender had been part of the integrated strategic litigation team for the Ukraine v. Russia ITLOS case, the individual could have conducted a comparative analysis to other cases, such as the Philippines' v. China, to discover which MALOPs strategies work best in a case concerning international maritime law. This individual would have quickly discovered that shaping the legitimacy of the case such that the tribunal's jurisdiction is called into question via exceptions or existing treaties is the easiest way to avoid accountability. While this would not have helped Ukraine receive a favorable ruling any sooner than it did, it would have absolutely aided in the development of public engagement strategies for immediate responses to Russian legitimacy shaping campaigns on social media and in the news.

#### 4.4.3. Close Gaps, Loopholes, and Vulnerabilities

The final and perhaps most challenging step is to secure the legal frontier by addressing known gaps, loopholes, and vulnerabilities. This is far-reaching and, like legal resilience, it is a mindset as much as it is an enduring task. To close legal gaps and loopholes is to be MALOPs-literate and for every individual with a hand in diplomacy, international negotiations, politics, and statecraft to be their own red team. Great care must be taken when concluding international agreements or wading into unexplored legal territory because the status quo and precedents created by these decisions will have lasting effects on individual or national security, particularly if other parties have malicious intent or seek legal containment. However, this task is easier said than done. Dr. Sari noted that these legal vulnerabilities are often deliberate as a matter of political pragmatism. “[T]hresholds and lines exist not because they are the result of legislative oversight or incompetence, but because they reflect underlying political choices and stalemates. There are gray areas in the law because States do not want, or could not agree, that all of it is black and white. Consequently, combating legal uncertainty at best offers only a partial solution. Developing sound policy and doctrine would seem to be a more realistic way of maintaining unity of effort.”<sup>287</sup>

Despite this reality, maintaining a cautious approach and a healthy cultural perspective of exactly whose international law is being discussed during any given negotiation is paramount. Specifically, one must remember the reasons for stalemate or the political pragmatism that led to these gray areas. Not just from the perspective of one’s own organization, but from the other side’s perspective as well. These things must be maintained in the institutional memory so that, following political change or renewal, the reasons for a pragmatic approach towards legal domains are not leveraged by the other side. This notion, of course, is nothing new. In 1946, American diplomat George Keenan observed the following: “Moscow has no abstract devotion to UNO [United Nations

---

<sup>287</sup> Sari, “Legal Aspects of Hybrid Warfare.”

Organization] ideals. Its attitude to that organization will remain essentially pragmatic and tactical.”<sup>288</sup> Keenan, being a diplomat, was keenly aware of the problem as it manifested in unkept international agreements. Lauri Mälksoo, however, would argue that this is due to the underlying “competing universalistic ideological basis” between the two powers.<sup>289</sup>

It is important to be cognizant of naiveté when approaching legal domains. As Chen noted, “American emphasis on the rule of law has generally assumed that one’s adversaries will not engage in offensive lawfare.”<sup>290</sup> The previous section dedicated to accountability addresses an example where a legal loophole can be closed. The Montreux Convention of 1936 allows two or more high-contracting parties to recommend amendments to the agreement, which could be used to specify that Article 12 shall not be manipulated for submarines to rotate through the Black Sea as part of an expeditionary force, but rather strictly for repairs. The conduct of activities not related to immediate repair, or transit to repair, could be grounds for banning a vessel from re-entering the Black Sea. As noted through accountability, this is unlikely to be politically palatable to Turkey, however, the attempt itself has a repairing and reinforcing effect on the Rules Based International Order, which results in resilience and legal deterrence.

#### 4.4.4. Illuminating MALOPs

The illumination of a particular MALOP refers to the act of shining a public light on the behavior to display its underlying malicious intent. This is ultimately intended to counter the information operations put forth by the MALOPs practitioner. This technique is often an effective method to build literacy as well. The difference is that literacy is meant to teach the uninitiated what MALOPs are, and illumination is meant to show ongoing or past MALOPs to hold the practitioner publicly accountable. There are four

---

<sup>288</sup> Kennan, “The Long Telegram.”

<sup>289</sup> Mälksoo, *Russian Approaches to International Law*.

<sup>290</sup> Cheng, “Winning Without Fighting: Chinese Legal Warfare.”

excellent examples of illumination during the Kerch Strait incident. Initially, Russia claimed that the three Ukrainian ships violated UNCLOS articles 19 (the meaning of innocent passage) and 21 (law and regulations of the coastal State relating to innocent passage), calling the incident a provocation under the auspices of Russia's de facto sovereignty over Crimea and the Kerch Strait. Contrary to those claims, it was reported that Russia committed substantial cyber-attacks against the Ukrainian Navy in the hours leading up to the incident.<sup>291</sup> This author's previously published work also highlights deliberate attacks leading up to, and during, the Russian provocation that could not have occurred if the event was not pre-planned. "Evidence also exists, according to the Contact Point Cell of the Ukrainian Naval Forces, that localized control over the electromagnetic spectrum was present during the incident to include possible communications jamming and spoofing of the Automatic Vessel Identification System (AIS) in the area of the Strait. These reports of both cyber and electromagnetic interference are evidence that this incident was planned in advance, discrediting the legal disinformation employed against the Ukrainian Navy."<sup>292</sup> Finally, Bellingcat reported shortly after the incident that, according to global positioning system (GPS) data, the Ukrainian ships were actually outside of 12 Nautical Miles from the illegally seized territory following a 12-hour chase to the south of the Strait. In fact, the Ukrainian ships were attempting to return to Odesa when they were finally seized.<sup>293</sup> This indicates that the Russian ships knew the Ukrainian vessels would soon depart the so-called territorial waters and, to support their MALOP, intended to seize them before that line was crossed. Ultimately, the Ukrainian vessels were seized outside of 12 nautical miles. These four facts: (1) cyber-attacks; (2) spoofing; (3) jamming; and (4) GPS data, all point to the fact that this MALOP was manufactured by Russia and executed by the FSB. The entire goal, as indicated by the

---

<sup>291</sup> Patrick Tucker, "Russia Launched Cyber Attacks Against Ukraine Before Ship Seizures, Firm Says," DefenseOne, 2018, <https://www.defenseone.com/technology/2018/12/russia-launched-cyber-attacks-against-ukraine-ship-seizures-firm-says/153375/>.

<sup>292</sup> Fisher, "The Kremlin's Malign Legal Operations on the Black Sea: Analyzing the Exploitation of PIL Against Ukraine."

<sup>293</sup> Michael Cruickshank, "Investigating The Kerch Strait Incident - Bellingcat," bellingcat, 2018, <https://www.bellingcat.com/news/uk-and-europe/2018/11/30/investigating-the-kerch-strait-incident/>.

FBS's desire to seize the ships prior to their 12 nautical mile escape, was to manufacture a Ukrainian escalation under the auspices of international law, specifically UNCLOS. There was nothing to be materially gained by seizing the small ships or the sailors, so this is a rare instance where aggression was used purely to shape and reinforce legitimacy and promote the recognition of Russia's ownership of Crimea. This was clearly a MALOP, however, the illumination was woefully insufficient. The cyber-attack coverage did not reach the national level, the spoofing and jamming information was not disseminated beyond regional and Ukrainian naval information channels, and the Bellingcat story did not reach a wide audience. Ukraine's MALOPs defenders could have consolidated this information and, in addition to using it in their ITLOS submission months later, used it as part of a public diplomacy strategy to reinforce their legitimate rights to the Strait.

## **CHAPTER 5.**

### **Lessons from Russia's 2022 Invasion of Ukraine**

#### 5.1. Introduction

The Russian Federation executed an illegal and unprovoked invasion of Ukraine on 24 February 2022. Over 100,000 Russian soldiers were positioned along Ukraine's border with Belarus, throughout Russia, in Crimea, and on the Black Sea. On one hand, Putin claimed that Russia's so-called Special Operation to Liberate Donetsk and Luhansk was purely aimed at securing those two regions. On the other hand, he repeatedly cited an existential need to de-nazify Ukraine by seizing its capital, replacing its leadership, and demilitarizing the country. As established in Chapter 3, language plays a key role in the analysis of Russian MALOPs. This chapter does not seek to re-tell the history of Russia's invasion or argue, *inter alia*, its *locus standi*. Sufficient evidence exists to classify Russia's so-called operation as not just an illegal armed aggression, but as a genocide to include war crimes, crimes against peace, and crimes against humanity. This behavior is contrary to the principles of UN Charter and PIL. Since the theory of Malign Legal Operations is not intended to describe blatantly illegal acts, this chapter will highlight examples of Russia's malign exploitation of legal instruments to justify, hide, or excuse those illegal acts. It will also highlight Ukrainian and international successes and limitations in countering Russia's MALOPs:

1. Legal Intelligence. The Russian Federation followed a familiar playbook in its manufacturing of a *faux casus belli* for invasion and seizure of Ukraine's territory. Using MALOPs Intelligence, one could have predicted the invasion at a time when most international experts were adamant that Russia was merely chest-thumping or once again attempting to coerce Ukraine into capitulation by posturing troops on its border.

2. Illuminate and Maintain Accountability. The international community executed an incredibly influential illumination and accountability campaign against the Russian Federation's Malign Legal Operations.
3. Limitations and Victories. There is a limit to what countering Malign Legal Operations can achieve, particularly once violence begins. However, one should not ignore the legal domain, because Ukraine was able to use military force to affect Russian MALOPs in the annexed territories.

## 5.2. International Response and Russian Claims

The International Criminal Court initiated investigations to uncover evidence of Russian crimes against humanity, war crimes, and genocide on 2 March 2022 after 39 States referred the matter to the ICC. These referrals were made to the Prosecutor through numerous reports and media outlets, including Amnesty International, Human Rights Watch, and several Governments. These reports included direct attacks on civilian centers, hospitals, educational facilities, the rape and abuse of civilians, torture, and the use of prohibited weapons and methods. ICC jurisdiction over the events in Ukraine date back to 2014, when the Ukrainian government accepted jurisdiction through Article 12(3) of the ICC Statute. While the jurisdiction specified a window of 2013-2014, it also noted that there were no time restrictions for future applicability.

Specifically, Russia committed the crime of aggression against Ukraine as defined by Article 8 of the Rome Statute, as inserted by resolution RC/Res.6 on 11 June 2010. Specifically, the definition includes the “planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.” The requirements for character, gravity, and scale are clear as indicated by Russia's admission of invasion since 24 February 2022. Furthermore, the UN Charter was clearly manifestly violated.

Specifically, as previously discussed, Russia violated Article 2 by “threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

In defense of the ICC’s investigation, Russia’s primary justification for invasion is Article 51 of the UN Charter, which secures the “inherent right of individual or collective self-defense if an armed attack occurs.” Russia cited Article 51 both in pre-emptive or anticipatory self-defense and collective self defense of the newly recognized so-called independent people’s republics of Donetsk and Luhansk. Russia’s recognition of these regions stems from its interpretation of Article 55’s guarantee of the right to self-determination. Anticipatory self-defense has no locus standi under the Charter, however it is referenced as Customary International Law as outlined in the Caroline Test, which necessitates “instant, overwhelming, and leaving no choice of means, and no moment for deliberation” as the pre-condition for anticipatory self-defense. The remaining sections will highlight Russia’s use of Malign Legal Operations to create false legal narratives that support their claims that collective self-defense was invoked as a matter of Russia’s self-proclaimed responsibility to protect both Russian citizens and the citizens of the so-called independent republics. Russia’s legal disinformation was also employed to generate an international sense of instant, overwhelming, and leaving no moment for deliberation regarding Ukraine’s alleged direct threat of genocide and attack.

### 5.3. MALOPs Intelligence

The international media space was overwhelmed with false narratives claiming that a distinctly nazi-Ukrainian genocide was taking place in the Donbas region in the three months leading up to the full invasion.<sup>294</sup> A trained MALOPs defender would know that these claims never ceased following Russia’s initial invasion of Ukraine in 2014, but they

---

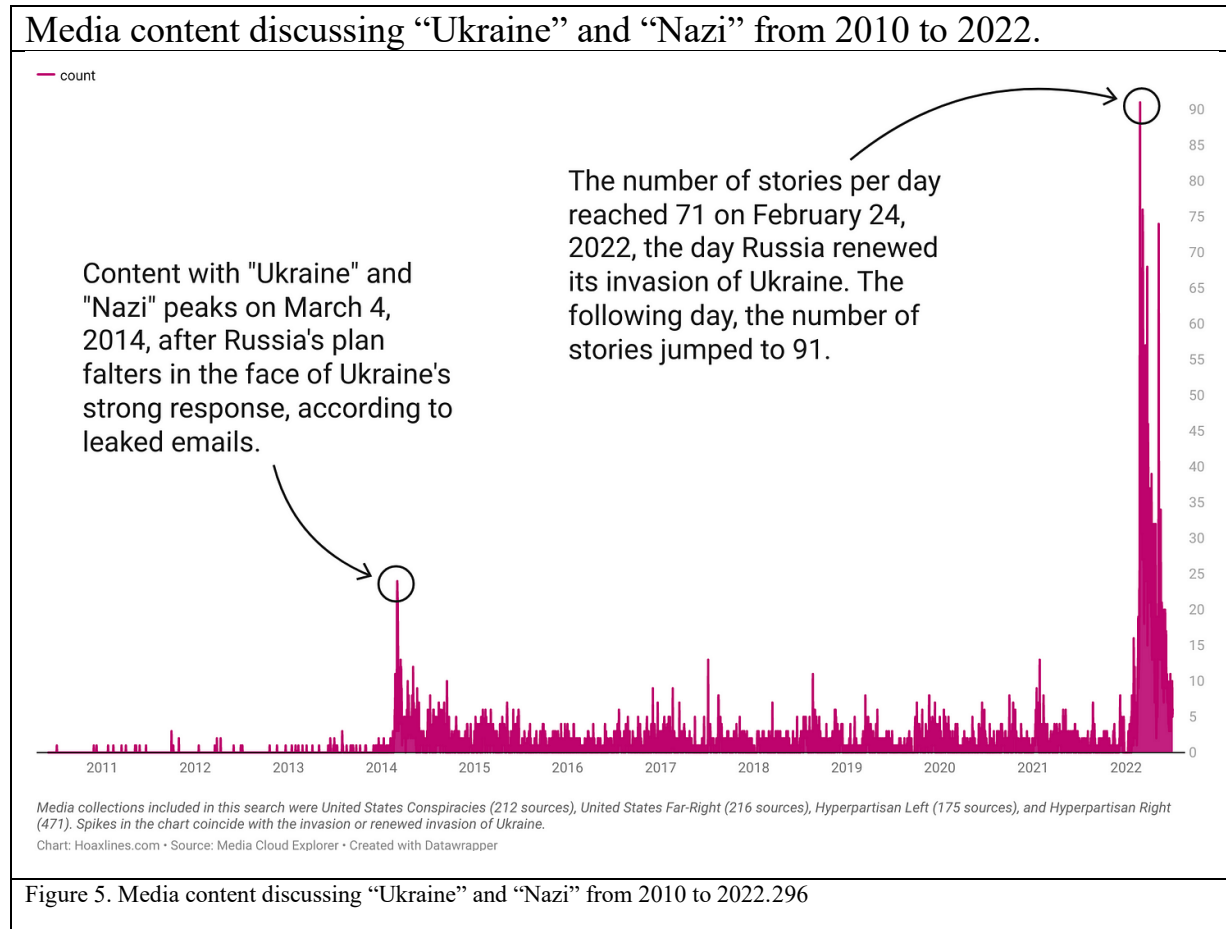
<sup>294</sup> Grzegorz Rossoliński-Liebe and Bastiaan Willems, “Putin’s Abuse of History: Ukrainian ‘Nazis’, ‘Genocide’, and a Fake Threat Scenario,” *The Journal of Slavic Military Studies*, July 6, 2022, <https://doi.org/10.1080/13518046.2022.2058179>.

did represent a significant increase in the use of the language of international law to shift public perception in favor of a legitimate Russia against an illegitimate Ukraine under the auspices of PIL.<sup>295</sup> For example, as President Putin reiterated with German Chancellor Schultz, “I have to say that Russophobia is a first step toward genocide...We see and know what is happening in the Donbas. It certainly looks like genocide.” This was on 15 February 2022, a mere 9 days before the invasion began. As a point of comparison from Chapter 3, President Putin claimed in 2014 that “[Ukraine has] demonstrated a large-scale crisis of the international law, basic norms of the Universal declaration in human rights and the convention to prevent genocide.” Despite citing zero evidence, these accusations were damaging enough to positively shape the legitimacy of Russia’s faux legal position and to generate sufficient domestic support to execute the intervention.

A study by Hoaxline highlighted Russia’s legitimacy shaping against Ukraine from 2010 to 2022 by capturing media narratives using the terms Ukraine and Nazi. As indicated in Figure 7, the campaign to de-legitimize Ukraine began in 2014 with a significant jump in 2022 coinciding with the full invasion.

---

<sup>295</sup> The United States Department of State, “Fact vs. Fiction: Russian Disinformation on Ukraine,” 2022, <https://www.state.gov/fact-vs-fiction-russian-disinformation-on-ukraine/>.



The Malign Legal Operations campaign to manufacture a casus belli for invasion formally began on 19 January 2022. Eleven members<sup>297</sup> of Russia’s communist party submitted a proposal to the Duma calling for the government to vote on sending a decision to recognize Donetsk and Luhansk forward to President Putin for consideration. This proposal was titled To the President of the Russian Federation V.V. Putin on the need to recognize the Donetsk Republic and the Luhansk People's Republic.<sup>298</sup> The proposal cited humanitarian purposes, the population’s desire to speak and write in the Russian language, freedom of religion, and the Ukrainian governments so-called violation of their

<sup>296</sup> Anton Shekhovtsov, “Stories about ‘Ukrainian Nazis’ Were Rare before 2014 When They Surged as Russia’s Plans Faltered.,” Hoaxlines, August 3, 2022, [https://novelscience.substack.com/p/stories-about-ukrainian-nazis-were?r=5qaob&s=w&utm\\_campaign=post&utm\\_medium=web](https://novelscience.substack.com/p/stories-about-ukrainian-nazis-were?r=5qaob&s=w&utm_campaign=post&utm_medium=web).

<sup>297</sup> G.A. Zyuganov, I.I. Melnikov, V.I. Kashin, Yu.V. Afonin, N.V. Kolomeitsev, D.G. Novikov, L.I. Kalashnikov, K.K. Taysaev, N.I. Osadchik, V.I. Bessonov and A.V. Kurin.

<sup>298</sup> G.A. Zyuganov et al., “Draft Resolution №58243-8, To the President of the Russian Federation V.V. Putin on the Need to Recognize the Donetsk Republic and the Luhansk People’s Republic,” Legislative Activity Support System of the State Duma of the Federal Assembly of the Russian Federation § (2022), <https://sozd.duma.gov.ru/bill/58243-8>.

rights and freedoms. It accused the new (post-2014 revolution) authorities of Ukraine of glorifying Nazi ideologies, being intolerant of established historical norms, daily life, and the will of the people. On one hand, the proposal cited the Russian-manufactured referendums in May 2014 titled the Act on self-determination of the Donetsk People's Republic and Act on self-determination of the Luhansk People's Republic as reasons to recognize the so-called republics. The proposal claimed that these referendums received majority 89% and 96% votes respectively. On the other hand, the proposal claimed that recognition should be approved because the Ukrainian government refused to pay pensions and provide basic government services to these peoples. The first argument, Russia's sham-referendums in 2014, created the conditions for the second argument, Ukraine ceasing support to the Russian puppet governments in these two regions, yet the Russian communists curiously cited them both.

Additionally, the proposal cited that the Minsk agreements, which it claimed “laid the main vector for the protection of rights and freedoms and the restoration of peaceful life citizens, infrastructure and economies of the Donetsk People's Republic and of the Luhansk People's Republic,” were unfulfilled by Ukraine with none of the relevant clauses of the agreements implemented. The proposal accused Ukraine of “simulating compliance” to work towards a truce and the implementation of Minsk II while consistently violating the ceasefire across the entire line of contact and destroying civilian homes, schools, and other infrastructure. This effectively amounts to Russia accusing Ukraine of Malign Legal Operations. Ultimately, the proposal repeated the false narrative that Ukraine was committing a “genocide of their own people.” For Russia's part, the proposal claimed that “democratic bodies have been built with all the attributes of legitimate power” and that Russia regularly sends “humanitarian convoys...with food, construction materials, medicines and gifts for children.”<sup>299</sup>

---

<sup>299</sup> Zyuganov et al.

The proposal concluded with the unmistakable faux legal arguments meant to legitimize Russia's illegal claims. The last two sentences include what a trained observer will immediately recognize as a thinly veiled declaration of war. "Recognition will create grounds for providing security guarantees and protection of their peoples from external threats and the implementation of genocidal policies against the inhabitants of the republics, as well as to strengthen international peace and regional stability in line with the goals and the principles of the Charter of the United Nations and process of international recognition of both states." The proposal ended with the assertion that Russia and the newly recognized so-called republics will negotiate "a legal basis for interstate relations, providing regulation of all aspects of cooperation and mutual assistance, including security issues."<sup>300</sup>

This communist proposal was immediately discredited by so-called international experts because the communist party was dismissed as not being influential enough in Putin's Russia to gain any traction. However, the Counter-MALOPs Toolkit presented in Chapter 4 would have helped a keen observer to connect the increased rhetoric and legal-language to the cleverly timed proposal through MALOPS red-teaming and war gaming. While it is true that the Russian communist party lacks influence, any student of Russia knows that nothing occurs in the government without Putin's awareness, and the proposal's initiation by the communist party was simply a form of deception to create international confusion and buy time for Russia to prepare for its pending decision and subsequent illegal invasion. On 21 February, President Putin approved the recognition of both so-called republics as "sovereign and independent" states due to "Ukraine's refusal to peacefully resolve the conflict in accordance with the Minsk agreements." The declaration approved the drafting of a "treaty on friendship, cooperation and mutual assistance"<sup>301</sup> for both regions and also approved the introduction of Russian peacekeeping forces on the territories of these so-called States. This declaration amounted

---

<sup>300</sup> Zyuganov et al.

<sup>301</sup> TASS, "Putin Signs Decrees on Recognizing Donetsk and Lugansk Republics," February 21, 2022, <https://tass.com/politics/1407731>.

to another clever step in Putin's shaping of the legitimacy of his imminent invasion. For those paying close attention, it was a pre-meditated and carefully choreographed plan. In November 2019, the separatist's so-called parliament passed a law on the state border, whereby they theoretically laid claim to the entire Donetsk Oblast rather than only the occupied portions. They stipulated that the self-proclaimed polity's border would only temporarily run along the line of engagement "pending conflict resolution."<sup>302</sup> Later, on 4 February 2022, former security minister and Russian-planted separatist leader in the self-proclaimed Donetsk People's Republic Alexander Khodakovsky requested in an interview with Reuters that Russia send 30,000 soldiers.<sup>303</sup> Unbeknownst to the international community when Putin signed the decree of recognition on 21 February 2022, Russia's acknowledgement of these so-called States was a recognition of their entire territorial claims and not simply of the borders associated with the line-of-contact in the stalemate in Eastern Ukraine. Therefore, according to Russia's justification and formal requests from the so-called republics, Ukraine immediately became an occupying force the moment Russia recognized the independence of these regions. With the intent to send peacekeepers, an international armed conflict was seemingly inevitable but was actually the result of a well-choreographed Malign Legal Operations campaign designed to contain Ukraine, shape its government as illegitimate and as violators of human rights and international law, and to present a faux-justification for invasion under the guise of historic right, responsibility to protect, collective self-defense, and the right to self-determination.

One may wonder why the above analysis is relevant given Russia's commitment to further invade Ukraine. No amount of MALOPS Intelligence could have changed that fact, however, this information was still critical because it allowed both Ukraine and the

---

<sup>302</sup> "The DPR Recognizes as Its National Border the Boundaries of the Donetsk Region - Donbass Insider," Donbass Insider, December 1, 2019, <https://www.donbass-insider.com/2019/12/01/the-dpr-recognizes-as-its-national-border-the-boundaries-of-the-donetsk-region/>.

<sup>303</sup> Anton Zverev, "Exclusive: Senior Separatist Urges Russia to Send 30,000 Troops to East Ukraine," Reuters, February 7, 2022, <https://www.reuters.com/world/europe/exclusive-senior-separatist-urges-russia-send-30000-troops-east-ukraine-2022-02-07/>.

international community to show the world these legal manipulations and lies, thereby countering Russia's portrayal of an illegitimate, fascist, Nazi, or genocidal Ukraine.

#### 5.4. Illuminate and Maintain Accountability

Russia proports that over 90% of voters in Kherson, Zaporizhzhia, Donetsk, and Luhansk decided to join Russia, and Putin claims ownership over 18% or 90,000 square kilometers of Ukrainian territory. Furthermore, Russia is issuing Russian passports and fast-tracking the application process for Ukrainian citizens in occupied territories via executive decision from Putin in May 2022.<sup>304</sup> They are also forcefully deporting Ukrainian citizens to re-education camps inside Russia, changing area codes and cellular service in occupied territories, and re-settling Russian citizens into these areas to ensure a positive vote in referendums. In fact, U.S. Secretary of State Antony Blinken confirmed on 22 September 22 that Russian citizens were temporarily bussed into these regions for the sole purpose of ensuring a positive vote. In May, the United Russia party's secretary general visited Kherson and announced "Russia is here forever"<sup>305</sup> while Peskov said on 19 May that "nothing should be done with Ukraine's occupied territories without the will of the people of those territories" and that Kherson should be absorbed into Russia "as legitimately as Crimea did." He reiterated that "the inhabitants of Kherson Region should decide after all - this is the primary thing. And the inhabitants of Kherson region should also determine their fate. Of course, this issue should be clearly and carefully verified and assessed by lawyers and legal specialists, because, of course, such fateful decisions should have an absolutely clear legal background, legal justification, and be absolutely legitimate, as was the case with Crimea."<sup>306</sup> The chair of the Federation Council Committee on

---

<sup>304</sup> "№ 183 Об Определении в Гуманитарных Целях Категорий Лиц, Имеющих Право Обратиться с Заявлениями о приеме в Гражданство Российской Федерации в Упрощенном Порядке," Указ Президента Российской Федерации, May 25, 2022, <http://publication.pravo.gov.ru/Document/View/0001202205250004#print>.

<sup>305</sup> Roman Petrenko, "Путінський Сенатор Приїхав у Херсон і Заявив, Що "Росія Тут Назавжди" | Українська Правда," *Ukrainska Pravda*, May 6, 2022, <https://www.pravda.com.ua/news/2022/05/6/7344470/>.

<sup>306</sup> Roman Petrenko, "Putin Official Says Kherson Region Should Enter Russian Federation "as Legitimately as Crimea" | *Ukrayinska Pravda*," *Ukrainska Pravda*, May 11, 2022, <https://www.pravda.com.ua/eng/news/2022/05/11/7345495/>.

Constitutional Legislation, Andrey Klishas, also stated that citizens of all Ukrainian territories occupied by the Russian Federation, not just those living in Donbas, have the right to decide if they would like to become part of Russia. “It’s not just citizens of the Donetsk People's Republic and the Luhansk People's Republic who have the right to decide whether to continue to stay with Russia. So do residents of the Kherson region, Zaporizhzhia, all of the territories where denazification has taken place and people have gained the right to determine their future.”<sup>307</sup> These are all methods of shaping the legitimacy of illegal aggression and occupation. They fall perfectly within the definition of Malign Legal Operations. Whenever confronted over this abuse, Russia cites the Kosovo Precedent and the principle of self-determination.<sup>308</sup> However, Russia distorts these principles by manufacturing referendums, coercing civilian populations, or manipulating the results in its favor. The referendum itself is of little consequence to MALOPs practitioners and only serves as a tool to legitimize its behavior to naïve observers, those looking for plausible deniability, or for political expediency.

This same technique was used leading up to Russia’s 2022 invasion through the recognition of the so-called Donetsk and Luhansk republics.<sup>309</sup> In doing so, Russia was able to cite the so-called legitimate invitation of a newly-recognized nation as justification to introduce forces on sovereign Ukrainian territory. This was not coincidence, but rather the result of years of careful planning. In fact, one can now observe through Russia’s extremely high casualty rates that more time was spent on the legal and informational preparation of the battlefield than on actually preparing for battle. Ukrainian forces left Russia’s self-proclaimed world class military bloodied following strategic defeat within 48 hours of the invasion. Even nearly two years into the invasion, Russia continues to

---

<sup>307</sup> Olha Hlushchenko, “Russian Media: Russian Passports to Be Issued in Kherson and Zaporizhzhia Oblasts,” *Ukrainska Pravda*, May 27, 2022, <https://news.yahoo.com>

<sup>308</sup> Dean B. Pineles, “How the ‘Kosovo Precedent’ Shaped Putin’s Plan to Invade Ukraine | Balkan Insight,” *Balkan Transitional Justice*, March 9, 2022, <https://balkaninsight.com/2022/03/09/how-the-kosovo-precedent-shaped-putins-plan-to-invade-ukraine/>.

<sup>309</sup> “State Duma Ratifies Treaties on Friendship, Cooperation, Mutual Assistance with DPR, LPR - Russian Politics & Diplomacy - TASS,” TASS, February 22, 2022, <https://tass.com/politics/1408337>.

employ information operations adorned with the language of international law to justify its blatant violation of the UN charter, the definition of aggression, and the principles of international law to continue its aggression.

Both Ukraine and the international community broke new ground in the months leading up to, and including, Russia's 2022 invasion by executing a strategy of disclosure whereby classified information that would otherwise never be seen by the public was rapidly declassified to show Russia's malign behavior. From troop movements and war plans to prove to the world that Russia was serious this time to imagery of busloads of Russian voters to show that the referendums were, in fact, a sham. In September 2022, the director of the U.S. Central Intelligence Agency, William Burns, noted the effectiveness of this strategy. "The decisions to declassify intelligence are always very complicated one...I think it's been a very important means of denying Vladimir Putin something that I've watched him employ too often in the past, which is creating false narratives, trying to blame the Ukrainians, to create false provocations in the run up to the war."<sup>310</sup>

This strategy of illumination makes legitimizing faux-legal narratives extremely difficult for the MALOPs practitioner. In the days leading up to Russia's decision to recognize the so-called Donetsk and Luhansk republics in February 2022, the United States and Ukraine shared information near-daily about staged attacks on civil infrastructure, fake guerilla raids, and other potential smoking guns that would provide Russia with the casus belli it sought to escalate its war against Ukraine. These targeted information-releases seized the initiative from Russia and discredited its legal narratives.

Furthermore, Ukraine and the international community have sufficiently maintained accountability for Russia. There is no logical legal scholar or practitioner of international law that believes non-binding UN resolutions condemning aggression,

---

<sup>310</sup> Lauren C Williams, "Sharing Secrets Has Been 'Effective' Against Russia, But the Tactic Has Limits, CIA Chief Says - Defense One," Defense One, September 8, 2022, <https://www.defenseone.com/defense-systems/2022/09/sharing-secrets-has-been-effective-against-russia-tactic-has-limits-cia-chief-says/376882/>.

vetoed UNSC resolutions, or reports containing evidence of Russian war crimes are going to deter this aggressor. However, as discussed throughout this research, it remains critical to continue employing every instrument of accountability so that the narrative of aggressor versus sovereign state can be maintained and to preserve the legitimacy of Ukraine as a victim, not as a fascist nazi-state. It is also critical to exercise the international legal system itself, because despite Russia's refusal to cease its aggression against Ukraine without capitulation, as exercising the system de-legitimizes Russia's false claims.

### 5.5. Limitations and Victories

No amount of counter-MALOPs activity will stop a hostile actor if it is determined to commit aggression or any other illegal act. This is precisely why the counter-MALOPs toolkit should not be utilized independent of other deterrent methods or strategies. Despite an impressive illumination campaign leading up to the 2022 invasion of Ukraine, neither Ukraine nor its international partners were able to stop Russia's aggression. This is perhaps the greatest limitation of the counter-MALOPs toolkit. To be truly effective, it must be accompanied by force-posturing and backed by the asymmetric application of legal and proportional force. The term asymmetric is stressed because, in the case of Ukraine, a relatively small force was able to achieve strategic defensive victory over an overwhelming offensive army in a matter of 48 hours.<sup>311</sup> By pairing military force with an integrated strategic litigation campaign at the UN, in the media, and during nightly presidential addresses, Ukraine has maintained control of the narrative, at least outside of Russia, that it is the victim of unchecked aggression.

This research shows that MALOPs can be slowed or stopped using the counter MALOPs toolkit, however, a novel example of military force hindering MALOPs took place in and around Kherson during the late Summer of 2022. Russia, on numerous

---

<sup>311</sup> While the war has raged for almost 9 months at the time of this writing, many experts agree that Russia lost the initiative and any chance of total Ukrainian capitulation within 48 hours and, ultimately, with its failure to seize Kyiv.

occasions, attempted to hold referendums as justification to formally absorb the region. Through well-timed artillery strikes and long-range fires, Ukrainian forces were able to disrupt not only the sham referendums themselves, but they were also able to disrupt Russia's tactic of transporting large numbers of Russian citizens paid to pose as local citizens and vote yes during the referendum. Russia was forced to delay these referendums, thereby creating time for Ukraine to seize the informational initiative to shape the legal narrative against Russia. This was effective, and the referendums were largely not taken seriously. Thanks to Ukrainian and international illumination, the referendums became the subject of comedy routines for late night television hosts. Within a few weeks, Ukrainian armed forces seized these areas and Russian forces found themselves retreating from territory that it had allegedly absorbed.

## CONCLUSION

Perhaps the true novelty of modern conflict is that aggressors have managed to circumvent the most complex set of international norms and institutions that have ever existed. Rather than using the term hybrid warfare, a more accurate characterization of modern conflict is as follows: modern conflict is best characterized as all conceivable ways and means, both violent and non-violent, employed in a non-linear fashion to remain below the legal and political threshold of accountability. This creates asymmetry, even against a far more superior military adversary. Whether a victim or observer understands this strategy or not, their potentially more lethal military force is rendered impotent to any measured response due to their own observance of international norms and laws. This falls under the MALOPs tenant of legal containment and is itself a form of asymmetry. As the victim gathers data and builds an international case against the antagonist (litigator's dilemma), the aggressor needs only to counter with faux- and quasi- legal arguments containing a modicum of truth to cast doubt on the legitimacy of the victim's claims. Then, when the antagonist's political objective is met, they cite the de facto circumstances on the ground to justify the rapid military consolidation of their gains. This also advances the antagonist's control over the legitimacy of the situation with the ultimate objective of shaping the social reality to force the acceptance, and thereby custom, of the international community. By the time that the international community has sufficient understanding of the situation to build and articulate a case under the auspices of PIL, the aggressor has created a situation whereby they will need to be forced – through significant military commitment and loss to include the threat of nuclear war – to surrender their gains.

This theory of MALOPs was devised to provide an appropriate vernacular for the description, identification, and response to modern legal manipulations such as those demonstrated in this study. One must take great care, however, not to become a MALOPs practitioner in pursuit of justice or in response to this behavior. The damage done to the rule of law and international norms through legal manipulation is just as destructive when

manipulations are good intentioned as it is when they are malign. “Law-abiding states must therefore mediate between both challenges: they cannot afford to counter lawfare, hybrid and gray zone challenges harmful to their national interests with identical means without chipping away at the international rule of law.”<sup>312</sup> One must remember that lawyers and legal experts that happen to be MALOPs Defenders are not the ultimate executors of Counter-MALOPs. This is for the politicians and policy makers. “Law exists in a political environment and serves political purposes. That is a given. But to offer any added social value, law cannot become the same as politics, but must retain some distance to it. The instrumental use of law as a tool of hybrid warfare threatens to obliterate that distance.”<sup>313</sup>

Thankfully, the UN Charter in its current form is mostly sufficient to address the challenges posed by MALOPs. The definition of aggression and the rights of states to defend themselves and others is enough to counter the malign threats to the territorial integrity and political independence of states. The challenge is a matter of political willpower to build coalitions of willing practitioners of PIL to address violations of the UN Charter and Customary International Law. The only true way to defend the public international legal domain is to exercise it in defense of itself, and this is done by holding MALOPs practitioners accountable to the UN Charter. In some cases, this means referring cases to the PCA, UNSC, ICC, and other international legal bodies. In other cases, it means exercising Article 51 of the UN Charter in defense of innocent states that fall victim to MALOPs practitioners.

The purpose of this study was to offer a theoretical framework, Malign Legal Operations, to identify, understand, and counter modern abuses and manipulations of legal domains through the lens of PIL. It sorted through the varied interpretations and international relations theories meant to explain this phenomenon, such as hybrid warfare and lawfare. In doing so, this research determined that – until now – no framework existed

---

<sup>312</sup> Sari, “Legal Resilience in an Era of Gray Zone Conflicts and Hybrid Threats.”

<sup>313</sup> Sari, “Legal Aspects of Hybrid Warfare.”

to consistently observe, explain, and address these events. Therefore, Malign Legal Operations was necessary to fill a gap in understanding and to advance the contemporary discourse of international law and international relations. This study determined the following:

- There exists a crisis of international law. Nations that fundamentally disagree with the present international system, such as China and Russia, are now powerful enough to challenge it and are doing so regularly.
- The present Rules-Based International Order is realist in character, as evidenced by Russian and Chinese approaches to international law. Unanimity is a requisite for universality, and there is no unanimous interpretation of international law or its foundational principles.
- The law is not simply an instrument of modern conflict, but a domain over which nations vie for influence. In this sense, legal domains are both a weapon and a battlefield and can be simultaneously fought over and fought with.
- The law plays a significant role in 21st century interstate conflict as it is the greatest indicator of legitimacy. Shaping and creating legitimacy under the auspices of PIL is becoming a principal task for states to achieve political objectives.
- The notions of hybrid warfare, gray-zone conflict, and non-linear warfare are not novel concepts and can be sufficiently addressed through the current body of PIL as forms of aggression that threaten the political independence of a state.
- The term lawfare was created as a bumper sticker term to educate non-lawyer military decision makers and politicians about the use of law to achieve operational military objectives in-lieu of force, specifically in the context of non-state radical organizations. It has since been re-defined numerous times, with great debate and politicization. None of these definitions sufficiently characterize the role of the law in modern conflict or how major powers use the law to achieve political (to include military) objectives. It is for these reasons that the term lawfare should be retired.
- No term, concept, theory, or framework exists to identify and describe the phenomena described above. Malign Legal Operations serves this purpose, and should be adopted in academic, policy, military, legal, and political circles to describe, address, identify, and defend against the modern manipulation of legal domains.

- The clever application of legal domains and mechanisms to achieve objectives without compromising or maliciously twisting the law itself should not constitute lawfare or Malign Legal Operations. This is simply using the law as intended, albeit cleverly. MALOPs are meant to describe the use of the law in ways other than intended, mischaracterizing, or twisting the spirit and intent, presenting faux legal arguments, masking the truth, or feigning legitimacy.
- There are numerous historic, recent, and ongoing examples of Malign Legal Operations, as outlined in this study, that prove how critical it is to adopt a theory of legal manipulation for use in identifying and combatting this behavior.
- There are several tactics that can be used to counter and dissuade Malign Legal Operations. These can be best described by this study's Counter-MALOPs Toolkit. Furthermore, those who work to counter this behavior can be considered MALOPs Defenders. The Toolkit includes considerations for MALOPs identification (literacy, intelligence, operationalization), disruption (integrated strategic litigation, combatting litigator's dilemma, illumination, accountability), and defense (legal resilience and deterrence, red teaming and war gaming, closing gaps and loopholes).
- MALOPs practitioners work to politicize the law, because it then becomes the subject of debate and can be subjugated. It is critical that MALOPs Defenders avoid the temptation to politicize the law to avoid becoming a MALOPs practitioner in the process. Legal experts must provide legal advice, with political considerations, to decision makers. They should not cross the line into the politicization of legal domains.

The existence of a consolidated theory of Malign Legal Operations, such as this, is a form of legal resilience-building because it acknowledges the problem and creates a vernacular for further explanation and discourse. Furthermore, the existence of a parlance for the modern manipulation of legal domains is itself a deterrent because a body of work now exists for legal theorists to build upon in pursuit of a more harmonious, inclusive, and principled body of international law. President Zelenskyy summarized this research in his address to The Hague on 14 July 2022. “[R]ight now, it depends on our joint efforts

whether humanity will have such an instrument as international law.” In the end, according to Zelenskyy, the ultimate objective is to “save international law itself.”<sup>314</sup>

---

<sup>314</sup> Volodymyr Zelenskyy, “Telegram: Contact @V\_Zelenskiy\_official,” Official Telegram Channel, July 14, 2022, [https://t.me/V\\_Zelenskiy\\_official/2534](https://t.me/V_Zelenskiy_official/2534).

## REFERENCES

- “About Lawfare: A Brief History of the Term and the Site.” Lawfare: Hard National Security Choices Blog. Accessed February 4, 2021. <https://www.lawfareblog.com/about-lawfare-brief-history-term-and-site>.
- Ansah, Tawia. “Lawfare: A Rhetorical Analysis.” *Case Western Reserve Journal of International Law* 43, no. 1 (2010). <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1145&context=jil>.
- Bartman, Christi Scott. *Lawfare: Use of the Definition of Aggressive War by the Soviet and Russian Federation Governments*. Newcastle upon Tyne: Cambridge Scholars Publishing, 2010.
- . “Lawfare and the Definition of Aggression: What the Soviet Union and Russian Federation Can Teach Us.” *Case Western Reserve Journal of International Law* 43, no. 1 (2010): 423–45. <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1163&context=jil>.
- BBC News. “Interview with BBC Television - President of Russia.” The Kremlin Website, 2008. <http://en.kremlin.ru/events/president/transcripts/1228>.
- Bekhterev, Vladimir M. *Objective Psychology*. Unknown, 1907.
- Bennett, Kirk. “The Minsk Trap.” The American Center for a European Ukraine, 2015. <http://www.europeanukraine.org/home/2015/09/the-minsk-trap/>.
- Black, Christopher. “Ideological Aggression Against China Intensifies – The Uyghur Tribunal.” *New Eastern Outlook*, June 10, 2021. <https://journal-neo.org/2021/10/06/ideological-aggression-against-china-intensifies-the-uyghur-tribunal/>.
- Campbell, Caitlin, and Nargiza Salidjanova. “South China Sea Arbitration Ruling: What Happened and What’s Next?,” 2016. <http://www.andrewerickson.com/wp-content/uploads/2016/07/PH-CN->.
- Campbell, Duncan. “US Buys up All Satellite War Images.” *The Guardian*, 2001. <https://www.theguardian.com/world/2001/oct/17/physicalsciences.afghanistan>.
- Cantwell, Douglas. “Hybrid Warfare: Aggression and Coercion in the Gray Zone.” *American Society of International Law*, 2017. <https://www.asil.org/insights/volume/21/issue/14/hybrid-warfare-aggression-and-coercion-gray-zone>.
- Carlson, John, and Neville Yeomans. “Whither Goeth the Law - Humanity or Barbarity.” *The Way Out - Radical Alternatives in Australia*, 1975. <http://www.laceweb.org.au/whi.htm>.
- Center for Strategic and International Studies. “The Ukraine Crisis Timeline,” 2013. <http://ukraine.csis.org/kyiv.htm#1>.
- Charbonneau, Louis. “Russia: Yanukovich Asked Putin to Use Force to Save Ukraine |

- Reuters.” Reuters, March 3, 2014. <https://www.reuters.com/article/us-ukraine-crisis-un-idUSBREA2224720140304>.
- Chargé d’Affaires a.i. Kate M. Byrnes. “Ongoing Violations of International Law by the Russian Federation in Ukraine,” 2017. <https://osce.usmission.gov/ongoing-violations-international-law-russian-federation-ukraine-2/>.
- Chen, Ti-Chiang. *The International Law of Recognition*. New York: Stevens & Sons Limited, 1951. <https://archive.org/details/cu31924016945770/page/n7>.
- Cheng, Dean. “Winning Without Fighting: Chinese Legal Warfare.” *The Heritage Foundation Backgrounder*, May 21, 2012. <https://www.heritage.org/asia/report/winning-without-fighting-chinese-legal-warfare>.
- Chernichenko, Stanislav Valentinovich. “Ideological Aggression as the Use of Force in International Law.” *Eurasian Legal Journal* 1 (2019): 21–24. <https://eurasianlaw.ru/nashi-rubriki/yuridicheskie-stati/ideologicheskaya-agressiya-kak-primenenie-sily-v-mezhdunarodnom-prave>.
- Clausewitz, Carl Von. *On War*. Edited by Michael Howard and Peter Paret. Princeton, New Jersey: Princeton University Press, 1976.
- Conley, Heather A., James Mina, Ruslan Stefanov, and Martin Vladimirov. *The Kremlin Playbook*. Center For Strategic and International Studies, 2016.
- Council on Foreign Relations. “Conflict in Ukraine.” *Global Conflict Tracker*. Accessed June 7, 2021. <https://microsites-live-backend.cfr.org/global-conflict-tracker/conflict/conflict-ukraine>.
- Cruickshank, Michael. “Investigating The Kerch Strait Incident - Bellingcat.” *bellingcat*, 2018. <https://www.bellingcat.com/news/uk-and-europe/2018/11/30/investigating-the-kerch-strait-incident/>.
- Darczewska, Jolanta. “The Anatomy of Russian Information Warfare: The Crimean Operation, A Case Study.” Warsaw: Centre for Eastern Studies, 2014.
- Defense Science Board. “Capability Surprise Volume I: Main Report,” September 2009. <http://www.projectwhitehorse.com/pdfs/Ed9/4>. *Capability Surprise Vol I DSB-2009.pdf*.
- Department of Defense Cyber Read Team Certification and Accreditation, CJCSM 6510.03 § (2013). [www.dtic.mil/cjcs\\_directives](http://www.dtic.mil/cjcs_directives).
- Dunlap, Charles J, Jr. “Lawfare In Modern Conflicts.” *The Reporter*, Keystone Edition, October 3, 2005, 95–101. <https://www.afjag.af.mil/Portals/77/documents/AFD-090116-023.pdf>.
- Dunlap, Charles J. “Does Lawfare Need an Apologia?” *Case Western Reserve Journal of International Law* 43, no. 1 (2010). <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1146&context=jil>.
- Dunlap Jr., Charles J. “Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts.” Kennedy School of Government, Harvard University,

2001. <http://people.duke.edu/~pfeaver/dunlap.pdf>.
- . “Lawfare 101: A Primer.” *MILITARY REVIEW*. Vol. 8, 2017. <https://sites.duke.edu/lawfire/>.
- . “Lawfare Today: A Perspective.” *Yale Journal of International Affairs*, no. Winter Issue (2008): 146–54. <http://yalejournal.org/wp-content/uploads/2011/01/083111dunlap.pdf>.
- Dunlap Jr, Charles J. “Lawfare: A Decisive Element of 21st Century Conflicts?” *Joint Force Quarterly*, no. 54 (2009): 34–39.
- EuroMaidan Press. “The Hidden Invasion: Russia’s Military Convoys to Ukraine since 2014,” 2018. <http://euromaidanpress.com/2018/11/06/the-hidden-invasion-russias-military-convoys-to-ukraine-since-2014/>.
- F. Kittrie, Orde. *Lawfare: Law as a Weapon of War*. New York: Oxford University Press, 2016.
- Farer, Tom J. “Political and Economic Coercion in Contemporary International Law.” *American Society of International Law* 79, no. 3 (1985): 406.
- Fisher, Brad. “Ideological Aggression and International Law: Soviet and Russian Malign Influence Withing Legal Domains (MILDs).” *Наукові Записки НаУКМА. Юридичні Науки* 5 (2020). <http://nrplaw.ukma.edu.ua/article/view/208086>.
- . “The Kremlin’s Malign Legal Operations on the Black Sea: Analyzing the Exploitation of Public International Law Against Ukraine.” *Kyiv-Mohyla Law and Politics Journal* 5 (2019): 193–223.
- Foxall, Andrew. “The Ceasefire Illusion: An Assessment of the Minsk II Agreement Between Ukraine and Russia,” no. 8 (2015). <https://henryjacksonsociety.org/wp-content/uploads/2015/12/Minsk-II-FINAL-For-Website.pdf>.
- Fridman, Ofer. *Russian “Hybrid Warfare” Resurgence and Politicisation*. New York: Oxford University Press, 2018.
- FSB via Sputnik. “Ukrainian Naval Ships Ignored Calls to Stop, Violated Russian State Border - FSB.” *Sputnik International*, 2018. <https://sputniknews.com/russia/201811261070123720-ukraine-navalships-azov-balcks-sea-kerch/>.
- Gady, Franz-Stefan. “Chinese Admiral: South China Sea ‘Belongs to China’ – The Diplomat.” *The Diplomat*, September 16, 2015. <https://thediplomat.com/2015/09/chinese-admiral-south-china-sea-belongs-to-china/>.
- Galeotti, Mark. “I’m Sorry for Creating the ‘Gerasimov Doctrine.’” *Foreign Policy*, March 2018. <https://foreignpolicy.com/2018/03/05/im-sorry-for-creating-the-gerasimov-doctrine/>.
- . “The ‘Gerasimov Doctrine’ and Russian Non-Linear War | In Moscow’s Shadows.” Accessed December 1, 2018. <https://inmoscowsshadows.wordpress.com/2014/07/06/the-gerasimov-doctrine-and-russian-non-linear-war/>.

- Gerasimov, Valeriy. "НАУКИ В ПРЕДВИДЕНИИ." *Military Industrial Courier* 8, no. 476 (2013): 2–3. [https://vpk-news.ru/sites/default/files/pdf/VPK\\_08\\_476.pdf](https://vpk-news.ru/sites/default/files/pdf/VPK_08_476.pdf).
- Gerasimov, Valery. "Russian Def. Min.: We Must Act Quickly To Preempt The Enemy." MEMRI, March 2, 2019. [https://www.memri.org/reports/russian-first-deputy-defense-minister-gerasimov-our-response-based-active-defense-strategy#\\_edn1](https://www.memri.org/reports/russian-first-deputy-defense-minister-gerasimov-our-response-based-active-defense-strategy#_edn1).
- Globalsecurity.org. "HQ-9." Accessed May 2, 2021. <https://www.globalsecurity.org/military/world/china/hq-9.htm>.
- Goldstein, Brooke. "Speech Delivered by Brooke Goldstein at Fordham Law School on Lawfare & Combating the Goldstone Report." *The Lawfare Project*, April 27, 2010. [https://www.thelawfareproject.org/analysis/2010/4/27/ispeech-delivered-by-brooke-goldstein-at-fordham-law-school-on-lawfare-combating-the-goldstone-reportibrthe-lawfare-project?rq=what is lawfare%3F](https://www.thelawfareproject.org/analysis/2010/4/27/ispeech-delivered-by-brooke-goldstein-at-fordham-law-school-on-lawfare-combating-the-goldstone-reportibrthe-lawfare-project?rq=what%20is%20lawfare%3F).
- Goldstein, Brooke. "Lawfare: Real Threat or Illusion? ." *The Lawfare Project*, May 10, 2010. [https://www.thelawfareproject.org/analysis/2010/11/5/ilawfare-real-threat-or-illusionibrthe-lawfare-project?rq=what is lawfare](https://www.thelawfareproject.org/analysis/2010/11/5/ilawfare-real-threat-or-illusionibrthe-lawfare-project?rq=what%20is%20lawfare).
- Goldstein, Brooke M., and Aaron Eitan Meyer. "'Lawfare' Gains Ground: U.N. Resolution on 'Defaming' a Case in Point ." *Middle East Forum*, May 19, 2009. <https://www.meforum.org/2138/lawfare-gains-ground>.
- Grossman, Derek. "Military Build-Up in the South China Sea." *RAND*, January 22, 2020. [https://www.rand.org/pubs/external\\_publications/EP68058.html](https://www.rand.org/pubs/external_publications/EP68058.html).
- Halper, Stefan. "China: The Three Warfares." Washington D.C., May 2013. [https://www.iwp.edu/wp-content/uploads/2019/05/201810171\\_HalperChinaThreeWarfares.pdf](https://www.iwp.edu/wp-content/uploads/2019/05/201810171_HalperChinaThreeWarfares.pdf).
- Headquarters, Department of the Army. "Legal Operations, FM 27-100," September 3, 1991. [https://www.loc.gov/rr/frd/Military\\_Law/pdf/legal\\_operations.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/legal_operations.pdf).
- Hlushchenko, Olha. "Russian Media: Russian Passports to Be Issued in Kherson and Zaporizhzhia Oblasts." *Ukrainska Pravda*, May 27, 2022. [https://news.yahoo.com/russian-media-russian-passports-issued-035053206.html?guccounter=1&guce\\_referrer=aHR0cHM6Ly93d3cuYmluZy5jb20v&guce\\_referrer\\_sig=AQAAABU\\_R2Daid1RRGofZR\\_WMcpsQin1GOsrmjWHy0EShRctQhGuKebqnLRMjK2\\_hAayhdn2dePFXSCaOb-qa9D5jvRR7gBqHO6cOHUicn437tmqDdmw-g9IIZwKlAPBB6oWlAySj9MqeOVPyFnQkPHbT8p9tQhIDesWrGevsbnd8](https://news.yahoo.com/russian-media-russian-passports-issued-035053206.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuYmluZy5jb20v&guce_referrer_sig=AQAAABU_R2Daid1RRGofZR_WMcpsQin1GOsrmjWHy0EShRctQhGuKebqnLRMjK2_hAayhdn2dePFXSCaOb-qa9D5jvRR7gBqHO6cOHUicn437tmqDdmw-g9IIZwKlAPBB6oWlAySj9MqeOVPyFnQkPHbT8p9tQhIDesWrGevsbnd8).
- Hoffman, Frank. "On Not-So-New Warfare: Political Warfare vs Hybrid Threats - War on the Rocks." *War On The Rocks*, July 28, 2014. <https://warontherocks.com/2014/07/on-not-so-new-warfare-political-warfare-vs-hybrid-threats/>.
- Hoffman, Frank G. "Examining Complex Forms of Conflict: Gray Zone and Hybrid Challenges." *PRISM: The Journal of Complex Operations* 7, no. 4 (November 8, 2018). <https://cco.ndu.edu/News/Article/1680696/examining-complex-forms-of-conflict-gray-zone-and-hybrid-challenges/>.

- Hoffman, Frank G. "The Rise of Hybrid Wars," 2007. <http://www.potomac institute.org/>.
- Hvenmark Nilsson, Carl. "Revisiting the Minsk II Agreement," 2016. [www.csis.org](http://www.csis.org).
- Hybrid CoE. "The European Centre of Excellence for Countering Hybrid Threats." Accessed January 15, 2022. <https://www.hybridcoe.fi/>.
- Irani, Freya. "'Lawfare', US Military Discourse, and the Colonial Constitution of Law and War." *European Journal of International Security* 3, no. 1 (2018): 113–33. <https://doi.org/10.1017>.
- Kennan, George. "The Long Telegram." The National Security Archive, 1946.
- Kennedy, David. "The Disciplines of International Law and Policy." *Leiden Journal of International Law* 12 (2008): 17.
- Kissinger, Henry. *World Order*. New York: Penguin Books, 2015.
- Kittrie, Orde F. "Lawfare and U.S. National Security." *Case Western Reserve Journal of International Law* 43, no. 1 (2010). <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1162&context=jil>.
- Kofman, Michael. "Russian Hybrid Warfare and Other Dark Arts." *War On The Rocks*, March 11, 2016. <https://warontherocks.com/2016/03/russian-hybrid-warfare-and-other-dark-arts/>.
- Kofman, Michael, and Matthew Rojansky. "A Closer Look at Russia's 'Hybrid War.'" *Kennan Cable* 7, no. 7 (2015).
- Kraska, James. "EJIL: Talk! – The Kerch Strait Incident: Law of the Sea or Law of Naval Warfare?" *Blog of the European Journal of International Law*, 2018. <https://www.ejiltalk.org/the-kerch-strait-incident-law-of-the-sea-or-law-of-naval-warfare/>.
- Lally, Kathy, and Will Englund. "Putin Says He Reserves Right to Protect Russians in Ukraine - The Washington Post." *The Washington Post*, March 4, 2014. [https://www.washingtonpost.com/world/putin-reserves-the-right-to-use-force-in-ukraine/2014/03/04/92d4ca70-a389-11e3-a5fa-55f0c77bf39c\\_story.html](https://www.washingtonpost.com/world/putin-reserves-the-right-to-use-force-in-ukraine/2014/03/04/92d4ca70-a389-11e3-a5fa-55f0c77bf39c_story.html).
- League of Nations. "1936 Montreux Convention," 1936. [http://sam.baskent.edu.tr/belge/Montreux\\_ENG.pdf](http://sam.baskent.edu.tr/belge/Montreux_ENG.pdf).
- Liang, Qiao, and Wang Xiangsui. *Unrestricted Warfare*. Unrestricted Warfare, 1999. <https://doi.org/B67812>.
- Luban, David, and Carl Schmitt. "Carl Schmitt and the Critique of Lawfare." *Case Western Reserve Journal of International Law* 43, no. 1 (2010). <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1165&context=jil>.
- Lykke, Arthur F. "Defining Military Strategy." *Military Review*, 1989.
- Maggs, Peter B, Olga Schwartz, and William Burnham. *Law and Legal System of the Russian Federation*. Sixth. New York: Juris Publishing, Inc., 2015. [https://books.google.co.uk/books?hl=en&lr=&id=J0jwCQAAQBAJ&oi=fnd&pg=PR21&dq=Russian+Legal+System&ots=uO\\_Un7Ih5J&sig=LYkZ31kADv7Xg9KD\\_](https://books.google.co.uk/books?hl=en&lr=&id=J0jwCQAAQBAJ&oi=fnd&pg=PR21&dq=Russian+Legal+System&ots=uO_Un7Ih5J&sig=LYkZ31kADv7Xg9KD_)

- 2sGzLnp0Uc#v=onepage&q&f=true.
- Mälksoo, Lauri. Russian Approaches to International Law. *Russian Approaches to International Law*, 2015. <https://doi.org/10.1093/acprof:oso/9780198723042.001.0001>.
- Malyarenko, Tatyana, and Stefan Wolff. “The Logic of Competitive Influence-Seeking: Russia, Ukraine, and the Conflict in Donbas.” *Post-Soviet Affairs* 34, no. 4 (2018): 191–212. <https://doi.org/10.1080/1060586X.2018.1425083>.
- Martin, Bradley. “Book Review; Hybrid Warfare: Fighting Complex Opponents from the Ancient World to the Present.” *Journal of Military and Strategic Studies* 5., 2013, 5.
- Mayer, Henry. “Russia Denies Ukraine Claim Troops Stayed in Belarus After Games - Bloomberg.” *Bloomberg*, September 30, 2017. <https://www.bloomberg.com/news/articles/2017-09-30/russia-denies-ukraine-claim-troops-stayed-in-belarus-after-games>.
- Mearsheimer, John J. “Bound to Fail: The Rise and Fall of the Liberal International Order” 43, no. 4 (2019): 7–50.
- Mensah, Thomas A, Jean-Pierre Cot, Stanislaw Pawlak, Alfred H A Soons, and Wolfrum Registry. “PCA Case No 2013-19 IN THE MATTER OF THE SOUTH CHINA SEA ARBITRATION-before-AN ARBITRAL TRIBUNAL CONSTITUTED UNDER ANNEX VII TO THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA-between-THE REPUBLIC OF THE PHILIPPINES-and-THE PEOPLE’S REPUBLIC OF CHINA,” 2016. <https://www.pcacases.com/pcadocs/PH-CN - 20160712 - Award.pdf>.
- Ministry of Defense of the Russian Federation. *The Fundamentals of the State Policy of the Russian Federation in the Field of Naval Operations for the Period Until 2030* (2017).
- . *The Military Doctrine of the Russian Federation* (2014).
- Mosquera, A.B. Munoz, and N. Chalanouli. “Decoding Gray Zone Environments. Legal Resilience.” Presented to the University of Exeter – ‘Legal Resilience in an Era of Hybrid Threats,’ n.d.
- Mosquera, Andres B.Munoz, and Sascha Dov Bachmann. “Lawfare in Hybrid Wars: The 21st Century Warfare.” *Journal of International Humanitarian Legal Studies* 7, no. 1 (2016): 63–87. <https://doi.org/10.1163/18781527-00701008>.
- Munoz Mosquera, Andres B., and Nikoleta Chalanouli. “Guest Post: Andrés Munoz Mosquera’s and Nikoleta Chalanouli’s Essay: ‘China, an Active Practitioner of Legal Warfare.’” *Lawfire*, February 2, 2020. <https://sites.duke.edu/lawfire/2020/02/02/guest-post-andres-munoz-mosqueras-and-nikoleta-chalanoulis-essay-china-an-active-practitioner-of-legal-warfare/>.
- Nadya Sadat, Leila, and Jing Geng. “On Legal Subterfuge and the So-Called ‘Lawfare’ Debate.” *Case Western Reserve Journal of International Law* 43, no. 1 (2010). <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1148&context=jil>.

- NATO ACO Office of Legal Affairs. “Exeter Conference on Legal Resilience: Decoding Gray Zone Environments and the Path to Legal Resilience,” 2019.
- Newton, Michael A. “Illustrating Illegitimate Lawfare.” *Case Western Reserve Journal of International Law* 43, no. 1 (2010). <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1155&context=jil>.
- “№ 183 Об Определении в Гуманитарных Целях Категорий Лиц, Имеющих Право Обратиться с Заявлениями о приеме в Гражданство Российской Федерации в Упрощенном Порядке.” Указ Президента Российской Федерации, May 25, 2022. <http://publication.pravo.gov.ru/Document/View/0001202205250004#print>.
- Noone, Gregory P. “Lawfare or Strategic Communications?” *Case Western Reserve Journal of International Law* 43, no. 1 (2010). <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1144&context=jil>.
- OHCHR. “A/HRC/52/CRP.4: Conference Room Paper of the Independent International Commission of Inquiry on Ukraine,” 2022. <https://www.ohchr.org/en/documents/reports/ahrc52crp4-conference-room-paper-independent-international-commission-inquiry>.
- Petrenko, Roman. “Putin Official Says Kherson Region Should Enter Russian Federation “as Legitimately as Crimea” | Ukrayinska Pravda.” *Ukrainska Pravda*, May 11, 2022. <https://www.pravda.com.ua/eng/news/2022/05/11/7345495/>.
- . “Путінський Сенатор Приїхав у Херсон і Заявив, Що “Росія Тут Назавжди” | Українська Правда.” *Ukrainska Pravda*, May 6, 2022. <https://www.pravda.com.ua/news/2022/05/6/7344470/>.
- Pineles, Dean B. “How the ‘Kosovo Precedent’ Shaped Putin’s Plan to Invade Ukraine | Balkan Insight.” *Balkan Transitional Justice*, March 9, 2022. <https://balkaninsight.com/2022/03/09/how-the-kosovo-precedent-shaped-putins-plan-to-invade-ukraine/>.
- Pinker, Steve. *The Better Angels of Our Nature: Why Violence Has Declined*. Viking Books, 2011.
- Putin, Vladimir. “Address by President of the Russian Federation,” March 14, 2014. <http://en.kremlin.ru/events/president/news/20603>.
- . “Meeting of the Valdai International Discussion Club.” *Kremlin.Ru*, 2014.
- . “Putin Speech and the Following Discussion at the 2007 Munich Conference on Security Policy.” Munich, 2007. <http://russialist.org/transcript-putin-speech-and-the-following-discussion-at-the-munich-conference-on-security-policy/>.
- . “Vladimir Putin Answered Questions from Journalists about the Situation in Ukraine.” *The Kremlin*, 2014. <http://www.kremlin.ru/events/president/news/20366>.
- Puyvelde, Dr. Damien Van. “Hybrid War – Does It Even Exist?” *NATO Review Magazine*, 2015. <https://www.nato.int/docu/Review/2015/Also-in-2015/hybrid-modern-future-warfare-russia-ukraine/EN/index.htm>.

- Riepl, Michael. "Russian Contributions to International Humanitarian Law: A Contrastive Analysis of Russia's Historical Role and Its Current Practice," 2022. <https://doi.org/10.5771/9783748913214>.
- Rivkin, David B, and Lee A. Jr. Casey. "The Rocky Shoals of International Law." *The National Interest*, 2000. <https://nationalinterest.org/article/the-rocky-shoals-of-international-law-523>.
- Robinson, Heather. "Lawfare Conference Takes Aim at Terrorists' Efforts to Wage 'Legal Jihad.'" *HuffPost*, June 16, 2010. [https://www.huffpost.com/entry/lawfare-conference-takes\\_b\\_501381](https://www.huffpost.com/entry/lawfare-conference-takes_b_501381).
- Rossi, Christopher. "Ex Injuria Jus Non Oritur, Ex Factis Jus Oritur , and the Elusive Search for Equilibrium After Ukraine." *Tulane Journal of International and Comp. Law*, 2015, 143–73. <https://poseidon01.ssrn.com/delivery.php?ID=8380690700930670820251011100070190980980270200220330210870200931270860960950280980741230231191031070610270990960881141210871160460420560530361210050900991050780730750560060320960060221200050950890151151130240750>.
- Rossoliński-Liebe, Grzegorz, and Bastiaan Willems. "Putin's Abuse of History: Ukrainian 'Nazis', 'Genocide', and a Fake Threat Scenario." *The Journal of Slavic Military Studies*, July 6, 2022. <https://doi.org/10.1080/13518046.2022.2058179>.
- Rumer, Eugene. "The Primakov (Not Gerasimov) Doctrine in Action." *The Carnegie Endowment for International Peace*, 2019.
- Sari, Aurel. "Legal Aspects of Hybrid Warfare." *Lawfare: Hard National Security Choices Blog*, 2015. <https://www.lawfareblog.com/legal-aspects-hybrid-warfare>.
- . "Legal Resilience in an Era of Gray Zone Conflicts and Hybrid Threats." *SSRN Electronic Journal*, 2019. <https://doi.org/10.2139/ssrn.3315682>.
- Scharf, Michael P, and Elizabeth Andersen. "Is Lawfare Worth Defining - Report of the Cleveland Experts Meeting - September 11, 2010." *Case Western Reserve Journal of International Law* 43, no. 1 (2010): 43. <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1141&context=jil>.
- Scharf, Michael P, and Shannon Pagano. "Foreward: Lawfare!" *Case Western Reserve Journal of International Law* 43 (2010). <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1140&context=jil>.
- Shaw, Malcolm. *International Law. Journal of Experimental Psychology: General*. 6th ed. Vol. 136. New York: Cambridge University Press, 2008.
- Shekhovtsov, Anton. "Conceptualizing Malign Influence of Putin's Russia in Europe," 2020. [https://www.4freerussia.org/wp-content/uploads/sites/3/2020/04/Malign-Influence\\_web\\_eng-5.pdf](https://www.4freerussia.org/wp-content/uploads/sites/3/2020/04/Malign-Influence_web_eng-5.pdf).
- . "Stories about 'Ukrainian Nazis' Were Rare before 2014 When They Surged as Russia's Plans Faltered." *Hoaxlines*, August 3, 2022.

- [https://novelscience.substack.com/p/stories-about-ukrainian-nazis-were?r=5qaob&s=w&utm\\_campaign=post&utm\\_medium=web](https://novelscience.substack.com/p/stories-about-ukrainian-nazis-were?r=5qaob&s=w&utm_campaign=post&utm_medium=web).
- Shishkin, Alexander. "Russian Submarines Are Prevented from Operating in the Mediterranean Sea." *Vzhlyad*, 2018. <https://vz.ru/world/2018/5/28/924562.html>.
- Song, Yann-huei, and Keyuan Zou. *Major Law and Policy Issues in the South China Sea: European and American Perspectives*. London and New York: Routledge, 2014.
- Southerland, Matthew. "China's Island Building in the South China Sea: Damage to the Marine Environment, Implications, and International Law," April 12, 2016. [https://www.uscc.gov/sites/default/files/Research/China%27s Island Building in the South China Sea\\_0.pdf](https://www.uscc.gov/sites/default/files/Research/China%27s%20Island%20Building%20in%20the%20South%20China%20Sea_0.pdf).
- Spring, Ronald. "Russian Operational Art, New Type Warfare, and Reflexive Control | Small Wars Journal." *Small Wars Journal*, 2018. <https://smallwarsjournal.com/jrnl/art/russian-operational-art-new-type-warfare-and-reflexive-control>.
- Sputnik News. "Russia Guarantor of Ukraine Settlement, Not Party Fulfilling Deal - Kremlin," 2015. <https://sputniknews.com/politics/201502131018209668/>.
- "State Duma Ratifies Treaties on Friendship, Cooperation, Mutual Assistance with DPR, LPR - Russian Politics & Diplomacy - TASS." TASS, February 22, 2022. <https://tass.com/politics/1408337>.
- Sutton, H. "Russian Submarine Transits Bosphorus In Move That Raises Questions Under International Treaty." *Forbes*, June 23, 2020. <https://www.forbes.com/sites/hisutton/2020/06/23/image-shows-russian-submarine-appearing-to-break-international-treaty/?sh=1f49568e57b8>.
- Sutyagin, Igor. "Zapad-2017 : Why Do the Numbers Matter ? Zapad-2017 : Why Do the Numbers Matter ?," no. September (2017).
- Swaine, Michael D. "Chinese Views on the South China Sea Arbitration Case between the People's Republic of China and the Philippines." *The China Leadership Monitor*, no. 51. Accessed May 2, 2021. <https://carnegieendowment.org/files/CLM51MS.pdf>.
- "Tallinn Manual on the International Law Applicable to Cyber Warfare," 2017.
- TASS. "Moscow to Respond to EU Sanctions Due to Kerch Strait Incident - Russian Foreign Ministry - Russian Politics & Diplomacy." Russian News Agency, March 16, 2019. <https://tass.com/politics/1048969>.
- . "Putin Signs Decrees on Recognizing Donetsk and Lugansk Republics," February 21, 2022. <https://tass.com/politics/1407731>.
- . "Russian Navy Sub Embarks on Deployment to Mediterranean Sea." Russian News Agency, April 27, 2020. <https://tass.com/defense/1150089>.
- "The DPR Recognizes as Its National Border the Boundaries of the Donetsk Region - Donbass Insider." *Donbass Insider*, December 1, 2019. <https://www.donbass-insider.com/2019/12/01/the-dpr-recognizes-as-its-national-border-the-boundaries-of-the-donetsk-region/>.
- The International Law Commission. "Report of the Special Committee on the Question

- of Defining Aggression.” The United Nations Digital Library. New York, 1953. <https://digitallibrary.un.org/record/715503?ln=en>.
- The Kremlin. “Vladimir Putin Interview with The Financial Times,” 2019. <http://en.kremlin.ru/events/president/news/60836>.
- The Lawfare Project. “What We Do.” Accessed February 2, 2021. <https://www.thelawfareproject.org/whatwedo>.
- The Ministry of Foreign Affairs of the Russian Federation. Foreign Policy Concept of the Russian Federation (2016).
- The Soviet Union et al. “The London Convention for the Definition of Aggression,” 1933. <https://www.iilj.org/wp-content/uploads/2016/08/Convention-for-the-Definition-of-Aggression-1933.pdf>.
- The United Nations. “Democracy and the United Nations.” Accessed May 4, 2020. <https://www.un.org/en/sections/issues-depth/democracy/index.html>.
- The United States Department of State. “Fact vs. Fiction: Russian Disinformation on Ukraine,” 2022. <https://www.state.gov/fact-vs-fiction-russian-disinformation-on-ukraine/>.
- The Warsaw Institute. “Russian ‘Contractors’ In the Service of the Kremlin,” 2019. <https://warsawinstitute.org/russian-contractors-in-the-service-of-the-kremlin/>.
- Theohary, Catherine A. “Defense Primer: Information Operations.” Congressional Research Service, December 15, 2020. <https://crsreports.congress.gov/product/pdf/IF/IF10771>.
- Tiefenbrun, Susan W. “Semiotic Definition of Lawfare.” *Case Western Reserve Journal of International Law* 43, no. 1 (2010). <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1142&context=jil>.
- Tolve, Robert De. “At What Cost? America’s UNCLOS Allergy In The Time of ‘Lawfare.’” *Naval Law Review* 61 (2012). <http://www.jag.navy.mil/documents/navylawreview/NLRVolume61.pdf>.
- Tucker, Patrick. “Russia Launched Cyber Attacks Against Ukraine Before Ship Seizures, Firm Says.” *DefenseOne*, 2018. <https://www.defenseone.com/technology/2018/12/russia-launched-cyber-attacks-against-ukraine-ship-seizures-firm-says/153375/>.
- U.S. Army Training and Doctrine Command. “The U.S. Army in Multi-Domain Operations 2028.” TRADOC Pamphlet 525-3-1, 2018. [https://www.tradoc.army.mil/Portals/14/Documents/MDO/TP525-3-1\\_30Nov2018.pdf](https://www.tradoc.army.mil/Portals/14/Documents/MDO/TP525-3-1_30Nov2018.pdf).
- Ukraine and Russia. “Partition Treaty on the Status and Conditions of the Black Sea Fleet,” May 28, 1997.
- Ukrainian Ministry of Justice. “Lawfare: Legal Confrontation with the Russian Federation.” Accessed January 15, 2022. <https://www.lawfare.gov.ua/>.
- United Nations Audiovisual Library of International Law. “Definition of Aggression.”

- General Assembly resolution 3314 (XXIX), 1974.  
<http://legal.un.org/avl/ha/da/da.html>.
- United Nations General Assembly. “Summary Record of the 389th Meeting, 1st Committee, 5th Session, United Nations General Assembly,” 1950.  
<https://doi.org/10.1017/S0020818300010821>.
- Vázquez Benítez, Rodrigo. “Legal Operations: The Use of Law as an Instrument of Power in the Context of Hybrid Threats and Strategic Competition.” NATO Legal Gazette, no. 41 (October 2020): 138–44.  
[https://act.nato.int/application/files/5316/0195/2156/legal\\_gazette\\_41.pdf](https://act.nato.int/application/files/5316/0195/2156/legal_gazette_41.pdf).
- Vibhute, Khushal, and Filipos Aynalem. Legal Research Methods. Wordpress, 2009.
- Volkova, Nadia. “The Minsk Trap: Moscow’s Perversion of the Conflict Arbitration Process in Ukraine” 131 (2019): 73–82. <https://doi.org/10.18523/2617-2607.2019.4.73-82>.
- Voyger, Mark. NATO at 70 and the Baltic States: Strengthening the Euro-Atlantic Alliance in an Age of Non-Linear Threats. Estonia. Tartu: Baltic Defense College, 2019.  
[http://www.baltdefcol.org/files/files/publications/NATO\\_AT\\_70\\_AND\\_THE\\_BALTIC\\_STATES.pdf](http://www.baltdefcol.org/files/files/publications/NATO_AT_70_AND_THE_BALTIC_STATES.pdf).
- Wenshen, Zong. Legal Warfare: Discussion of 100 Examples and Solutions. Beijing: PRC: PLA Publishing House, 2004.
- Williams, Lauren C. “Sharing Secrets Has Been ‘Effective’ Against Russia, But the Tactic Has Limits, CIA Chief Says - Defense One.” Defense One, September 8, 2022. <https://www.defenseone.com/defense-systems/2022/09/sharing-secrets-has-been-effective-against-russia-tactic-has-limits-cia-chief-says/376882/>.
- Williams, Matthias, and Pavel Polityuk. “Russia Left Troops in Belarus after Wargames.” Reuters, September 29, 2017. <https://www.reuters.com/article/us-ukraine-crisis-army/russia-left-troops-in-belarus-after-wargames-ukraine-idUSKCN1C4234>.
- Wittes, Benjamin. “Welcome to Lawfare.” Lawfare: Hard National Security Choices Blog, September 1, 2010. <https://www.lawfareblog.com/welcome-lawfare>.
- Yixin, Chen, and Jian Chang. “陈一新：学深悟透习近平法治思想，推动法治中国建设迈上新台阶-中国长安网 [Chen Yixin: Learn to Understand Xi Jinping’s Thoughts on the Rule of Law and Push the Construction of Rule of Law in China to a New Level],” April 2, 2021.  
[http://www.chinapeace.gov.cn/chinapeace/c100007/2021-04/02/content\\_12470137.shtml](http://www.chinapeace.gov.cn/chinapeace/c100007/2021-04/02/content_12470137.shtml).
- Zelenskyy, Volodymyr. “Telegram: Contact @V\_Zelenskiy\_official.” Official Telegram Channel, July 14, 2022. [https://t.me/V\\_Zelenskiy\\_official/2534](https://t.me/V_Zelenskiy_official/2534).
- Zverev, Anton. “Exclusive: Senior Separatist Urges Russia to Send 30,000 Troops to East Ukraine.” Reuters, February 7, 2022.  
<https://www.reuters.com/world/europe/exclusive-senior-separatist-urges-russia->

send-30000-troops-east-ukraine-2022-02-07/.

Zyuganov, G.A., I.I. Melnikov, V.I. Kashin, N.V. Kolomeitsev, Yu. V. Afonin, D.G. Novikov, L.I. Kalashnikov, et al. Draft Resolution №58243-8, To the President of the Russian Federation V.V. Putin on the need to recognize the Donetsk Republic and the Luhansk People’s Republic, Legislative Activity Support System of the State Duma of the Federal Assembly of the Russian Federation § (2022). <https://sozd.duma.gov.ru/bill/58243-8>.

Министерство обороны Российской Федерации. “Подводная Лодка «Ростов-На-Дону» Черноморского Флота Проходит Черноморские Проливы ,” June 23, 2020. [https://function.mil.ru/news\\_page/country/more.htm?id=12298689@egNews](https://function.mil.ru/news_page/country/more.htm?id=12298689@egNews).

## FIGURES

Figure 1: Gerasimov's Role of Non-Military Methods in Inter-State Conflict Resolution .....	41
Figure 2. Russian Disinformation and Propaganda in Donetsk, Ukraine, leading up to the referendum on May 11th, 2014. Translation: "MAKE YOUR CHOICE! The 11th OF MAY, FROM 0900 TO 2200." .....	119
Figure 3. Russian Disinformation leading up to the Crimean Referendum on March 16th, 2014. Translation: "16 March We Will Choose [Left] or [Right]." .....	127
Figure 4. Voyger's Matrix of Hybrid Warfare Domains and Areas of Law .....	210
Figure 5. Media content discussing “Ukraine” and “Nazi” from 2010 to 2022.315.....	222

**APPENDIX 1. List of publications**

1. Fisher B., The Origins of “Lawfare” and the Exploitation of Public International Law / B Fisher // Scientific notes NaUKMA. Legal Science. – 2023. – Vol.11. – P.100-107. DOI: <https://doi.org/10.18523/2617-2607.2023.11.100-107>
2. Fisher B., Russia’s Invasion of Ukraine and the Doctrine of Malign Legal Operations / B Fisher // Access to Justice in Eastern Europe. – 2022. – DOI: <https://doi.org/10.33327/AJEE-18-5.4-a000456>
3. Fisher B., Ideological Aggression and International Law: Soviet and Russian Malign Influence within Legal Domains / B Fisher // Scientific notes NaUKMA. Legal Science. – 2020. – Vol.5. – P.78-93. DOI: <https://doi.org/10.18523/2617-2607.2020.5.78-93>
4. Fisher B., The Kremlin’s Malign Legal Operations on the Black Sea: Analyzing the Exploitation of Public International Law against Ukraine / B Fisher // Kyiv-Mohyla Law and Politics Journal. – 2019 – P.193-223. DOI: <https://doi.org/10.18523/kmlpj190000.2019-5.193-223>

**APPENDIX 2. MALOPs Analysis of Putin Speech, 2014**  
**MALOPs Analysis of President Putin’s 18 Mar 2014 Speech Concerning the**  
**Annexation of Crimea**

Putin Quote (Mar 18th, 2014)	MALOPs
<p>“They [the West] say we are violating norms of international law. Firstly, it's a good thing that they at least remember that there exists such a thing as international law - better late than never.”<sup>316</sup></p>	<p>This falls under tenant III, “Shape Legitimacy.” Putin is attempting to delegitimize international claims of Russian aggression against Ukraine by counter-accusing and attacking the source.</p>
<p>“True, the president of the Russian Federation received permission from the upper house of parliament to use the armed forces in Ukraine. However, strictly speaking, nobody has acted on this permission yet. Russia's armed forces never entered Crimea; they were there already in line with an international agreement. True, we did enhance our forces there; however - this is something I would like everyone to hear and know - we did not exceed the personnel limit of our armed forces in Crimea, which is set at 25,000, because there was no need to do so.”<sup>317</sup></p>	<p>Russian Armed Forces were in place, as Putin noted, due to the “Agreement Between the Russian Federation and Ukraine on the Status and Conditions of the Russian Federation Black Sea Fleet’s Stay on Ukrainian Territory”<sup>318</sup> (28 May 1997).  However, even if the 25,000 troop limit was not breached, article 6 of the Agreement states that “Military formations carry out their activity at stationing locations... respect Ukraine’s sovereignty... do not allow interference in Ukraine’s internal affairs.” Article 9 of the Agreement also limits training and aircraft to flights within prescribed training areas.</p>
<p>“Crimean authorities referred to the well-known Kosovo precedent - a precedent our Western colleagues created with their own hands in a very similar situation, when they agreed that the unilateral separation of Kosovo from Serbia, exactly what Crimea is doing now, was legitimate and did not require any permission from the country's central authorities. Pursuant to Article 2, Chapter 1 of the United Nations Charter, the UN International Court agreed with this approach and made the following</p>	<p>This is only partially true. Yes, Putin speaks the truth about the UNSC’s stance on declarations of independence. However, the definition of Aggression as established by General Assembly Resolution 3314 (XXIX) of 1974 contains clear verbiage to address Russia’s actions in 2014. Article I states “Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter</p>

<sup>316</sup> Putin, “Address by President of the Russian Federation.”

<sup>317</sup> Putin.

<sup>318</sup> Ukraine and Russia, “Partition Treaty on the Status and Conditions of the Black Sea Fleet,” May 28, 1997.

<p>comment in its ruling of July 22, 2010, and I quote: "No general prohibition may be inferred from the practice of the Security Council with regard to declarations of independence," and "General international law contains no prohibition on declarations of independence." Crystal clear, as they say... I do not like to resort to quotes, but in this case, I cannot help it. Here is a quote from another official document: the Written Statement of the United States America of April 17, 2009, submitted to the same UN International Court in connection with the hearings on Kosovo. Again, I quote: "Declarations of independence may, and often do, violate domestic legislation. However, this does not make them violations of international law." End of quote. They wrote this, disseminated it all over the world, had everyone agree and now they are outraged. Over what? The actions of Crimean people completely fit in with these instructions, as it were. For some reason, things that Kosovo Albanians (and we have full respect for them) were permitted to do, Russians, Ukrainians and Crimean Tatars in Crimea are not allowed. Again, one wonders why."<sup>319</sup></p>	<p>of the United Nations, as set out in this Definition." Furthermore, Article 3 bans "The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such a territory beyond the termination of the agreement." Finally, Article 3 bans "The sending by or on behalf of a State of armed bands groups, irregulars or mercenaries, which carry out acts of armed force against another State..." The Russian Federation utilized its military, security forces, and mercenaries to violate the sovereignty, territorial integrity, and political independence of Ukraine by manufacturing a faux declaration of independence. Thus, this is a clear abuse of the "Kosovo Precedent."<sup>320</sup> Finally, Russia's blockade of the port of Sevastopol prohibiting the Ukrainian Navy's escape was an additional violation of Article 3, "The blockade of the ports of coasts of a State by the armed forces of another State." Contrary to Putin's claims, his was a clear violation of international peace and security.</p>
<p>"They keep talking of some Russian intervention in Crimea, some sort of aggression. This is strange to hear. I cannot recall a single case in history of an intervention without a single shot being fired and with no human casualties."<sup>321</sup></p>	<p>The firing of weapons is not a requisite for an act to constitute aggression under international law. Also, Ukrainian soldiers were ordered not to fight so as not to give Russia a casus belli excuse for a full armed invasion under Art. 51 of the UN Charter.</p>
<p>"After the dissolution of bipolarity on the planet, we no longer have stability. Key</p>	<p>No evidence of this statement was provided. This statement is pure</p>

<sup>319</sup> Putin, "Address by President of the Russian Federation."

<sup>320</sup> United Nations Audiovisual Library of International Law, "Definition of Aggression," General Assembly resolution 3314 (XXIX), 1974, <http://legal.un.org/avl/ha/da/da.html>.

<sup>321</sup> Putin, "Address by President of the Russian Federation."

<p>international institutions are not getting any stronger; on the contrary, in many cases, they are sadly degrading.”<sup>322</sup></p>	<p>disinformation and is intended to delegitimize those opposed to Russia’s illegal armed intervention in Ukraine. See tenant III, “Shape Legitimacy.”</p>
<p>“Our Western partners, led by the United States of America, prefer not to be guided by international law in their practical policies, but by the rule of the gun. They have come to believe in their exclusivity and exceptionalism, that they can decide the destinies of the world, that only they can ever be right.”<sup>323</sup></p>	<p>No evidence of this statement was provided. This statement is pure disinformation and is intended to delegitimize those opposed to Russia’s illegal armed intervention in Ukraine. See tenant III, “Shape Legitimacy.”</p>

---

<sup>322</sup> Putin.

<sup>323</sup> Putin.

### APPENDIX 3. Voyger’s Matrix of Lawfare and Hybrid Warfare

LAW AREAS	HYBRID				WARFARE DOMAINS:				
	Political	Diplomatic	Socio-Cultural	Information	Economic/Financial	Energy/Infrastructure	Cyber	Intelligence	Military
<b>Legal Theory</b>	Uphold ethnic self-determination over state sovereignty in target states	Assert Russia’s right to ‘spheres of interest’; blur boundaries between peace and war	Use history to legalise interventions and annexations	Claim Russia’s status as USSR legal successor when beneficial	Set the legal groundwork to dominate Eurasian economic integration	Assert Russian State sovereignty over energy resources	Assert Russian State sovereignty over the cyber domain	Define Western legal concepts as foreign and subversive to Russia	Assert the Russia’s right of pre-emptive actions abroad
<b>Customary International Law</b>	Emphasise the fluidity of international law over peremptory legal norms	De-recognise neighbouring states’ governments to justify Russian invasions and annexations	Assert Russian ‘cultural values’ over individual rights	Portray existing international order as West-centric and unfair toward Russia	Expropriate foreign assets to compensate for assets frozen by the West	Oppose Western sanctions against Russian energy infrastructure	Oppose U.S. sanctions for meddling in U.S. elections	Oppose Western sanctions for chemical attacks on UK soil	Assert right to military exercises within Russia’s borders
<b>Humanitarian Law</b>	Assert Russian ‘responsibility to protect’ its compatriots in “Near Abroad”	Create new ethnic realities on the ground through Russian passports	Provide Russian citizenship on historical grounds	Claim Russian minorities’ oppression and violation of language rights	Exert pressure on EU through migration flows	Destroy energy infrastructure to justify humanitarian convoys	Target Western humanitarian organisations	Collect intelligence during reconciliation campaigns	Target civilians to trigger humanitarian crises
<b>Constitutional Law</b>	Assert supremacy of Russian constitution over international law	Claim the transfer of Crimea to Ukraine contradicted Soviet constitution	Close ethnic minorities institutions accusing them of separatist propaganda	Claim USSR dissolution was ‘unconstitutional’ under Soviet law	Subject economic entities to state interests in wartime	Vest the Russian National Guard with the rights to protect infrastructure	Launch cyber attacks on Western electoral systems	Legalise the supremacy of Russian security apparatus over individual rights	Define Russian military as a pillar of Russia’s domestic order
<b>Criminal Law</b>	Justify domestic repressions to preempt ‘Colour Revolutions’	Abuse Interpol arrest warrants to target critics sentence foreign ‘war criminals’	Criminalise the offence of religious feelings of believers	Force hostages to admit to ‘terrorist’ activities	Tax evasion charges against opposition leaders	Fabricating infrastructure attack plots to arrest foreign citizens	Criminalise Internet criticism as ‘terrorism’ and ‘extremism’	Legalise intelligence services control over the Internet	Define ‘Colour Revolutions’ as a domestic military threat
<b>Maritime Law</b>	Cancel Ukrainian State licenses to expropriate natural shelf resources in the Black and Azov Seas	Oppose the presence of the U.S. navy in the Black Sea	Exploit history to assert warm ports access	Portray Azov and Black Seas as “Russian Seas”	Impede maritime traffic to Ukrainian ports	Obstruct access to Ukraine by building the Kerch bridge	Use cyber tools to target Western ports or naval assets	Compromise Western underwater cables claiming ‘re-search’ activities	Support extended Russian claims on Arctic shelf by more bases
<b>International Organisations</b>	Abuse UN Security Council veto to obstruct UN resolutions	Create Russian-dominated regional organisations	Accuse neighbours of ‘Nazism’ at UN bodies	Portray Russian international organisations membership as stabilising	Leverage Russian membership in World Trade organisation	Oppose EU energy infrastructure rules in Europe	Use cyber to target international organisations	Exploit international organisations to collect intelligence	Use Russian OSCE observers for intel on Ukrainian military
<b>International Treaties</b>	Uphold the principle of ‘Rebus sic stantibus’ over ‘Pacta sunt servanda’	Use ceasefire negotiations to delay response and divide public opinion	Use zero-sum game culture while negotiating treaties	Exploit legal loopholes to claim non-performance of other signatories	Use Russian loans to keep neighbouring states within Russian orbit	Use Russian infrastructure to ‘hardwire’ countries to Russian energy supplies	Enlist international support for greater Internet control	Collect intelligence during treaty negotiations	Abuse ‘snap’ exercises by exploiting the Vienna Document’s loopholes
<b>Law of Armed Conflict</b>	Assert that Russian aggression against Ukraine is ‘civil war within Ukraine’	Sign SOFA with Syria assuming no liability for war crimes	Use Russian fears of enforcement by NATO	Accuse Ukraine and West of war crimes in Donbas and Syria	Hire private military companies to fight overseas	Destroy civilian infrastructure to justify humanitarian intervention	Oppose NATO attempts to define cyber attacks as Art. 5 events	Use cyber for intelligence acquisition and influence operations	Claim that Russian military in Ukrainian are on leave or retired

Figure 4. Voyger’s Matrix of Hybrid Warfare Domains and Areas of Law

Mark Voyger’s focus as a lecturer at the Baltic Defense College was on Russian studies. He culminated his time in Tartu by editing and publishing a collection of articles titled NATO at 70 and the Baltic States. In particular, Mr. Voyger wrote a policy paper titled Russian Lawfare – Russia’s Weaponization of International and Domestic Law: Implications for NATO and Policy Recommendations. This paper was accompanied by a lengthy and wide-reaching lecture series focused mostly on conferences that highlighted hybrid warfare and international conflict studies, particularly in Eastern Europe. Mr. Voyger played a pivotal role in advancing the discourse surrounding the manipulation of international law, specifically in the aftermath of Russia’s invasions of Georgia and Ukraine. Mr. Voyger observed and proposed a matrix<sup>324</sup> to capture the inextricable link

<sup>324</sup> Figure 2.

between the law and the peculiarities of 21st century conflict. At the foundation of his policy recommendations were the terms lawfare and hybrid warfare. For lawfare, he elected to adopt General Dunlap's definitions, specifically "a method of warfare where law is used as a means of realising a military objective...using law as a form of asymmetrical warfare."<sup>325</sup> With respect to hybrid warfare, Voyager stated that it comprises "non-military tools (political, diplomatic, economic, information, cyber), and military ones – conventional and covert."<sup>326</sup> He also noted that informational and cyber tools are the most prominent in Russia's arsenal. Later in the article, Voyager expands his definition to include socio-cultural, infrastructure, intelligence, and clandestine military tools. These definitions are critical as they highlight the theoretical foundation upon which Voyager rests both his policy recommendations and his aforementioned matrix of hybrid warfare domains as they apply to areas of law. This theoretical foundation will be the subject of important analysis to show that, while novel and very important, the fundamental assumptions have room for improvement. The x-axis of Voyager's matrix contains 9 columns with what he refers to as hybrid warfare domains. As he loosely stated in his initial description, these columns highlight the political, diplomatic, socio-cultural, information, economic/financial, energy/infrastructure, cyber, intelligence, and military domains. The y-axis contains 9 rows that highlight 9 areas of law; legal theory, customary international law, humanitarian law, constitutional law, criminal law, maritime law, international organizations, international treaties, law of armed conflict. At the intersection of each is an example of Russia's manipulation of that particular legal area to achieve strategic effects within the associated hybrid warfare domain.

For example, at the intersection of the international treaties row and the military column is "the abuse of snap exercises by exploiting the Vienna Document's loopholes." Voyager is alluding to the Organization for Security and Cooperation in Europe's (OSCE) Vienna Document of 2011, which requires states to make public notifications of military

---

<sup>325</sup> Voyager, *NATO at 70 and the Baltic States: Strengthening the Euro-Atlantic Alliance in an Age of Non-Linear Threats*.

<sup>326</sup> Voyager.

exercises at least 42 days in advance. Article 41 states that “Notifiable military activities carried out without advance notice to the troops involved are exceptions to the requirement for prior notification to be made 42 days in advance.” Additionally, Article 47 states that notifications are only required if over 13,000 troops are involved and Article 58 waives these notifications when concerning no-notice drills of less than 72 hours in duration. Russia exploits these articles as legal loopholes by declaring “snap exercises” and deploying troops to coerce others, support ongoing military operations, or intimidate neighboring states.

One particular case for discussion is Russia’s annual Zapad military exercise that occurred 14-20 September, 2017, in Belarus and Western Russia and Belarus. Russia declared that only 12,500-12,700 troops took part in the snap drill, absolving them of reporting requirements. According to reporting from the Conventional Forces in Europe Treaty, Poland estimated that 100,000 troops took part. Lithuania and Ukraine estimated 140,000 and 240,000 respectively. Finally, the United Kingdom’s Royal United Services Institute’s Igor Sutyagin estimated that 65,000-75,000 troops took part.<sup>327</sup> According to Viktor Muzhenko, Chief of the Armed Forces of Ukraine, “We had information that they had withdrawn only a few units of the declared 12,500 troops, of which 3,000 were Russians, but there were significantly more of them there.”<sup>328</sup> Regardless of the actual number, which may never be known, evidence shows that Russia abuses the Vienna Document to avoid reporting requirements. This helps Russia achieve military objectives in the strategic movement of troops, and political objectives in the geostrategic intimidation and coercion of neighbors like Ukraine and the Baltic States. Meanwhile, Russia denied all allegations and reiterated the criticality of international law, universality,

---

<sup>327</sup> Igor Sutyagin, “Zapad-2017 : Why Do the Numbers Matter ? Zapad-2017 : Why Do the Numbers Matter ?,” no. September (2017).

<sup>328</sup> Matthias Williams and Pavel Polityuk, “Russia Left Troops in Belarus after Wargames,” Reuters, September 29, 2017, <https://www.reuters.com/article/us-ukraine-crisis-army/russia-left-troops-in-belarus-after-wargames-ukraine-idUSKCN1C4234>.

and observance while simultaneously continuing the behavior to achieve legal asymmetry.<sup>329</sup>

Another expanded-example from Voyger's matrix that was further analyzed in Chapter 4 is the intersection of the law of armed conflict within the areas of law y-axis and the political column within the hybrid warfare x-axis. The provided example is "assert that Russian aggression against Ukraine is 'civil war within Ukraine.'"<sup>330</sup> This concerns the blurring of legal statuses of Russia's pre-2022 invasion of Ukraine between international and internal armed conflicts and, taken one step further, between criminal law and the law of armed conflict. For example, Russia refuses to acknowledge the presence of its forces on Ukrainian territory and maintains that it is ensuring regional stability as a guarantor of the Minsk agreements. Furthermore, Russia blurs the lines between the law of naval warfare (war) and UNCLOS (peace) by, for example, "arresting" Ukrainian sailors in the Kerch Strait and declaring them criminals rather than prisoners of war.<sup>331</sup> Creating this legal uncertainty results in an asymmetry where Russia maintains a strategic advantage by using disinformation to literally change the rules to its benefit.

Throughout his analysis, Voyger makes frequent reference to historical precedent. This is very helpful in understanding Russia's revanchist agenda and general approach towards international law that dates back not just to the Soviet Union, but to the Russian Empire. He uses the example of the Russian-Ottoman treaty of Küçük Kaynarca in 1774, which Catherine the Great exploited to achieve Russia's first annexation of Crimea in 1783. It also made the Russian Empire the sole protector of Orthodox Christians. There are numerous correlations in this example between Catherine and Putin. From the way in which an international treaty was misconstrued as a faux-legal argument for the annexation of Crimea to the way in which "the responsibility to protect" (Orthodox

---

<sup>329</sup> Henry Mayer, "Russia Denies Ukraine Claim Troops Stayed in Belarus After Games - Bloomberg," Bloomberg, September 30, 2017, <https://www.bloomberg.com/news/articles/2017-09-30/russia-denies-ukraine-claim-troops-stayed-in-belarus-after-games>.

<sup>330</sup> Voyger Matrix

<sup>331</sup> FSB via Sputnik, "Ukrainian Naval Ships Ignored Calls to Stop, Violated Russian State Border - FSB," Sputnik International, 2018, <https://sputniknews.com/russia/201811261070123720-ukraine-navalships-azov-balcks-sea-kerch/>.

Christians vs ethnic Russians) was exploited to justify military aggression. In this vein, Voyager noted:

“Russia has been trying to amalgamate international and domestic law with categories often as vague and contested as history and culture...to regulate the right to go to war and set the rules of engagement; and normalize post-war relations through ceasefires, armistices, and peace treaties. International law in its modern interpretation was not intended to sanction and justify the invasion and annexation of territories.”<sup>332</sup>

Voyager’s matrix is an extremely helpful tool. Much like lawfare, it serves as a “bumper sticker” for the uninitiated or those without legal training to very quickly understand the importance that the legal dimension plays in modern conflict. However, there are a few gaps, the first of which is the same informal “bumper sticker” presentation just mentioned. This research has already proven that the time for “bumper sticker” terms and concepts pertaining to this subject is over. The international community requires a framework for handling these manipulations that not only describes them, but that offers a theoretical foundation to serve as the bedrock for rigorous analysis. With respect to hybrid warfare and lawfare, the primary assumptions underpinning Voyager’s matrix are lacking for reasons discussed in Chapters 1 and 2. The narrowed scope of Dunlap’s notion of lawfare to military objectives and the myopic focus of the definition of hybrid warfare on the tools of modern conflict rather than on the desired ends or objectives portrays a loose theoretical foundation. This is akin to treating the symptoms of an illness and hoping that it cures the disease, rather than managing symptoms but treating the disease itself. Despite this, Mr. Voyager is one of a growing minority of non-legally trained experts in the sphere of international security to highlight the importance of legal domains in modern conflict. “Lawfare (legal warfare), which is critically important and equally dangerous [as other tools], but that has remained understudied by the analytical community and is effectively still unknown to the general

---

<sup>332</sup> Voyager, *NATO at 70 and the Baltic States: Strengthening the Euro-Atlantic Alliance in an Age of Non-Linear Threats*.

public.”<sup>333</sup> Another area that could benefit from additional research is the high-level that Voyager offers mostly unique examples for each intersection of areas of law and hybrid warfare domains within his matrix. This contributes to the “bumper sticker” moniker because each example is only surface-deep. This is likely deliberate as Voyager’s primary focus is to build public awareness and not to offer rigorous legal analysis. However, it is possible that this matrix can be applied to one single case study, rather than a unique example in each square, as a deeper analysis into legal manipulations. Regardless, Voyager’s observations are critical to this study and serve as validation for this formal and more detailed academic research.

---

<sup>333</sup> Voyager.