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LAW AS A BATTLEFIELD: THE U.S., CHINA, AND THE GLOBAL ESCALATION OF LAWFARE

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Law is increasingly being used as a weapon of war. Unable or unwilling to challenge other states militarily, states use legal strategies to weaken the enemy's legitimacy. Such "lawfare" can be used to achieve a kinetic objective, to forestall one, to degrade the enemy's will to fight, and to shape the narrative of war. The Chinese military prioritizes lawfare as one of the "Three Warfares" that shape its military's influence operations. Meanwhile, the U.S. has no similar lawfare doctrine or strategy, even as China forces it to fight back. This Article argues that the U.S. needs to develop a lawfare strategy to combat its adversaries. It will first define the concept of lawfare and discuss how its use has evolved and escalated globally in recent years. It will illustrate this phenomenon by examining three different instances of lawfare between China and the U.S. or its allies: China's non-uniformed maritime militias, international arbitration over China's claims to the Spratly Islands, and litigation involving the U.S. and Huawei. After discussing the rise of lawfare globally, including lawfare efforts by Russia and the U.S., the article concludes with recommendations for a U.S. lawfare strategy.

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I. INTRODUCTION

Law is increasingly being used as a weapon of war. As the "new endless war" shifts from the battlefields of Afghanistan and Iraq to the information realm, states are increasingly looking beyond conventional weapons for tools that can help them win hearts, minds, and the narrative of war. This strategy is especially important for states that wish to avoid a traditional

kinetic conflict, whether because they are unable or unwilling to enter one. Enter law as warfare by other means.[1]

Lawfare, as defined in 2001 by then-Colonel (later Major General and Professor) Charles Dunlap, is "a method of warfare where law is used as a means of realizing a military objective."[2] Since that time, the term has primarily been used to refer to "battlefield-exploitation lawfare,"[3] also known as "compliance-leverage disparity lawfare."[4] This type of lawfare involves exploitation of an adversary's compliance with international humanitarian law. For example, al-Qaeda often employed human shields in facilities used for military purposes and launched attacks from mosques, knowing that the U.S. and its coalition partners were bound by the Geneva Conventions of 1949 ("Geneva Conventions") and the 1954 Hague Convention on the Protection of Cultural Property During Armed Conflict.[5] U.S. and allied forces therefore would be unlikely to attack these sites so as to avoid harming civilians, civilian objects, and cultural property. This type of lawfare has been successfully employed by a variety of non-state actors, including the Islamic State and Hamas.[6]

However, lawfare is not only the weapon of the weak. Today, states like China and Russia are increasingly employing law as a tool against the U.S. Among the U.S.'s potential adversaries,[7] China has the most developed

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[1] Paraphrasing Carl von Clausewitz's famous quote "War is politics by other means." *See* CARL VON CLAUSEWITZ, ON WAR (1832), available at https://www.gutenberg.org/files/1946/1946-h/1946-h.htm.

[2] Charles J. Dunlap, Jr., Colonel, USAF, Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts 4 (Nov. 29, 2001) (transcript available at https://people.duke.edu/~pfeaver/dunlap.pdf).

[3] This term was coined by Prof. Laurie Blank when she was a visiting speaker in my Lawfare and Information Operations Elective at Marine Corps University-Command and Staff College in January 2020.

[4] ORDE F. KITTRIE, LAWFARE: LAW AS A WEAPON OF WAR 11 (2016).

[5] *See, e.g.*, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention (III) relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention (IV) relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Hague Convention on the Protection of Cultural Property, May 14, 1954, S. TREATY DOC. 106-1, 249 U.N.T.S. 216.

[6] KITTRIE, *supra* note 4, at 284-92; Jared Malsin, *'They Just Took Us.' Mosul Civilians on Being Used as Human Shields by ISIS*, TIME (Mar. 30, 2017), https://time.com/4717319/mosul-iraq-offensive-civilians-human-shields/; Terri Moon Cronk, *DOD Spokesman: ISIS Deliberately Misuses Mosques*, DEP'T OF DEF. (Oct. 23, 2018), https://www.defense.gov/Explore/News/Article/Article/1669289/dod-spokesman-isis-deliberately-misuses-mosques/.

[7] DEP'T OF DEF., SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA: SHARPENING THE AMERICAN MILITARY'S COMPETITIVE

lawfare strategy, having defined lawfare as a major part of its military strategy as early as 1999.[8] Their goals are not simply to exploit U.S. compliance with international humanitarian law, but to weaken the U.S.'s legitimacy.[9] They are doing so to forestall the need for kinetic conflict, and also to control the narrative of conflict. In military-speak, these states may be said to be engaging in "legal preparation of the battlefield": setting the conditions for negotiations for peace—or under which they might go to war.

Despite China's sophisticated lawfare strategy, the U.S. is barely fighting back. The U.S. conducts routine Freedom of Navigation Operations (FONOPS) in the South China Sea, but has avoided the type of conflict with China that might escalate into kinetic operations, and allowed China's island-building to progress undeterred.[10] It has steered clear of confrontation with Chinese maritime militia, plain-clothes fishermen who function as an extension of the Chinese Coast Guard. In 2013, the Philippines filed a landmark claim against China in the Permanent Court of Arbitration.[11] The claim alleged that China violated the United Nations Convention on the Law of the Sea (UNCLOS) due to its environmental damage, dangerous activities, and threatening of Philippines fishing rights in the South China Sea. The Philippines prevailed in a landmark decision in July 2016. While the U.S. urged China to comply with its ally's sweeping win, the U.S. remained cautious in its statements about the decision.[12]

Only within the past two years has the U.S. begun more offensive lawfare against China. In the 2019 National Defense Authorization Act, the U.S. Congress barred technology made by the Chinese corporation Huawei from being included in U.S. defense equipment.[13] Congress's concern was

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EDGE 2 (2018) ("China and Russia are now undermining the international order from within the system by exploiting its benefits while simultaneously undercutting its principles and 'rules of the road.'").

[8] KITTRIE, *supra* note 4, at 162-63 ("Additional conceptual context for the PRC's use of legal warfare is provided by a treatise titled *Unrestricted Warfare*, which was written by two PLA colonels . . . and published by the PLA in 1999. The treatise suggests various tactics—including legal warfare—that developing countries, in particular China, could use to compensate for their military inferiority vis-à-vis the United States.").

[9] Id.

[10] See Congressional Research Service, U.S.-CHINA STRATEGIC COMPETITION IN THE SOUTH AND EAST CHINA SEAS: BACKGROUND AND ISSUES FOR CONGRESS, Updated February 6, 2020.

[11] S. China Sea Arb. (Phil. v. China), Case No. 2013-19, PCA Case Repository, Award, (July 12, 2016); on U.S. support for the arbitration, see *Arbitration Support Tracker*, ASIA MAR. TRANSPARENCY INITIATIVE (June 16, 2016), https://amti.csis.org/arbitration-support-tracker/

[12] See *Arbitration Support Tracker*, Id. (Tracking U.S. statements before and after the arbitration).

[13] John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-332, § 889, 132 Stat. 1636, 1917.

that Huawei's technology would be used for spying and surveillance by the Chinese government. In response, Huawei filed a lawsuit in U.S. courts arguing that Congress violated the U.S. Constitution by doing so.[14] Meanwhile, at the U.S.'s request, Canada arrested Sabrina Meng, Huawei's CFO and the daughter of its founder on charges of fraud and violating U.S. sanctions against Iran. While the timing of the arrest may be coincidence, it is clear that the U.S. is using lawfare to counter Chinese warfare tactics.

The U.S. prides itself on its advanced legal system and compliance with the rule of law. Yet, the U.S. lawfare strategy is woefully underdeveloped compared to its adversaries'—and even its allies. China's lawfare tactics have been mirrored by Russia and other state and non-state actors across the globe. Recognizing this, the Office of the Legal Advisor at NATO's Supreme Headquarters Allied Powers Europe (SHAPE), one of NATO's strategic commands, has personnel working on lawfare.[15] Israel has personnel dedicated to lawfare within its Ministry of Justice.[16] The U.S. has no counterpart to these programs, in doctrine or in manpower. No agency within the U.S. government has an office dedicated to lawfare. Military lawyers are not trained in lawfare, nor are the vast majority of military officers and commanders.[17] In a world where war is increasingly fought outside the conventional battlefield, lawfare will only become more important. To best its adversaries—and keep pace with its allies—the U.S. must develop a lawfare strategy.

This paper will proceed in five parts. First, the paper will propose a new definition of lawfare. The paper will argue that previous definitions of lawfare must be expanded to reflect contemporary use of law as a weapon of war, and how law is now used as a tool in the information domain to bolster and undermine parties' legitimacy. Second, I will discuss the lawfare involving the U.S. and China as a case study of the contemporary use of lawfare. This represents a critical case study of lawfare because of rising fears of kinetic conflict between the U.S. and China and the primacy

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[14] Complaint at 10, Huawei v. United States, No. 4:19-CV-00159, 2019 WL 1076892 (E.D.Tex. Mar. 6, 2019).

[15] These personnel focus mainly on providing "legal vigilence." NATO primarily refers to lawfare as "Legal Operations."

[16] *See* Yonah Jeremy Bob, *Israeli gov't lawyers help NATO fight lawfare, receive awards*, THE JERUSALEM POST (Sept. 2, 2019), https://www.jpost.com/Israel-News/Israel-govt-lawyers-help-NATO-fight-lawfare-receive-awards-600346 (discussing the lawfare work of the Israeli Ministry of Justice's Counter-Terrorism and Foreign Litigation Division). Kittrie discusses how the Shurat HaDin Law Center is explicitly dedicated to Lawfare and works closely with the Israeli government. *See* KITTRIE, *supra* note 4, at 312.

[17] To the author's knowledge, the only course on lawfare currently taught at a professional military education institution in the U.S. is her own.

of lawfare to Chinese legal strategy.[18] No state in the world currently has a lawfare strategy as sophisticated as China's. The U.S. and China have also fought legal battles in multiple arenas: in the waters of the South China Sea, through a U.S. ally in international arbitration, through legislation, and now via proxy in U.S. Courts. Third, the article will discuss the global escalation of lawfare, showing how Russia has emulated some of China's tactics and how U.S. institutional lawfare efforts in Afghanistan suffered due to lack of a comprehensive strategy. It will also briefly discuss other recent examples of lawfare. Fourth, the article will explain why the U.S. needs to develop a lawfare strategy to counter its adversaries and collaborate with its partners and allies. The article will conclude by discussing what a U.S. lawfare strategy might look like.

II. BACKGROUND: WHAT IS LAWFARE?

A. A Brief History of the Term "Lawfare"

In the 5th Century BC, the Chinese military strategist Sun Tzu famously wrote that "Supreme excellence consists in breaking the enemy without fighting."[19] His philosophy remains influential in Chinese military doctrine today. In the 1999 military strategy book "Unrestricted Warfare," two colonels in China's military, the People's Liberation Army (PLA), argued that modern warfare will no longer be defined by military means, or even involve the military at all.[20] Society, instead, would be the battlefield.

1. Lawfare and China's Three Warfares

China's military doctrine has included "The Three Warfares" since at least 1963.[21] The Three Warfares involve political warfare, or influence operations, designed to replace or supplement traditional military activities.[22] The PLA published its current statement of the Three Warfares

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[18] NOAH FELDMAN, COOL WAR: THE UNITED STATES, CHINA, AND THE FUTURE OF GLOBAL COMPETITION (2015); GRAHAM ALLISON, DESTINED FOR WAR: CAN AMERICA AND CHINA ESCAPE THUCYDIDES'S TRAP? (2018); STEFAN HALPER, CHINA: THE THREE WARFARES (2013) (report produced for the Office of Net Assessment of the Department of Defense).

[19] SUN TZU, THE ART OF WAR (Thomas Cleary trans., Shambhala Publications) (1991).

[20] QIAO LIANG & WANG XIANGSUI, UNRESTRICTED WARFARE: CHINA'S MASTER PLAN TO DESTROY AMERICA (1999).

[21] STEFAN HALPER, CHINA: THE THREE WARFARES (2013) (report produced for the Office of Net Assessment of the Department of Defense).

[22] JOHN COSTELLO & JOE MCREYNOLDS, CHINA'S STRATEGIC SUPPORT FORCE: A FORCE FOR A NEW ERA (Phillip C. Saunders ed., 2018).

in its 2003 Political Work Guidelines, and again in 2010.[23] In 2005, the PLA promulgated official guidelines on the Three Warfares incorporating the three concepts into its training and education.[24] Chinese government entities have also published several recent texts emphasizing that lawfare is critical to advancing Chinese interests in peacetime and wartime.[25]

Public Opinion Warfare, also known as Media Warfare, involves shaping public opinion domestically and internationally.[26] Public opinion is used as a weapon by using the media to propagandize and weaken the adversary's will to fight while bolstering the will and unified views of one's own population.[27] The second warfare, Psychological Warfare, seeks to "undermine the adversary's combat power, resolve, and decision-making," while exploiting divisions to promote an adversary's factionalization.[28]

The third warfare is Legal Warfare. The Chinese term, "falu zhan," has been translated as lawfare.[29] Lawfare involves shaping the legal context for Chinese actions using both domestic and international law. Lawfare seeks to gain "legal principle superiority" over an adversary and delegitimize adversary actions.[30] In China, lawfare is seen as a form of combat.[31] According to Dean Cheng, a scholar of Chinese lawfare, "PRC writers assign equal importance to preparing the legal and physical battlefields."[32] Strong coordination between legal and kinetic warfare is emphasized.[33] Lawfare is a complement to traditional military operations and an instrument in its own right to shape the environment for Chinese military or political actions, seize the initiative, and serve as a force multiplier.[34] While most commonly employed at the outbreak of kinetic

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[23] ELSA KANIA, *THE PLA'S LATEST STRATEGIC THINKING ON THE THREE WARFARES*, 16 China Brief 13 (AUGUST 22, 2016), AVAILABLE AT HTTPS://JAMESTOWN.ORG/PROGRAM/THE-PLAS-LATEST-STRATEGIC-THINKING-ON-THE-THREE-WARFARES/

[24] Id.

[25] Id.

[26] LARRY WORTZEL, THE CHINESE PEOPLE'S LIBERATION ARMY AND INFORMATION WARFARE (2015).

[27] 2015 Chinese National Defense University Science of Military Strategy, cited in Kania, *supra* note 23.

[28] Id.

[29] KITTRIE, *supra* note 4, at 162.

[30] 2015 Chinese National Defense University Science of Military Strategy, cited in Kania, *supra* note 23.

[31] Dean Cheng, *Winning Without Fighting: Chinese Legal Warfare*, HERITAGE FOUND. (May 21, 2012), https://www.heritage.org/asia/report/winning-without-fighting-chinese-legal-warfare.

[32] Id.

[33] Id.

[34] Id.

hostilities, it can be used anytime in peacetime and wartime alike.[35] Drawing on the Maoist tradition, Legal Warfare assumes that law can be an instrument of politics and political warfare efforts.[36]

Legal Warfare is informed by several principles: "protect[ing] national interests as the highest standard," "respect the basic principles of the law," "carry out [lawfare] that centers upon military operations," and "seize standards [and] flexibly use [them]."[37] Accordingly, effective use of lawfare requires a nuanced and detailed understanding of relevant domestic and international law.

China uses these Three Warfares as complementary and mutually reinforcing, in both peacetime and wartime, to shape and control narratives. They serve to influence perceptions favorable to China and unfavorable to its adversaries, while hampering its adversaries' capacity to respond.[38] China views the Three Warfares as a force multiplier in military or political conflict.[39] For example, Lawfare can be used together with Media Warfare to shape domestic and international perceptions to match China's view that China is the rightful legal sovereign over most of the South China Sea.

According to the 2013 Chinese Academy of Military Science's edition of Science and Military Strategy, the Three Warfares should be adapted for China's use based on the operational circumstance and desired outcome.[40] For example, garnering international sympathy and support can be a "powerful pillar to support the whole operational activity."[41] If the operational objective is secret, "the use of propaganda to influence public opinion can reinforce the stratagem of 'making a feint to the east and attacking in the west.'"[42] Used together, the Three Warfares can have a "psychological frightening force" against an enemy.[43] The Three Warfares can thus be used to support deception as well as to shape perceptions within the information environment.

Integration of the Three Warfares throughout China's military and political strategies positions it well to compete in our current information environment. While the U.S. Joint Forces released a Joint Publication on Information Operations only in 2014, China has been developing its information warfare strategy for decades and integrating it with its other

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[35] Id.

[36] Id.

[37] Kania, *supra* note 23.

[38] Kania, *supra* note 23.

[39] Id.

[40] 2013 Chinese Academy of Military Science's edition of Science and Military Strategy, cited in Kania, *supra* note 23.

[41] Id.

[42] Id.

[43] Id.

strategies and tactics.[44] In the area of lawfare, the U.S. is even farther behind.

2. Lawfare in the West

In the U.S., the definition of lawfare is more contested. The term was popularized in 2001 by U.S. Air Force Major General (retired) Charles Dunlap (then Colonel Dunlap). Dunlap defined lawfare as "a method of warfare where law is used as a means of realizing a military objective."[45] Dunlap based his definition primarily on the exploitation of the Geneva Conventions by violent non-state actors, such as Hamas's use of human shields against Israel. The definition thus took on a pejorative connotation because of its association with tactics by violent non-state actors and enemies of the U.S. and Israel. The definition took on a further negative gloss when International NGOs began to try to use international courts to advance grievances against the U.S. and Israel.[46] Perhaps in response to this, Dunlap subsequently modified his definition to include a more positive use of lawfare. In 2007, Dunlap defined lawfare as "the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective.[47]

In his book *Lawfare: Law as a Weapon of War*—the preeminent book on the topic—Professor Orde Kittrie delineates two types of lawfare.[48] The first is compliance-leverage disparity lawfare, which he defines as roughly equivalent to both Dunlap's use of the term "lawfare" and what Professor Laurie Blank calls "battlefield exploitation lawfare."[49] States and non-state actors leverage their adversaries' compliance with international law against them. By Kittrie's writing, tactics like Hamas's had been adopted by Al-Qaeda, the Islamic State, and other violent non-state groups against the U.S. Kittrie's second type of lawfare, instrumental lawfare, is the use of law to achieve a military objective. Kittrie's prime example is the U.S.'s use of sanctions against Iran to halt its nuclear program and force negotiations. The U.S. could have chosen traditional military means to achieve a similar objective, but at a much higher cost than sanctions. Since then, as law has been increasingly used to achieve traditional military objectives, as a tool to prepare the battlefield, or to force negotiations,

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[44] JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-13, INFORMATION OPERATIONS (Nov. 20, 2014).

[45] Dunlap, *supra* note 2, at 4.

[46] Kittrie, at XX.

[47] Charles Dunlap, *Lawfare Today: A Perspective*, YALE J. INT'L AFFAIRS 146 (2008).

[48] KITTRIE, *supra* note 4, at 11.

[49] See *supra* note 3.

academics have not coalesced around a single definition of lawfare. In 2010, a Cleveland Panel of Experts convened and could not agree upon a definition.[50] One thing they agreed on is that the term lawfare had a negative connotation at the time, largely because of its use against Israel, the U.S., and its allies. In 2019, one exasperated commentator referred to the concept as "infinitely plastic."[51]

Further confusing the definition of lawfare, the term entered household use due to the popularity of the Lawfare blog, a prominent site on law and national security that launched in 2010.[52] Taking Dunlap's definition as a starting point, the blog states that "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."[53] This definition framed the site's content. It also broadened the definition of the term to the point that it is not analytically useful for academics and impossible to operationalize in the military or policy realm.

In 2016, Joel Trachtman conducted a literature review to develop his own definition of lawfare. Trachtman defines lawfare as "legal activity that supports, undermines, or substitutes for other types of warfare."[54] Trachtman's definition, too, is too broad to be useful. All warfare waged by the U.S. is supported by law—our Constitutional structure, the Uniform Code of Military Justice, international law, and the laws of war that support our military's conduct in peacetime and wartime. Moreover, every law that involves other countries does not involve lawfare. Intent to use law as a substitute for traditional military activity, and to bolster the legitimacy of our fight and weaken that of our enemy's, is important for employing law as a weapon. To define lawfare as involving practically any use of law related to warfare does not provide useful guidance for policymakers and the military.

Trachtman is correct, however, that lawfare need not have a pejorative connotation. Jack Goldsmith has also argued this point.[55]

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[50] Michael P. Scharf and Elizabeth Andersen, *Is Lawfare Worth Defining - Report of the Cleveland Experts Meeting - September 11, 2010*, 43 CASE W. RES. J. INT'L L. 11 (2010) Available at: https://scholarlycommons.law.case.edu/jil/vol43/iss1/2

[51] Eric Loeffeld, *The World Revolutionary Origins of the Crime of Aggression: Sovereignty, (Anti-)Imperialism, and the Soviet Union's Contradictory Geopolitics of Global Justice*, 12 UNBOUND: HARV. J. LEGAL LEFT 1, at 61.

[52] Lawfare blog, http://www.lawfareblog.org

[53] "About," Lawfare blog, 2010, available at http://www.lawfareblog.org.

[54] Joel P. Trachtman, *Integrating Lawfare and Warfare*, 39 B.C. J. OF INT'L & COMP. L. 267, 268 (2016).

[55] Jack Goldsmith, *Thoughts on "Lawfare,"* LAWFARE (Sept. 8, 2010), https://www.lawfareblog.com/thoughts-lawfare.

Lawfare should not be the sole province of U.S. adversaries. The U.S., too, can wield law as a weapon of war. A contemporary definition of lawfare should also consider the information environment in which all military activity now occurs. Law is no longer used solely to achieve a military objective. It is used to weaken adversaries by creating facts on the ground contrary to what they would like to see or by advancing a counter-narrative to what they would like the public to believe. Lawfare can be used in "legal preparation of the battlefield," or "shaping the environment" for future military or diplomatic actions by a country. It can be used to set terms prior to conflict, such as by defining the boundaries of territory that a state will defend. Similarly, it can also be used to set the conditions under which a military might be willing to accept peace, or a starting point for peace negotiations. Lawfare can be used during armed conflict, to prevent armed conflict, or outside of it. And it is a vital tool for winning hearts and minds.

For these reasons, I define lawfare as 1) the purposeful use of law taken toward a particular adversary with the goal of achieving a particular strategic, operational, or tactical objective, or 2) the purposeful use of law to bolster the legitimacy of one's own strategic, operational, or tactical objectives toward a particular adversary, or to weaken the legitimacy of a particular adversary's particular strategic, operational, or tactical objectives. This definition encompasses and broadens Dunlap's and Kittrie's definitions of lawfare to cover the way that states use lawfare today. It also presents an actionable definition on which the U.S. can base a lawfare strategy.

How can lawfare bolster legitimacy? Max Weber defined political legitimacy as having certain beliefs or a faith in regard to a political system: "the basis of every system of authority, and correspondingly of every kind of willingness to obey, is a belief, a belief by virtue of which persons exercising authority are lent prestige."[56] In the context of war, lawfare would mean undermining the legitimacy of the adversary's cause for going to war or of certain strategy, operations or tactics used within the war. Law might also be used to bolster one's own legitimacy by emphasizing the justness and legality of a side's mission. Indeed, such an emphasis on legality is critical for U.S. military recruiting, for cohesion and retention by reinforcing that they serve a cause bigger than themselves, and for ensuring that they maintain their honor in combat in a way that allows them to sleep at night when they return home. Over the past 20 years, emphasizing the justness and legality of U.S. military actions has also been important in

[56] *Political Legitimacy*, STANFORD ENCYCLOPEDIA OF POLITICAL PHILOSOPHY (Apr. 24, 2017), https://plato.stanford.edu/entries/legitimacy/#DesNorConLeg; *see also* MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 382 (Talcott Parsons ed., 1964).

winning hearts and minds in Afghanistan and Iraq. For example, lawfare has been employed proactively by U.S. and coalition forces in Afghanistan through the Rule of Law Field Force (ROLFF-A), which promoted the Rule of Law as part of U.S. strategy in rebuilding and stabilizing Afghanistan.

Lawfare is distinct from the mere adoption of law involving a foreign nation, or the signing of a treaty. Nor do all jus ad bellum or jus in bello actions taken by a state qualify as lawfare. Instead, whether a state is employing lawfare will depend on how those laws are being used—with what purpose, against what adversary, and to achieve what objective. The designation of what qualifies as lawfare and what does not will never be black and white. Nearly any jus ad bellum or jus in bello legal action, for example, can be used to purposefully bolster one's own legitimacy in a fight against a particular adversary. And a law adopted for non-lawfare purposes could eventually be used at the crux of a litigation that is part of a nation's broader lawfare strategy. However, it is the action of using that law that would constitute lawfare, not the passage of the law itself.

This new definition of lawfare is neutral, free of the negative connotations of the term's history. Any side of a conflict can exercise lawfare. Indeed, with its widely-respected and highly-developed judicial system and some of the best law schools and lawyers in the world, the U.S. is well-poised to fight lawfare, and to win. Lawfare can be used by civilian agencies and the military alike. It can and should be employed by the military at the strategic, operational, and tactical levels. While typically the Department of Defense is concerned with the strategic, operational, and tactical levels of war, civilian agencies may easily apply the definition above. Civilian agencies align their work with the overall strategic objectives of national policy; whether their work fits neatly into the "operational" or "tactical" categories will not always be relevant for achieving a unified effort.

B. Types of Lawfare

States have employed at least five types of lawfare in recent years. The first, *battlefield exploitation lawfare*, is similar to Dunlap's initial conception of lawfare or Kittrie's "compliance leverage disparity" lawfare. Battlefield exploitation lawfare is the exploitation of an adversary's law-abidingness, usually, its compliance with International Humanitarian Law. Embedding civilians within legitimate military targets, or hiding armed fighters in a large crowd of civilians, are quintessential examples of battlefield exploitation lawfare. The second, *instrumental lawfare*, was defined by Orde Kittrie as the "use of legal tools to achieve the same or similar effects

as those traditionally sought from conventional kinetic military action."[57] Kittrie uses U.S. sanctions against Iran as a prime example of instrumental lawfare.[58] The U.S. could have launched a military strike against Iranian nuclear facilities to cause Iran to abandon its nuclear program. Instead, the U.S. launched sanctions to achieve the same effect. *Proxy Lawfare* involves taking legal actions using adversary proxies. Lawfare between the U.S. and the Chinese company Huawei, discussed below, is a prime example of this type of lawfare.[59] The U.S. has battled Russian corporations in a similar manner.[60] *Information lawfare* is the use of law to control the narrative of the conflict. One party to a conflict can gain an advantage by portraying its actions as legal, or the other side's as illegal. This type of lawfare is especially important in the battle for hearts and minds. Information lawfare is often used in conjunction with other types of lawfare, as in the Huawei litigation. Andres Munoz Mosquera of the Office of the NATO Legal Adviser and Professor Sascha Dov Bachmann use the analogy of lawfare as the warhead of a missile, while information operations and strategic communications power the missile's flight.[61] Lawfare itself, however, is what is lethal. *Institutional lawfare* is the purposeful creation of new domestic and international laws and institutions to achieve one's military or strategic efforts. The U.S. has practiced this type of lawfare for years by serving as the primary funder of the United Nations and other international organizations. As discussed below, China is now beginning to build international institutions of its own to counter U.S. Institutional lawfare efforts.

These forms of lawfare are not necessarily new. For example, Israel has explicitly and implicitly encouraged settler outposts in the West Bank for years, creating facts on the ground to bolster its claims to land. The U.S. and the Soviet Union frequently used information lawfare during the Cold War, criticizing each other's commitments to international human rights law in U.N. fora, eventually resulting in two separate core human rights conventions: the International Covenant on Civil and Political Rights backed by the U.S., and the International Covenant on Economic and Social Rights, backed by the U.S.S.R.[62] However, the use of lawfare is escalating.

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[57] Kittrie, *supra* note 4.

[58] *Id.*, ch. 3.

[59] *See* John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-332, § 889, 132 Stat. 1636, 1917; Complaint at 10, Huawei v. United States, No. 4:19-CV-00159, 2019 WL 1076892 (E.D.Tex. Mar. 6, 2019).

[60] CONG. RESEARCH SERV., R45415, U.S. SANCTIONS ON RUSSIA 64 (2020) (table showing sanctioned Russian entities).

[61] Andres Munoz Mosquera & Sascha Dov Bachmann, *Lawfare in Hybrid Wars: The 21st Century Warfare*, 7 J. INT'L HUMANITARIAN LEGAL STUD. 63, 73 (2016).

[62] For discussion of U.S. and Soviet lawfare in the U.N. during the Cold War, see, e.g.,

Al-Qaeda and the Islamic State stole their battlefield exploitation lawfare tactics directly from Hamas. Russia's use of little green men in Ukraine is similar to China's use of little blue men in the South China Sea. And as conflict increasingly shifts to the information domain, lawfare is likely to become increasingly important.

Lawfare can be used before, during, and after armed conflict. It can also be employed at the strategic, operational, and tactical levels of war. For example, lawfare can be used to set the terms for conflict or for negotiation. A judicial decision in a lawsuit can legitimize a settlement in the international community. If no other enforcement mechanism is available for the decision, the judgment will still frame any future negotiations or conflict over the subject of the suit. In this way, lawfare might be considered "legal preparation of the battlefield." Lawfare can also be used to create facts on the ground that can influence a conflict. As discussed below, strategically placing civilians around military targets will affect the way an adversary can legally attack. Decisions in lawsuits can also have normative power that can affect the way that parties behave in conflict. Information lawfare can also be used to frame the narrative of conflict. This can help bolster the position of the military in winning hearts and minds, achieve public support for the military's actions, and boost troops' morale by reminding them that they serve to promote moral, just cause.

To be clear, lawfare is not a perfect substitute for armed conflict. As long as territory and resources exist, states will compete for rights and sovereignty over them. However, the use of lawfare is on the rise as a substitute for some military objectives, to prepare the battlefield in the event of armed conflict, and otherwise to support military efforts. Based on current trends and states' rational desire to conserve resources and prevent destruction of property and loss of life, the use of lawfare is likely to increase in the future.

Lawfare between the U.S. and China makes for an ideal case study of the phenomenon. First, speculation about the potential for war between the U.S. and China has occupied politicians and commentators in recent years. The second Obama administration famously pivoted towards Asia even as the U.S. was waging war in Iraq and Afghanistan. Academics and other commentators have written countless books on the subject.[63] Meanwhile, the U.S. and China have every incentive not to go to war. As each other's largest trading partners, kinetic war would wreak havoc on both economies, to say nothing of the death and destruction it would cause.

Jill Goldenziel, *Curse of the Nation-State: Refugees, Migration, and Security in International Law*, 48 ARIZ. ST. L. J. 579 (2016), at 610-30.

[63] *See, e.g.*, Feldman, *supra* note 18; Allison, *supra* note 18. On the primacy of lawfare to China's legal strategy, see Halper, *supra* note 18..

The U.S. and China are far more likely to continue to engage in alternate forms of competition for many years, such as trade wars and lawfare. Just as China is the U.S.'s most sophisticated military competitor, so too is China the U.S.'s most advanced competitor in lawfare. China also benefits from near-endless resources to invest in lawsuits and new legal organizations, and unlimited manpower for its battlefield exploitation lawfare tactics. China's control over its domestic information environment is second-to-none, making information lawfare towards its own population much easier than for any other state. By understanding lawfare tactics between the U.S. and China, one can understand similar lawfare tactics being employed all over the world.

III. LAWFARE BETWEEN THE U.S. AND CHINA

A. Background on the South China Sea

To understand lawfare between the U.S. and China, one must understand recent Chinese aggression in the South China Sea. The South China Sea is one of the most important strategic areas of the globe. While estimates vary, approximately one-third of the world's commerce transits through the South China Sea, amounting to $3 trillion in trade each year.[64] The Sea holds vast amounts of oil and gas reserves.[65] It is also home to about 50% of the world's fishing stocks, which play an important role in the economies of its surrounding countries, along with an major source of sustenance for their populations.[66]

China claims sovereignty over most of the South China Sea. A "Nine-Dash-Line" began to appear on Chinese Communist Party maps in 1947, roughly tracing the perimeter of the sea just inside the coastal areas of the Sea's neighboring states.[67] China claims the "historic rights" to all features within this Nine-Dash Line. Important features include the Paracels

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[64] *How much trade transits the South China Sea?*, CHINA POWER PROJECT (Oct. 10, 2019), https://chinapower.csis.org/much-trade-transits-south-china-sea/#easy-footnote-bottom-1-3073.

[65] https://amti.csis.org/south-china-sea-energy-exploration-and-development/

[66] John Reed, *South China Sea: Fishing on the front line of Beijing's ambitions*, FIN. TIMES (Jan. 24, 2019), https://www.ft.com/content/fead89da-1a4e-11e9-9e64-d150b3105d21 ("The South China Sea accounted for about 12 per cent of the world's fishing stocks, according to one 2015 estimate."); Gregory B. Poling, *Illuminating the South China Sea's Dark Fishing Fleets*, CTR. FOR STRATEGIC & INT'L STUD. (Jan. 9, 2019) ("The South China Sea accounted for 12 percent of global fish catch in 2015, and more than half of the fishing vessels in the world are estimated to operate there.").

[67] BILL HAYTON, THE SOUTH CHINA SEA: THE STRUGGLE FOR POWER IN ASIA, at 58-59 (2014).

and the Spratlys, often referred to as "islands." Legally, these are collections of maritime features that may include islands, rocks, reefs, and low-tide elevations (LTEs), among others. In a 2009 submission to the UN Commission on the Limits of the Continental Shelf, China asserted its sovereignty over all features in the South China Sea that fall within the Nine-Dash Line.[68] This letter, together with China's other aggressive activities in the South China Sea, began to concern its neighbors.

UNCLOS, to which China is a party, prescribes maritime boundaries within the Sea that do not comport with the Nine-Dash Line.[69] Under UNCLOS, each state surrounding the South China Sea is entitled to a 12 nautical mile (nm) territorial sea over which it enjoys sovereignty, as well as a 200 nm Exclusive Economic Zone (EEZ) in which it enjoys the sole rights to exploitation of natural resources. Foreign states have freedom of navigation and overflight within EEZs. More than 60 geographic features in the Spratlys alone are occupied by surrounding countries, including Vietnam, the Philippines, Malaysia, and Taiwan. Large numbers of features also fall in the Paracel Islands, which are claimed by Vietnam.[70] The Spratlys and the Paracels fall within the Nine-Dash Line, and China claims them all.

The legal status of features in the South China Sea has tremendous implications for the rights of states that claim them. Islands, for example, generate 12 nm territorial seas and 200 nm EEZs, which would allow states to significantly expand their territory and exclusive access to the Sea's resources.[71] Islands are defined as naturally-formed areas of land that remain above water at high tide and are capable of sustaining human habitation or economic activity.[72] A rock, defined as a feature that appears

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[68] Letter from the Permanent Mission of China to the U.N. to the Sec'y-Gen. of the U.N. (May 7, 2009), https://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf.

[69] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

[70] *Island Features of the South China Sea*, ASIA MAR. TRANSPARENCY INITIATIVE, https://amti.csis.org/scs-features-map/ (last visited Feb. 26, 2020). Vietnam claims the most features in the South China Sea, a total of 29. Vietnam, too, has built upon features in the South China Sea. However, they have avoided conflict with other countries from this practice because they have largely built on features they have held for years. Their construction has also been much smaller-scale and less environmentally destructive than China's. https://amti.csis.org/vietnams-island-building/ and https://www.voanews.com/east-asia-pacific/how-vietnam-quietly-built-10-islands-asias-most-disputed-sea

[71] UNCLOS, *supra* note 69, art. 121(1).

[72] *Id.*

during high tide but cannot sustain habitation and economic life of their own, generates a 12 nm territorial sea but no EEZ and no continental shelf.[73] Low tide elevations, or LTEs, are surrounded by and above water at low tide but disappear at high tide.[74] They do not generate any maritime entitlement, and they cannot be occupied.[75] Fringing reefs surrounding an island do not generate their own zones and territorial claims, but are considered when measuring EEZs, continental shelves, and baselines.[76] Other types of reefs may also be either islands or LTEs.

B. Battlefield Exploitation Lawfare: The People's Armed Force Maritime Militia

China shores up its claims to features in the South China Sea using the People's Armed Force Maritime Militia (PAFMM), colloquially known as the Chinese Maritime Militia, or the "little blue men."[77] These men appear to be plain-clothes fishermen, but actually fall under the PLAN's (People's Liberation Army Navy) chain of command, although not exclusively.[78] The Chinese military contracts with local and provincial commercial organizations to operate fishing boats on an ad hoc basis, outside of their civilian and commercial duties. However, these boats engage in no fishing, have no nets, and do not follow the collision and safety regulations required for safe operation under international law.[79] Although the PAFMM is considered a "reserve force," it is actually in routine use. 200,000 PAFMM fishing boats train with and support the Chinese Navy and Coast Guard.[80]

China uses the PAFMM in as part of a strategy known as "salami-slicing."[81] It takes small steps to assert its claims in the South China Sea—none of which are *casus belli* on their own—that over time can accumulate to a change in the status quo. China calculates that by using civilian boats to engage in its salami-slicing activities, it will reduce the risk of escalation in the South China Sea.[82] Fishing boats appear more innocuous than naval vessels and are far less expensive to operate. Moreover, the U.S. and its

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[73] *Id.*, art. 121(3).
[74] *Id.*, art. 13.
[75] *Id.*
[76] UNCLOS art. 6; UNCLOS art. 47.
[77] Congressional Research Service, *supra* note 10, at 10.
[78] James Kraska and Michael Monti, *The Law of Naval Warfare and China's Maritime Militia*, 91 INT'L L. STUD. 450 (2015), at 452.
[79] Cite COLREGS, SOLAS
[80] Id.
[81] Congressional Research Service, *supra* note 10, at 8.
[82] Kraska and Monti, *supra* note 78, at 456.

partners and allies would be unlikely to fire on what appears to be a civilian boat.

The PAFMM is often employed as part of the Chinese tactic of encroachment.[83] China will send large numbers of fishing vessels toward an island to intimidate its population and establish Chinese claims to the territory. For example, in April 2019, the Center for Strategic and International Studies observed 95 PAFMM vessels off the coast of Pag-Asa Island in the Philippines in a single day.[84] Sometimes PAFMM boats are backed by Chinese Coast Guard vessels, who are in turn backed by the Chinese Navy. This technique is called China's "cabbage strategy," in which it surrounds an island with increasingly more weaponized ships until it is wrapped like a cabbage.[85] When an island is "wrapped," the Chinese ships can prevent supplies of food and drinking water from reaching the islands. They can also prevent any islanders—or security forces defending small islands—from returning if they leave.

China also uses the PAFMM for peacetime force projection and several other traditional military functions.[86] The PAFMM's "rights protection missions" include presence missions in disputed waters, obstruction of other vessels, protection of fisheries, and development of reefs and artificial islands. The PAFMM coordinates with maritime law enforcement in these capacities. The PAFMM also performs military and intelligence functions including anti-air missile defense, light weapons use, and reconnaissance and surveillance.[87] They also engage in emergency response.

China is practicing battlefield exploitation lawfare by using the PAFMM. The PAFMM presents a classic dilemma under international humanitarian law because militia members do not fall neatly into the category of either combatants or civilians.[88] In the event of armed conflict, sailors of small coastal fishing vessels would not be legal targets under international law unless they were directly participating in hostilities. They are not part of the regular Chinese armed forces, and they are not volunteers. They do not meet the criteria for combatants because they are not under the command of a person responsible for his subordinates, they do

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[83] Victor Andres Manhit, Keeping the Peace Post Arbitration, ASIA MAR. TRANSPARENCY INITIATIVE, (July 27, 2016), available at https://amti.csis.org/keeping-peace-post-arbitration/.

[84] Center for Strategic and International Studies, *China's Maritime Militias in the South China Sea*, YOUTUBE (July 24, 2019), available at https://www.youtube.com/watch?v=y2Rk1wRCfnc.

[85] Manhit, *supra* note 83.

[86] Kraska and Monti, *supra* note 78, at 454.

[87] Id., at 456-58.

[88] Id., at 458-65.

not wear a fixed distinctive sign recognizable at a distance, they do not carry arms openly, and they do not conduct their operations in accordance with the law of war.[89] Whether they are operating under China's command or not depends on the day, since they are contracted by China on an ad hoc basis, and are not exclusively under Chinese military command. Any analysis of whether a PAFMM sailor or vessel would be a legitimate military target would be highly fact-dependent. Outside of armed conflict, the U.S. and its partners and allies would face a huge dilemma if faced with a PAFMM vessel engaged in illegal or threatening activity. China would have the upper hand in any information war involving a clash between a PAFMM vessel and a U.S. Naval vessel. The poor PAFMM fisherman on an unarmed craft might be on the Chinese payroll, but he would look helpless next to any U.S. Navy ship.

China's PAFMM is engaging in "legal preparation of the battlefield," creating facts on the ground in the South China Sea to bolster its claims to territory. The little blue men stand ready as a force multiplier for the PLAN in any future conflict with China.[90] In April 2019, then-Chief of Naval Operations, Admiral John Richardson, told Chinese Vice-Admiral Shen Jinlong that the U.S. will not treat the PAFMM different from the Chinese Navy since they are being used to advance China's military ambitions.[91] Following this warning will be easier in theory than in practice. The U.S. may not legally be able to target PAFMM vessels as they would the PLAN, and the stakes could be higher if the U.S. Navy should choose to engage with these vessels outside of armed conflict.

China's use of the PAFMM takes the battlefield exploitation lawfare previously used by violent non-state actors to a new level. China is using the little blue men, in the guise of innocent fishermen, to incrementally change the status quo in the South China Sea.

C. Instrumental Lawfare: The South China Sea Arbitration (2016)

1. Facts

China has threatened the Philippines through its aggressive actions in the South China Sea. Much of this aggression has occurred in the Spratlys, a

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[89] Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) art. 43(2), June 8, 1977, 1125 U.N.T.S. 3.

[90] Kraska and Monti, supra note 78, at 465-66.

[91] Ankit Panda, *The U.S. Navy's Shifting View of China's Coast Guard and 'Maritime Militia'*, THE DIPLOMAT (Apr. 30, 2019), available at https://thediplomat.com/2019/04/the-us-navys-shifting-view-of-chinas-coast-guard-and-maritime-militia/.

group of features within the Nine-Dash Line that also falls within the Philippines' EEZ. These features and their surrounding waters are rich in natural resources and fishing stocks. In 2013, China blocked access to the Scarborough Shoal, a traditional fishing ground for Filipino fishermen. In doing so, China endangered the lives of Filipino personnel by failing to communicate their maneuvering aggressively in contravention of the International Convention for Preventing Collisions at Sea (COLREGS) and the Convention on Safety of Life at Sea (SOLAS).[92]

China had also begun construction on Mischief Reef, Subi Reef, and Fiery Cross Reef, three features in the Spratlys within the Philippines' EEZ. China had occupied Mischief Reef in the mid-1990s, but did not begin construction on it until 2013.[93] Within a matter of months or years, China built these features from underwater reefs to above-sea artificial islands, causing severe environmental damage in the process. . China built runways, hangars, control towers, and radomes upon them.[94] China's facilities on these islands were capable of supporting advanced fighters, patrol, electronic-warfare, and advanced early-warning aircraft.[95] Using these airfields would expand China's Anti-Access/Area Denial capabilities, which are interrelated missile, sensor, guidance, and other technologies designed to bar potential adversaries from China's backyard or its mainland. The airfields would also enable transmission of targeting data to missile launchers at sea and on the mainland.[96]

China insisted that it was not "militarizing" the islands, and that it had a right to build them because they fell within the Nine-Dash Line.[97] However, China was obviously preparing these islands for potential military use. China was clearly creating facts on the ground to cement its claims to these features, and building islands in order to create legal claims to EEZs in the surrounding waters.

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[92] See the International Convention for Preventing Collisions at Sea, or COLREGS, and the Safety of Life at Sea (SOLAS) Chapter V, Regulation 19.

[93] S. China Sea Arb. (Phil. v. China), Case No. 2013-19, PCA Case Repository, Award, ¶ 993 (July 12, 2016).

[94] S. China Sea Arb. (Phil. v. China), Case No. 2013-19, PCA Case Repository, Supplemental Documents of the Philippines, Annex 782 (Nov. 19, 2015). *See also Mischief Reef*, ASIA MAR. TRANSPARENCY INITIATIVE, https://amti.csis.org/mischief-reef/.

[95] Robert Farley, *The 1 Downside to Building Fake Islands China Didn't See Coming: Too Much Land to Defend?*, NAT'L INTEREST (Jan. 17, 2020), https://nationalinterest.org/blog/buzz/1-downside-building-fake-islands-china-didnt-see-coming-114426.

[96] *Id.*

[97] S. China Sea Arb., Award, ¶¶ 1020-23.

2. The Arbitration

The Philippines would not have been able to contest China militarily without the U.S.'s support. U.S. Secretary of State Michael Pompeo said in 2019 that any armed attack on Philippine forces, aircraft, or public vessels in the South China Sea will trigger its Mutual Defense Treaty with the Philippines.[98] Yet in 2013, the U.S. seemed to have little desire to go to war with China over a pile of rocks.[99] Unable to confront China militarily on its own over these violations of its sovereignty, the Philippines turned to instrumental lawfare to achieve a military objective. The U.S. gave tacit diplomatic support to those efforts.[100] China viewed the Philippines as a "Trojan Horse" for the U.S. during the arbitration proceedings.[101]

The Philippines initiated an arbitration under Annex VII of UNCLOS in the Permanent Court of Arbitration (PCA) in the Hague. It alleged violations of the UN Convention on the Law of the Sea (UNCLOS), to which China is a party. 167 nations are parties to UNCLOS, which was signed in 1982 and came into effect in 1994. As a party to UNCLOS, China's participation in the arbitration was compulsory.[102] The Philippines alleged violations of their EEZ due to China's island-building activities and blocking access to its fishermen in the Scarborough Shoal, China's endangerment of the lives of Filipino fishermen and personnel because of their failure to comply with the COLREGS, and severe environmental damage.

Within a month of the Philippines filing its claim, China refused to participate in the arbitration.[103] This marked the first time a signatory to UNCLOS refused to participate in an arbitration arising from the treaty's

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[98] State Department, Remarks With Philippine Foreign Secretary Teodoro Locsin, Jr., Remarks [by] Michael R. Pompeo, Secretary of State, March 1, 2019, accessed August 21, 2019 at https://www.state.gov/remarks-with-philippine-foreign-secretary-teodoro-locsin-jr/. See also Regine Cabato and Shibani Mahtani, "Pompeo Promises Intervention If Philippines Is Attacked in South China Sea Amid Rising Chinese Militarization," *Washington Post*, February 28, 2019; Claire Jiao and Nick Wadhams, "We Have Your Back in South China Sea, U.S. Assures Philippines," *Bloomberg*, February 28 (updated March 1), 2019

[99] https://www.ft.com/content/8b4cb8b2-c9bd-11e3-99cc-00144feabdc0

[100] See *Arbitration Support Tracker*, ASIA MAR. TRANSPARENCY INITIATIVE (June 16, 2016), https://amti.csis.org/arbitration-support-tracker/.

[101] https://www.ft.com/content/8b4cb8b2-c9bd-11e3-99cc-00144feabdc0; David Groten, How Sentiment Matters in International Relations: China and the South China Sea, at 203.

[102] UNCLOS, arts. 188-190.

[103] Bernard Oxman, *Nonparticipation and Perceptions of Legitimacy*, 37 BERKELEY J. INT'L L. 235, 239 (2019).

compulsory jurisdiction proceedings.[104] In a letter delivered by the Chinese embassy to the registry of the PCA, China stated that "a true solution can only be sought through bilateral negotiation and consultation," and noted that "China does not accept or participate in this arbitration."[105] China vociferously protested the legitimacy of the arbitration process, claiming that the arbitration itself violated UNCLOS.[106] In China's view, UNCLOS requires the parties to attempt to negotiate before filing an arbitration. The Philippines countered that it had attempted to negotiate. Interestingly, China chose not to participate in the jurisdictional phase of the arbitration and make its arguments before the Tribunal, when it could have dropped out of the case later in the proceedings. China likely was concerned that it would lose both at the jurisdictional phase and on the merits, and thought its best strategy was to attempt to debunk the legitimacy of the entire process rather than to participate at all. China may also have wished to signal that it would not comply with the decision in order to discourage the lawsuit from proceeding or to discourage other states from filing similar claims.[107]

China then launched a major media campaign to denounce the legitimacy of the arbitration. On December 7, 2014, China's Ministry of Foreign Affairs released a position paper denouncing the arbitration.[108] Xu Hong, the Director-General of China's Foreign Ministry's Department of Treaty and Law, stated that China decided to release the position paper due to misperceptions of its position and allegations that China does not follow international law.[109] Xu claimed that the white paper "debunks the Philippines' groundless assertions and projects China's image as a defender and promoter of the international rule of law."[110] In the paper, China argued that the PCA did not have jurisdiction over the Philippines' claims. More broadly, since the PCA would have to "determine, directly or indirectly, the issue of territorial sovereignty over both the maritime features in question

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[104] Oxman, *supra* note 103, at 239.

[105] S. China Sea Arb., Award, ¶ 97.

[106] *Id.* at 244.

[107] *Id.* at 246.

[108] *Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines*, MINISTRY OF FOREIGN AFF. OF CHINA (Dec. 7, 2014), https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1368895.htm [hereinafter China's Position Paper]; *see also* Shannon Tiezzi, *Why China Won't Accept International Arbitration in the South China Sea*, DIPLOMAT (Dec. 9, 2014), https://thediplomat.com/2014/12/why-china-wont-accept-international-arbitration-in-the-south-china-sea/.

[109] *Id.*

[110] *Id.*

and other maritime features in the South China Sea," the decision would thus be invalid under Section 298 of UNCLOS itself.[111]

The position paper went further, responding to the merits of the Philippines' arguments. China argued that a decision on the extent of China's maritime claims in the South China Sea can be reached only after issues of sovereignty are resolved.[112] Before resorting to UNCLOS, China and its neighbors must negotiate over their respective claims. China also noted that the Philippines' case effectively deals with maritime delimitation, but China had declared in 2006 that it does not accept the compulsory settlement procedures of UNCLOS, including maritime delimitation.[113] Thus China claimed it would not be bound to accept the Tribunal's decision.[114] China further argued that the Philippines violated an existing agreement to settle the dispute through direct negotiations with China. China cited unspecified bilateral agreements, as well as the Declaration on the Conduct of Parties in the South China Sea, which it signed in 2002 along with ASEAN member states.[115] China asserted its sovereignty over the South China Sea Islands and its "resolve and determination to safeguard its sovereignty and relevant maritime rights," and reaffirmed its commitment to resolving disputes through direct negotiation and working with its neighbors to achieve peace and stability in the contested waters.[116]

The position paper looked suspiciously like a legal brief. It took the form of a brief and laid out China's legal objections to both the tribunal's jurisdiction and the merits of the case. China seemed to be afraid of the arbitration and its potential consequences in the international community and for its domestic and international legitimacy.

China was correct that the PCA would not have jurisdiction to determine sovereignty over features in the South China Sea. UNCLOS covers only the rights and responsibilities of nations regarding the use of oceans, including business, the environment, and natural resources. It does not cover sovereignty. However, the Court's decision would have implications for sovereignty claims. To determine whether China violated UNCLOS, the Court would need to determine the status of the various features in the Spratlys, such as whether they were islands, rocks, reefs, or low-tide elevations.

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[111] China's Position Paper, *supra* note 108.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*; Declaration on the Conduct of Parties in the South China Sea, Nov. 4, 2000, ASEAN.

[116] China's Position Paper, *supra* note 108.

The status of these features would determine what claims they would generate to sovereign territory or natural resources.[117] UNCLOS defines an island as "a naturally formed area of land, surrounded by water, which is above water at high tide."[118] Islands generate 12 nm territorial seas and 200 nm EEZs, which come with the sole rights to explore and exploit natural and biological resources within the EEZ. Other nations would still have Freedom of Navigation and Overflight within the EEZ. Rocks, like islands, are "naturally formed area[s] of land, surrounded by water, which [are] above water at high tide."[119] However, rocks "cannot sustain human habitation or economic life of their own."[120] Rocks generate a 12 nm territorial sea, but do not generate an EEZ or a continental shelf. Low-Tide Elevations, or LTEs, disappear at high tide. Under UNCLOS, "Where an LTE is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea," but "Where an LTE is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own."[121] Accordingly, an LTE is not part of a state's territory and cannot be appropriated.

Thus, a legally binding determination of the status of these features would have significant implications for a state's claims over them in the future. The territorial and economic claims generated by each of these features would determine the rights of states that own the features. For this reason, Taiwan made the unusual move of siding with China in the arbitration. Taiwan currently occupies a feature known to the Philippines as Itu Aba and to Taiwan as Taiping Island. Late in the Arbitration, Taiwan released a position paper on the status of Itu Aba, and the Taiwan Society of International Law submitted an amicus curiae brief to the PCA claiming that Itu Aba is an island.[122]

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[117] On the challenges of distinguishing rocks from islands under UNCLOS, *see e.g.*, Marius Gjetnes, *The Spratlys: Are They Rocks or Islands?*, 32 OCEAN DEV. & INT'L L. 191 (2001); Roberto Lavalle, *Not Quite a Sure Thing: The Maritime Areas of Rocks and Low-Tide Elevations Under the UN Law of the Sea Convention*, 19 INT'L J. MARINE & COASTAL L. 43 (2004) (examining how the South China Sea Tribunal used GEOINT products to make the factual determination that none of the disputed features in the South China Sea Arbitration met the criteria for fully-fledged islands under UNCLOS art. 121(3)).

[118] UNCLOS, *supra* note 69, art. 121(1).

[119] *Id.*, art. 121(3).

[120] *Id.*

[121] *Id.*, art. 13.

[122] Position Paper on ROC South China Sea Policy Republic of China (Taiwan)(21 March 2016); Amicus Curiae Submission by the Chinese (Taiwan) Society of International Law, S. China Sea Arb. (Phil. v. China), Case No. 2013-19, PCA Case Repository (23 March 2016).

Despite China's non-participation, the Tribunal bent over backwards to include China's perspective. The Tribunal reviewed China's position paper and statements by Chinese officials in lieu of the state's formal arguments. The Tribunal could have taken the Philippines' arguments as fact, but it took the unusual step of appointing independent experts to assess the parties' claims and measurements of contested geographic features.[123] Ordinarily, both parties to an arbitration would advance funds to compensate such independent experts. Since China did not participate, the Philippines bore these costs alone.[124] After China protested, one of the original judges even recused himself to avoid any semblance of impartiality because he had a Filipino wife.[125]

On October 29, 2015, the Tribunal released a decision on jurisdiction, despite the fact that China did not formally contest jurisdiction in the proceedings due to its non-participation.[126] Procedurally, the Tribunal would not ordinarily have had to release a decision on jurisdiction, but likely chose to do so in response to China's objections. The Tribunal also showed that it was taking China's arguments seriously by effectively treating the white paper as a legal brief in evaluating the parties' arguments. The Tribunal likely wished to bolster the international legitimacy of the decision by taking these extraordinary steps.

In the months before the decision on the merits was announced, China stepped up its propaganda efforts.[127] Near-daily condemnations of the arbitration appeared in the Chinese and English-language press, written by the Government and affiliated groups like the Chinese Fisheries association.[128] Chinese academics and lawyers made high-level international appearances to criticize the arbitration, such as at the Annual Meeting of the American Society of International Law.[129] High-level

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[123] S. China Sea Arb. (Phil. v. China), Case No. 2013-19, PCA Case Repository, Award, ¶¶ 15, 84 (July 12, 2016).

[124] Jill Goldenziel, *China Can't Ignore the Hague's Decision—But It Can Avoid It*, HUFFPOST (July 13, 2016), https://www.huffpost.com/entry/china-cant-ignore-the-hagues-decisionbut-it-can_b_57869173e4b0cbf01e9f0b74.

[125] *PH vs. China: Who are the judges of the Arbitral Tribunal?*, CNN PHILIPPINES (July 12, 2016), https://cnnphilippines.com/world/2016/07/11/ph-china-the-hague-arbitral-tribunal-judges.html; *Foreign Ministry Spokesperson Lu Kang's Remarks on Japanese Foreign Minister's Statement on the Award of South China Sea Arbitration initiated by the Philippines*, MINISTRY OF FOREIGN AFF. OF CHINA (July 12, 2016), https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1380245.shtml [hereinafter *Lu Kang's Remarks*].

[126] *See generally* S. China Sea Arb. (Phil. v. China), Case No. 2013-19, PCA Case Repository, Award on Jurisdiction and Admissibility (Oct. 29, 2015).

[127] Goldenziel, *supra* note 124.

[128] *Id.*

[129] AM. SOC'Y OF INT'L LAW, 110TH ASIL ANNUAL MEETING: CHARTERING NEW

ministers regularly spoke out against the case and the legitimacy of the tribunal.[130] China attempted to rally other countries to support its position.[131] Just weeks before the decision was announced, China attempted to debunk the legitimacy of the arbitration because one of the judges was Japanese.[132] China may have dismissed the arbitration, but it could not seem to ignore its existence. Instead, it appeared to be worried about the legitimacy of its own position—and about an adverse result.

3. Decision of the Permanent Court of Arbitration

The Tribunal released its decision on July 12, 2016. By 6 AM Eastern Standard Time, the arbitration was trending on both Twitter and Weibo, China's largest social media network.[133] The decision was almost a sweeping win for the Philippines, more so than most observers had expected. The Court held that China's maritime entitlements in the South China Sea cannot exceed those established by UNCLOS.[134] In doing so, the Court effectively invalidated the Nine-Dash line.[135] Surprisingly to many observers, the Court also found that no features in the Spratlys qualify as islands under UNCLOS.[136] The Court determined that Scarborough Shoal,

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FRONTIERS IN INTERNATIONAL LAW (2016).

[130] Goldenziel, *supra* note 124.

[131] *Arbitration Support Tracker*, ASIA MAR. TRANSPARENCY INITIATIVE (June 16, 2016), https://amti.csis.org/arbitration-support-tracker/; Michael Forsythe, *Beijing Tries to Whip Up Support for Its South China Sea Claims*, N.Y. TIMES (May 13, 2016), https://www.nytimes.com/2016/05/14/world/asia/south-china-sea-philippines-hague-ruling.html.

[132] Bethany Allen-Ebrahimian, *Beijing: Japanese Judge Means South China Sea Tribunal Is Biased*, FOREIGN POL'Y (June 21, 2016), https://foreignpolicy.com/2016/06/21/beijing-japanese-judge-means-south-china-sea-tribunal-is-biased-china-philippines-maritime-claims/.

[133] Twitter observed by author. *See also* Bethany Allen-Ebrahimian, *After South China Sea Ruling, China Censors Online Calls for War*, FOREIGN POLICY (July 12, 2016), https://foreignpolicy.com/2016/07/12/after-south-china-sea-ruling-china-censors-online-calls-for-war-unclos-tribunal/ ("Within hours of the [judgment's] announcement, "South China Sea arbitration" was trending on Weibo, China's heavily filtered Twitter-like microblogging platform, and hundreds of thousands of comments poured in."); Janis Mackey Frayer, *South China Sea Ruling: What's Next for Beijing After Tribunal's Rebuke?*, NBCNEWS (July 12, 2016), https://www.nbcnews.com/news/china/south-china-sea-ruling-what-s-next-beijing-after-tribunal-n607851 ("In the hours ahead of the ruling, #SouthChinaSeaArbitration was the top trending topic on Weibo with well over 100 million views.").

[134] S. China Sea Arb. (Phil. v. China), Case No. 2013-19, PCA Case Repository, Award, ¶¶ 278-79 (July 12, 2016).

[135] *Id.*

[136] *Id.*, ¶¶ 643, 646.

Fiery Cross Reef, and Itu Aba were rocks, and thus generated no EEZs.[137] Importantly, Scarborough Shoal generated a territorial sea for the Philippines, and thus China's barring Filipino fishermen from fishing there violated the Philippines' sovereign right to fish in its territorial sea.[138] Mischief Reef, Subi Reef, and the Second Thomas Shoal were all found to be LTEs.[139] The Tribunal found Second Thomas Shoal and the waters around it to be part of the EEZ and the continental shelf of the Philippines.[140] China's island-building activities on Mischief Reef, Subi Reef, and Fiery Cross Reef were thus illegal, since none of those features can sustain human habitation in their natural state.[141] The occupation of Mischief Reef was also illegal because it is part of the Philippines' continental shelf.[142] Although China had not made its claims explicit, most observers believed that China had claimed EEZs and continental shelves emanating from Scarborough Shoal and at least most of the Spratlys.[143] The tribunal's determination that none of the Spratlys are islands not only invalidated those claims, but has broader implications. The determination means that the only EEZs and continental shelves in the South China Sea are those generated by the coastlines of its surrounding states and possibly some of the Paracels, pending determination of the status of those features. Thus, the Tribunal's findings have implications for the territorial claims of other states.

The Tribunal found that China had violated UNCLOS in several additional ways. China engaged in unlawful interference with the Philippines' sovereign rights in its EEZ and continental shelf by preventing it from exploiting natural resources there.[144] China also engaged in

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[137] *Id.*

[138] *Id.*, ¶¶ 643, 646, 716.

[139] *Id.*, ¶¶ 643, 646.

[140] *Id.*, ¶¶ 646-47.

[141] *Id.*, ¶¶ 643, 646, 1043 (finding that Mischief Reef is an LTE and therefore not capable of appropriation).

[142] *Id.*, ¶ 1043 (finding that Mischief Reef is part of the Philippines' Continental Shelf).

[143] *Failing or Incomplete? Grading the South China Sea Arbitration*, ASIA MAR. TRANSPARENCY INITIATIVE (July 11, 2019), https://amti.csis.org/failing-or-incomplete-grading-the-south-china-sea-arbitration/ [hereinafter *Failing or Incomplete?*, AMTI]. China's white paper that it released the day after the arbitration, for example, states that "China has, based on the Nanhai Zhudao [islands of the South China Sea], internal waters, territorial sea, contiguous zone, exclusive economic zone and continental shelf." *See also China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea*, STATE COUNCIL OF CHINA, (July 13, 2016), http://english.www.gov.cn/state_council/ministries/2016/07/13/content_281475392503075.htm [hereinafter China's White Paper] (appearing to assert China's claims to an EEZ and continental shelf based on its proclaimed sovereignty over the Spratlys, but open to other interpretations).

[144] S. China Sea Arb. (Phil. v. China), Case No. 2013-19, PCA Case Repository,

substantial violations of environmental law through its island-building, including dredging and landfill work.[145] China also violated the Philippines' traditional fishing rights at Scarborough Shoal.[146] While both Chinese and Filipino fishermen have the right to engage in traditional fishing regardless of who has sovereignty over the shoal, China prevented Filipino fishermen from engaging in traditional fishing from May 2012 onward.[147] China also endangered the lives of Philippines' personnel at Scarborough Shoal, as well as in other areas through its failure to comply with the COLREGS required by UNCLOS.[148] It failed to stop Chinese nationals from interfering with the rights of and endangering Filipino fishermen and personnel.[149] China allowed its fishers and fishermen to illegally engage in environmental destruction through harvesting of endangered species.[150] Finally, it unlawfully aggravated the dispute by engaging in these activities while the lawsuit was pending.[151]

4. Aftermath of the Decision: Information Lawfare and Effects

China swiftly and strongly denounced the decision using information lawfare to shape the narrative surrounding the arbitration. China immediately dismissed the decision as "null and void" and "waste paper."[152] The day after the decision was announced, the Chinese Ministry of Foreign Affairs Released a white paper denouncing the decision.[153] In it, China continued to advance its narrative that the arbitration itself was illegal, as well as to assert its historic rights over the area within the Nine-Dash Line.[154] China's Foreign Ministry Spokesperson, Lu Kang, called the

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Award, ¶ 716 (July 12, 2016).

[145] *Id.*, ¶ 993.

[146] *Id.*, ¶ 814.

[147] *Id.*

[148] *Id.*, ¶¶ 1105, 1109; UNCLOS Article 94 incorporates the COLREGS into UNCLOS. The Tribunal found China to have "by virtue of the conduct of Chinese law enforcement vessels in the vicinity of Scarborough Shoal, created serious risk of collision and danger to Philippine vessels and personnel. The Tribunal found China to have violated Rulse 2,6,7,8,15, and 16 of the COLREGS and, as a consequence, to be in breach of Article 94 of the Convention." (Award, p 435).

[149] *Id.*, ¶ 757.

[150] *Id.*, ¶ 992.

[151] *Id.*, ¶ 1181.

[152] Jane Perlez, *Tribunal Rejects Beijing's Claims in South China Sea*, N.Y. TIMES (July 12, 2016), https://www.nytimes.com/2016/07/13/world/asia/south-china-sea-hague-ruling-philippines.html.

[153] China's White Paper, *supra* note 143.

[154] *Id.*

court's decision "null and void" in its next regular press conference.[155] Using strong terms, Lu said that "[T]he Philippines and the Arbitral Tribunal have abused relevant procedures, misrepresented the law, and obstinately forced [sic] ahead with the arbitration, and as a result, have severely violated the legitimate rights that China enjoys as a state party to the UNCLOS." China's ambassador to the U.S., Cui Tiankai, argued that the arbitration "undermine[s] the authority and effectiveness of international law." [156] Official media repeatedly characterized the arbitration as a "farce."[157] China refrained from formally announcing claims to EEZs and continental shelves emanating from features in the Spratlys at the time.[158]

China launched both domestic and international media campaigns to denounce the decision. It placed a billboard in Times Square with a three-minute video that ran five times an hour, 24 hours per day, from July 23 to August 3. China thus publicized its message to Americans along with foreign tourists.[159] China simultaneously released the video on Youtube and on Chinese television networks.[160] The video emphasized that China was the first to name, explore, and "exploit" islands in the South China Sea as early as the 2nd Century BCE.[161] It asserts that China has continuously "exercised sovereignty and jurisdiction over" these islands and waters.[162] China again argues that the arbitration is illegal and that it rejects the outcome "to preserve the solemnity of international law."[163] Instead, it claims it advocates the "dual-track approach" to resolve the disputes through friendly negotiations while China works with ASEAN to maintain peace in the South China Sea.[164] The video features experts and politicians affirming China's claims to the area. One of them, Catherine West, Shadow Secretary of State of Foreign Affairs from the British Labour Party, quickly released a statement that her remarks were taken out of context from a statement in which she actually denied China's claims over the area.[165]

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[155] *Lu Kang's Remarks*, *supra* note 125.

[156] Kania, *supra* note 38.

[157] Id.

[158] *Failing or Incomplete?*, AMTI, *supra* note 143.

[159] VideoChinaTV, *A short video on Times Square*, YOUTUBE (July 27, 2016), https://www.youtube.com/watch?v=XI2s-2vjr7o&t=73s.

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *Id.*

[165] Will Worley, *Labour MP says she was misrepresented in China's Times Square propaganda video*, INDEPENDENT (July 31, 2016), https://www.independent.co.uk/news/uk/politics/labour-mp-catherine-west-china-propaganda-video-times-square-new-york-120-a7165206.html

Internationally, many of the world's states issued statements on the arbitration. The U.S., the Philippines, the UK, Canada, Japan, Vietnam, Australia, and New Zealand—all parties strongly vested in either the immediate decision or its implications for future interpretations of and compliance with UNCLOS—strongly encouraged China to comply with the decision.[166] 33 other countries issued positive statements about the decision without explicitly calling for China to comply.[167] India, Malaysia, Myanmar and South Korea, all of which had taken no position on the arbitration prior to the decision, issued positive statements that stopped short of calling for compliance. Another eight countries made neutral statements without addressing the decision, including Brunei and Indonesia, who also have claims to features in the South China Sea.[168] Only six countries besides China issued statements opposing the decision: Russia, Montenegro, Sudan, Pakistan, Taiwan, and Vanuatu.[169] Taiwan's opposition to the decision was based on the tribunal's finding that Itu Aba is a rock rather than an island.[170] These statements are significant because China had claimed prior to the ruling that the majority of the world's states opposed the arbitration. For example, China had claimed the support of the 22 members of the Arab League based on a joint statement that the arbitration was invalid under Article 298 of UNCLOS itself.[171] Save for Sudan, all of those members rejected the outcome of the arbitration.

International pressure on China to comply with the decision has waned, however, because the Philippines itself has not pushed China to comply. Rodrigo Dueterte became president of the Philippines on June 30, 2016, less than two weeks before the arbitral decision was released.[172] Duterte quickly began to ostracize the US and to warm to China.[173] Duterte has refused to push compliance with the decision, despite pressure from his own people.[174] In his fourth State of the Nation Address, Duterte casually

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[166] *Who Is Taking Sides After the South China Sea Ruling?*, ASIA MAR. TRANSPARENCY INITIATIVE (Aug. 15, 2016), https://amti.csis.org/sides-in-south-china-sea/ [hereinafter *Who is Taking Sides*, AMTI].

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *Id.*; S. China Sea Arb. (Phil. v. China), Case No. 2013-19, PCA Case Repository, Award, ¶ 632 (July 12, 2016).

[171] *Who is Taking Sides*, AMTI, *supra* note 166.

[172] *Rodrigo Duterte sworn in as Philippines president*, BBC (June 30, 2016), https://www.bbc.com/news/world-asia-36670012.

[173] *See e.g.*, Hannah Beech & Jason Gutierrez, *Xi Visits Philippines to Celebrate 'Rainbow after the Rain' with Duterte*, N.Y. TIMES (Nov. 19, 2018), https://www.nytimes.com/2018/11/19/world/asia/xi-jinping-rodrigo-duterte-philippines-china.html.

[174] Renato Cruz De Castro, *Commentary: Is an appeasement policy vis-a-vis*

mentioned that he would raise the arbitral decision with China when the time is right.[175] In July 2019, during a visit to the Philippines, Xi allegedly offered Duterte a large oil and gas deal in exchange for abandoning the terms of the arbitration.[176] Thus far, Duterte has not agreed.

China's compliance with the arbitration has been mixed. China has not reneged on its claim to sovereignty over territory within the Nine-Dash Line.[177] Accordingly, it has not abandoned its artificial islands in the South China Sea.[178] Nor has China conceded that Second Thomas Shoal and its surrounding waters are part of the Philippines' EEZ and continental shelf, and Chinese Coast Guard vessels patrol near it regularly.[179] In May 2018, a PLAN helicopter also harassed a Philippine resupply mission to the *Sierra Madre*, a rusty, dilapidated WWII-era former U.S. Navy ship grounded on the Shoal by which the Philippines occupies the feature.[180] None of this is surprising, since giving up China's territorial claims would represent a massive loss of legitimacy in the eyes of its own people and an about-face on the legal position it has advanced before the international community.

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expansionist China worth pursuing?, PHILSTAR (Jan. 4, 2020) ("President Rodrigo Duterte, however, emphasized the futility of confronting China . . . ."); Jason Gutierrez, *Philippines Has Little Power Against China, Duterte Tells Lawmakers*, N.Y. TIMES (July 22, 2019), https://www.nytimes.com/2019/07/22/world/asia/rodrigo-duterte-philippines-congress.html ("Mr. Duterte has not pressured China to accept the ruling, instead making a point of appeasing Beijing by visiting often and courting billions of dollars in investment pledges."); Franco Luna, *Philippines is 'the lead in the South China Sea disputes,' Locsin claims*, PHILSTAR (Dec. 8, 2019), https://www.philstar.com/headlines/2019/12/08/1975297/philippines-the-lead-south-china-sea-disputes-locsin-claims; ("In July 2019, Duterte said that the ruling could no longer be enforced.").

[175] *Duterte's SONA 2019*, PHILSTAR (July 24, 2019), https://www.philstar.com/happens/713 ("Short of advocating a call to arms there are those who say we should stop those who fish in our economic zone. Of course we will, in due time."); Eimor Santos & Chad de Guzman, *Duterte vows to stop Chinese fishing in West PH Sea 'in due time,'* CNN PHILIPPINES (July 22, 2019), https://www.cnnphilippines.com/news/2019/7/22/duterte-sona-china-west-philippine-sea.html.

[176] Martin Petty & Karen Lema, *Philippines' Duterte to meet China's Xi over South China Sea Arbitration Win*, REUTERS (Aug. 6, 2019), https://www.reuters.com/article/us-philippines-china/philippines-duterte-to-meet-chinas-xi-over-south-china-sea-arbitration-win-idUSKCN1UW0SJ; Helen Regan, *Duterte says Xi Jinping offered him an oil and gas deal to ignore South China Sea ruling*, CNN (Sept. 12, 2019), https://www.cnn.com/2019/09/12/asia/duterte-xi-south-china-sea-deal-intl-hnk/index.html.

[177] China's White Paper, *supra* note 143.

[178] *Failing or Incomplete?*, AMTI, *supra* note 143.

[179] *Id.*

[180] Jim Gomez, *Philippines says it protests China 'harassment' of navy boat*, ASSOCIATED PRESS (May 30, 2018), https://apnews.com/575ca64f275f42f3bbb6ed3ded9821fa; Jeff Himmelman, *A Game of Shark and Minnow*, N.Y. TIMES MAG. (Oct. 27, 2013), http://www.nytimes.com/newsgraphics/2013/10/27/south-china-sea/index.html.

Doing so would also signal a willingness to back away from disputes with China's other neighbors regarding features in the South China Sea.

In defiance of the decision, China also continues to violate the Philippines' rights to fish within its EEZ. Since 1999, China has unilaterally declared a summer fishing ban from May to August of each year in all waters north of the 12th degree of latitude.[181] China claims it does so to protect fishing stocks.[182] This area includes large swaths of the EEZs of the Philippines and Vietnam. The Philippines and Vietnam have angrily rejected the ban in recent years, at times noting the arbitral decision.[183]

China also continues to allow its fishing vessels to illegally engage in environmentally destructive harvesting of endangered species in the Spratlys, despite the decision. Chinese fishermen initially dropped their activity sharply after the arbitral decision. However, in recent years, China's clam harvesters have continued to destroy environmental resources.[184] Disturbingly, there is some evidence that these vessels are now using more stealthy means to harvest clams while hiding their environmental damage.[185]

China's law enforcement vessels and maritime militia vessels also continue to operate in a dangerous manner.[186] The Chinese Coast Guard, PLAN, and maritime militia vessels continue not to comply with the COLREGS and SOLAS at Scarborough Shoal.[187] Numerous examples exist of Chinese harassment of Philippine, Vietnamese, and other vehicles, including the harassment of a Philippine resupply vessel near Second Thomas Shoal in May 2018,[188] a dangerous sudden stop by a PLAN ship

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[181] John Reed, *South China Sea: Fishing on the front line of Beijing's ambitions*, FIN. TIMES (Jan. 24, 2019), https://www.ft.com/content/fead89da-1a4e-11e9-9e64-d150b3105d21.

[182] *Id.*

[183] *See, e.g.*, Nestor Corrales, *China's fishing ban in South China Sea against Philippine sovereignty – Palace*, INQUIRER.NET (May 21, 2019), https://globalnation.inquirer.net/175440/chinas-fishing-ban-in-south-china-sea-against-philippine-sovereignty-palace; *Vietnam rejects Beijing's South China Sea fishing ban that covers Philippine EEZ*, PHILSTAR (May 7, 2019), https://www.philstar.com/headlines/2019/05/07/1915827/vietnam-rejects-beijings-south-china-sea-fishing-ban-covers-philippine-eez; Reed, *supra* note 181.

[184] *China's most destructive boats return to the South China Sea*, ASIA MAR. TRANSPARENCY INITIATIVE (May 20, 2019), https://amti.csis.org/chinas-most-destructive-boats-return-to-the-south-china-sea/.

[185] *Id.*; *see Failing or Incomplete?*, AMTI, *supra* note 143. ("Chinese clam harvesters have returned to their destructive activities at Scarborough Shoal and throughout the Paracels . . . .")

[186] *Failing or Incomplete?*, AMTI, *supra* note 143.

[187] International Convention for Preventing Collisions at Sea (COLREGS) and the Convention on Safety of life at Sea.

[188] *China's navy, coast guard 'harassed' Filipino troops on resupply mission on*

during a freedom of navigation operation by the USS Decatur in October 2018,[189] and a ramming of a Vietnamese fishing boat in March 2019.[190] All of these qualify as violations of the treaties above.

In a few areas, however, China does seem to be in compliance with the arbitral decision. China has consistently allowed Filipino fishermen access to Scarborough Shoal since late 2016.[191] Access to the shoal was so politically important to the Duterte government that he claims to have made a secret verbal deal with Chinese president Xi Jinping in 2016 to allow Chinese fishing in the Philippine EEZ in exchange for the Chinese allowing Filipinos to fish at Scarborough Shoal.[192] If true, this agreement would have traded non-compliance with one part of the arbitral ruling for compliance with another.[193] Agreement or not, the arbitral ruling almost certainly caused China's decision to stop barring the Philippines from the Shoal. Its continued harassment of Filipino boats, however, signals that it has not backed away from its territorial claims.

Second, China has ceased its island-building activity in the South China Sea. After the decision, China completed its dredging and landfill work on the existing islands in the Spratlys in late 2016.[194] After that, it ceased island-building operations in the Spratlys. Its last known island-building activity anywhere in the South China Sea was in the Paracels in mid-2017.[195] While it is possible that China had fulfilled its goals before it stopped its island-building activities, the timing suggests that the arbitral decision influenced it to stop.

Some hope remains that China will allow the Philippines to exploit the resources of its continental shelf. The arbitral decision concluded that Reed Bank is part of the Philippines' continental shelf.[196] China does continue to block the Philippines from exploring for oil and gas in the area.

Ayungin — Alejano, PHILSTAR (May 30, 2018), https://www.philstar.com/headlines/2018/05/30/1820063/chinas-navy-coast-guard-harassed-filipino-troops-resupply-mission-ayungin-alejano

[189] Danielle Paquette, *Chinese warship nearly hits U.S. destroyer in South China Sea near disputed islands*, WASH. POST (Oct. 2, 2018), https://www.washingtonpost.com/world/chinese-warship-nearly-hits-us-destroyer-in-south-china-sea/2018/10/02/877cc788-c5fb-11e8-9158-09630a6d8725_story.html.

[190] Hau Dinh, *Vietnam says fishing boat rammed and sunk by Chinese ship,* ABC NEWS (Mar. 8, 2019), https://abcnews.go.com/International/wireStory/vietnam-fishing-boat-rammed-sunk-chinese-ship-61550702.

[191] *Failing or Incomplete?*, AMTI, *supra* note 143.

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] S. China Sea Arb. (Phil. v. China), Case No. 2013-19, PCA Case Repository, Award, ¶ 716 (July 12, 2016).

However, in November 2018, China and the Philippines signed a memorandum of understanding over the area.[197] The details have yet to be determined, but it is possible that an eventual agreement could allow China to comply with the arbitral decision while saving face.[198]

Meanwhile, China's neighbors have begun to use the decision to their advantage. On December 12, 2019, Malaysia referenced the terms of the arbitral decision in a submission with the UN Commission on the Limits of the Continental shelf expressing its rights to an extended continental shelf beyond 200 nm.[199] Its filing, made in accordance with UNCLOS, would nearly double the range of the continental shelf northward from that in Malaysia's original 1979 governmental mapping. In line with the arbitral ruling, the submission recognized only the territorial seas of the Spratly features and not any EEZs. China swiftly responded that the submission "seriously infringed China's sovereignty, sovereign rights and jurisdiction in the South China Sea."[200] China claims an EEZ based on the South China Sea islands and its "historic rights" in the South China Sea. This response marks one of the first times that China had explicitly claimed an EEZ based on features in the Spratlys.[201] Indonesia, too, referenced the decision in a UN Submission following a row on December 30, 2019, with China interference by overfishing in Indonesia's EEZ.[202] Indonesia's foreign ministry cited the arbitral ruling, noting that China had lost its legal arguments based on its historic fishing rights. In response, China restated its stance that the ruling was "illegal, null, and void."[203]

China has harshly warned its neighbors against bringing additional lawsuits like the Philippines's. Since the arbitral decision was announced,

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[197] Jay Batongbacal, *The Philippines-China MOU on Cooperation in Oil and Gas Development*, ASIA MAR. TRANSPARENCY INITIATIVE (Dec. 5, 2018), https://amti.csis.org/philippines-china-mou-cooperation-oil-gas-development/.

[198] *Failing or Incomplete?*, AMTI, *supra* note 143.

[199] Commission on the Limits of the Continental Shelf (CLCS), Outer limits of the continental shelf beyond 200 nautical miles from the baselines: Submissions to the Commission: Partial Submission by Malaysia in the South China Sea (Dec. 20, 2019), https://www.un.org/Depts/los/clcs_new/submissions_files/submission_mys_12_12_2019.html

[200] Letter from the Permanent Mission of China to the U.N. to the Sec'y-Gen. of the U.N. (Dec. 12, 2019), https://www.un.org/Depts/los/clcs_new/submissions_files/mys85_2019/CML_14_2019_E.pdf.

[201] See China's White Paper, *supra* note 143.

[202] Sean Quirk, *Water Wars: Stare Decisis in the South China Sea*, LAWFARE (Jan. 6, 2020), https://www.lawfareblog.com/water-wars-stare-decisis-south-china-sea.

[203] Patricia Lourdes Viray, *China insists arbitral ruling is 'illegal' amid Indonesia's protest*, PHILSTAR (Jan. 3, 2020), https://www.philstar.com/headlines/2020/01/03/1981797/china-insists-arbitral-ruling-illegal-amid-indonesias-protest.

Vietnam and Indonesia have been rumored to be considering such claims.[204] Most recently, Vietnam was reportedly considering a lawsuit in late 2019.[205] When these rumors surfaced in the news, China immediately and harshly warned Vietnam "to avoid taking actions that may complicate matters or undermine peace and stability in the South China Sea as well as our bilateral relations."[206] China, again, seems to be running scared of a potential loss in international courts.

In the years since the arbitral decision, Chinese officials have spoken less frequently about the nine-dash line as the basis to their claim over the South China Sea.[207] China does continue to assert historic rights to the entire area, to rely on these rights as the basis for fishing in the EEZs of Vietnam, the Philippines, and Indonesia, and to object to all of its neighbors' oil and gas claims.[208] Some reports have surfaced that China is now emphasizing a new legal argument for its sovereignty over the South China Sea Islands known as the "Four Shas" claim.[209] This claim dates as far back as 1992 in Chinese policy documents.[210] China is asserting sovereignty and maritime entitlements extending from four groups of features in the South China Sea, which it claims are islands: Dongsha, Xisha, Nansha, and Zhongsha. These "Four Sha" are respectively known in

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[204] David Bosco, *Indonesia Hints at South China Sea Litigation*, LAWFARE (Nov. 12, 2015), https://www.lawfareblog.com/indonesia-hints-south-china-sea-litigation; James Pearson & Khanh Vu, *Vietnam mulls legal action over South China Sea dispute*, REUTERS (Nov. 6, 2019), https://www.reuters.com/article/us-vietnam-southchinasea/vietnam-mulls-legal-action-over-south-china-sea-dispute-idUSKBN1XG1D6.

[205] Richard Javad Heydarian, *Vietnam's Legal Warfare Against China: Prospects and Challenges*, ASIA MAR. TRANSPARENCY INITIATIVE (Nov. 21, 2019), https://amti.csis.org/vietnams-legal-warfare-against-china-prospects-and-challenges/; Richard Javad Heydarian, *Vietnam drops a legal gauntlet in South China Sea*, ASIA TIMES (Nov. 12, 2019), https://asiatimes.com/2019/11/vietnam-drops-a-legal-gauntlet-in-south-china-sea/; Quirk, *supra* note 202.

[206] Ankit Panda, *China Warns Vietnam to Not 'Complicate' South China Sea Dispute By Seeking Legal Arbitration*, DIPLOMAT (Nov. 9, 2019), https://thediplomat.com/2019/11/china-warns-vietnam-to-not-complicate-south-china-sea-dispute-by-seeking-legal-arbitration/.

[207] *Failing or Incomplete?*, AMTI, *supra* note 143.

[208] *Id.*

[209] Richard Javad Heydarian, *China's 'New' Map Aims to Extend South China Sea Claims*, NAT'L INTEREST (Apr. 30, 2018), https://nationalinterest.org/blog/the-buzz/chinas-new-map-aims-extend-south-china-sea-claims-25628; Julian Ku & Chris Mirasola, *The South China Sea and China's "Four Sha" Claim: New Legal Theory, Same Bad Argument*, LAWFARE (Sept. 25, 2017), https://www.lawfareblog.com/south-china-sea-and-chinas-four-sha-claim-new-legal-theory-same-bad-argument; Patricia Lourdes Viray, *Shifting tactics: China advances 'four sha' claim in South China Sea*, PHILSTAR (Sept. 27, 2017), https://www.philstar.com/headlines/2017/09/27/1742870/shifting-tactics-china-advances-four-sha-claim-south-china-sea.

[210] Ku, Id.

English as the Pratas Islands, Paracels, Spratlys, and the Macclesfield Bank area. Using UNCLOS terminology, China has drawn "straight baselines" around these features to maximize their territorial claims. However, this argument plainly violates Article 47 of UNCLOS, which states that archipelagic baselines may be drawn only if they enclose a state's "main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1." Even if all of those features were legally considered islands, China, with its enormous total land mass, would not meet this definition. Observers see this as a way for China to advance a new legal claim for sovereignty over these features to help it save face in the wake of its discredited ones.[211] China may also be waging that through use of UNCLOS language and an interpretation of UNCLOS, its position may become more accepted in the international community.

Considering that China has rejected the Philippines/China arbitration, it seems to be very concerned about its meaning in the international community and to its domestic populace. Its constant denunciation of any mention of the arbitral decision, its harsh warnings to its neighbors against new lawsuits, its offer of a major oil and gas deal in exchange for abandoning the decision, and its quiet compliance with some of the decision's terms all suggest that China is very concerned about what the decision means for its legitimacy in the international community. At home, China's legal defeat is seen as a national humiliation – perhaps precisely because of the importance that the country places on lawfare.[212] The arbitral decision not only has implications for China's territorial claims, it also means that China was beaten at its own game.

D. Instrumental Lawfare: China's Novel Interpretations of UNCLOS

China also uses instrumental lawfare to advance interpretations of international law that differ from those accepted by most of the international community to support its interests. Doing so is part and parcel to its definition of Legal Warfare as discussed above. It is exemplified by China's use of legal arguments to defend its decision not to participate in the Philippines-China arbitration, discussed above. It is also evident in China's interpretation of UNCLOS to restrict or prohibit U.S. military actions.

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[211] See *supra* note 209.

[212] Jill Goldenziel, *China Can't Ignore the Hague's Decision—But It Can Avoid It*, HUFFPOST (July 13, 2016), https://www.huffpost.com/entry/china-cant-ignore-the-hagues-decisionbut-it-can_b_57869173e4b0cbf01e9f0b74.

1. Military Actions and Innocent Passage

Chinese military leaders argue that U.S. military actions within China's EEZ violate UNCLOS. Upon ratification of UNCLOS, China entered a declaration requiring foreign militaries to obtain prior authorization or submit prior notifications before conducting activities in their EEZs.[213] China has also implemented domestic legislation to support this interpretation.[214] Accordingly, China argues that U.S. Naval ships must turn off their radar and otherwise restrict their operations when they pass through China's EEZ. China requires that military ships entering China's territorial sea must obtain prior approval from China. Other states, India most important among them, have adopted China's requirement of prior authorization.[215] Article 13 of China's 1992 law also allows Beijing to extend its penal jurisdiction beyond its territorial waters, and into the contiguous zone, for activities infringing its laws or regulations concerning security, the customs, finance, sanitation or entry and exit control within its land territory, internal waters or territorial sea.[216] The text of UNCLOS, however, does not require military vessels to obtain permission to enter a coastal state's territorial seas.[217] The U.S. therefore does not recognize UNCLOS's prior notification requirement. U.S. ships and aircraft are subject to harassment by Chinese authorities whenever it operates in China's EEZ, on sea or in the air.

Indeed, China does not believe foreign militaries should be able to operate in its EEZ at all. UNCLOS allows all states to enjoy rights of overflight and navigation, limited only by their exercise of due regard for the economic rights of the coastal states, within a coastal state's EEZ.[218] China issued a declaration upon ratification stating that it enjoys "sovereign rights and jurisdiction" over its EEZ, thereby asserting a broad view of its military control over its EEZ. As a practical matter, China seeks to limit the rights of warships and aircraft to operate within its EEZ by claiming that the

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[213] ISKANDER REHMAN, INDIA, CHINA, AND DIFFERING CONCEPTIONS OF THE MARITIME ORDER 4 (2017).

[214] *Id.*

[215] Other countries that interpret UNCLOS similarly include India, Brazil, Malaysia, Iran, Vietnam and Argentina. *Id.* at 1. Vietnam is of note here because it can easily use China's own legal arguments against it when Chinese military ships operate within Vietnam's EEZ without prior notification or authorization.

[216] *Id.* at 8.

[217] ANDREW J. THOMSON, KEEPING THE ROUTINE, ROUTINE: THE OPERATIONAL RISKS OF CHALLENGING CHINESE EXCESSIVE MARITIME CLAIMS 5-6 (Feb. 9, 2004).

[218] UNCLOS, *supra* note 69, art. 58.

mere presence of a military vessel violates the "due regard" elements of UNCLOS by posing threats to Chinese national security.[219]

China issued a statement upon ratification of UNCLOS that reiterated its restriction of innocent passage in their EEZs. China also noted that "China shall enjoy sovereign rights and jurisdiction over an exclusive zone of 200 nm and the continental shelf. … The People's Republic of China reaffirms that the provisions of [UNCLOS] concerning innocent passage through the territorial sea shall not prejudice the right of a coastal state to request, in accordance with its laws and regulations, a foreign State to obtain advance approval from or give prior notification to the coastal state for the passage of its warships through the territorial sea of the coastal state."[220] The 1998 "Law of the People's Republic of China on the EEZ and the Continental Shelf," states "all states shall, on the premise that they comply with international law and the laws and regulations of the People's Republic of China, enjoy the freedom of navigation in and flight over its exclusive economic zone."[221] The law then restates China's "historic rights" in its Article 14: "The provisions in this Law shall not affect the rights that the People's Republic of China has been enjoying ever since the days of the past."[222] As James Kraska notes, China appears to "take away with one hand what it gives with another" with this law.[223] This "legal layering," or presenting multiple and conflicting sources of legitimacy for Chinese actions, may be designed to be ambiguous and sow confusion.[224]

China has also accused the U.S. of violating UNCLOS through its peaceful maritime actions in these waters. UNCLOS affirms the right of all states and international organizations to conduct Marine Scientific Research (MSR), although coastal states have the right and authority to control and conduct MSR in their territorial seas and EEZ.[225] UNCLOS distinguishes between MSR and "hydrographic surveys" and "survey activities."[226] Hydrographic surveys and other survey activities are commonly performed by warships and thus have similar privileges to other common activities done by warships. China's 1996 Regulations Regarding Management of Marine Scientific Research (MSR) Involving Foreign Vessels, China do not appear to distinguish between MSR and military surveys.[227] China has

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[219] Thomson, *supra* note 217, at 6.

[220] *Id.* at 8.

[221] *Id.*

[222] *Id.*

[223] JAMES KRASKA, MARITIME POWER AND THE LAW OF THE SEA: EXPEDITIONARY OPERATIONS IN WORLD POLITICS 316 (2010).

[224] See Halper, *supra* note 63.

[225] UNCLOS, *supra* note 69, art. 238.

[226] *Id.*

[227] Thomson, *supra* note 217, at 9.

equated U.S. sonar activity in its EEZ with MSR, which would require China's express permission. It would also violate China's 2002 "Surveying and Mapping Law" which states that any form of maritime data collection in China's EEZ—including hydrographic research—is "subject to approval by the administrative department for surveying and mapping of the Army."[228] Chinese legal experts have also argued that U.S. intelligence gathering operations constitute a transgression of the "peaceful purposes clause" of UNCLOS, and are therefore in violation of the law of the sea.[229] These arguments are widely considered to be without merit. UNCLOS itself does not prohibit hydrographic intelligence collection in foreign EEZs, and required only that nation-states must "refrain from any threat or use of force against the territorial integrity or political independence of any State."[230] During the Cold War, both superpowers routinely conducted such operations. China itself also frequently collects maritime intelligence in U.S. and other foreign EEZs.

2. Coastal Baselines

China interprets UNCLOS standards defining coastal baselines in a way that allows it to claim more territory. UNCLOS permits the coastal state to determine its baselines by one of three methods: the low-water line, straight baselines, or archipelagic baselines.[231] For coastal states like China and the U.S., "the normal baseline for measuring the breadth of the territorial sea is the low-water line along the Coast."[232]

UNCLOS allows coastal states to apply straight baselines to measure territorial seas in select circumstances, such as when a coastline is deeply indented and cut, or if a fringe of islands exists in the immediate vicinity of the coast.[233] China has consistently claimed straight baselines, since 1958.[234] China first specified the geographic coordinates of its straight baseline claims, which allow it to claim nearly 2,000 square nautical miles of territorial seas than if it used the UNCLOS baseline standards.[235] The U.S. disputes China's use of straight baselines, noting that "much of China's

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[228] REHMAN, *supra* note 213, at 8.
[229] *Id.*
[230] UNCLOS, *supra* note 69, art. 301.
[231] UNCLOS, *supra* note 69, art. 5, 24, 47.
[232] *Id.*
[233] *Id.*
[234] first in its 1958 Declaration on the Territorial Sea, then in the 1992 Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone, and again in the 1996 In the 1996 Declaration of the Government of the People's Republic of China on the Baseline of the Territorial Sea.,
[235] Thomson, *supra* note 217, at 8-9.

coastline does not meet either of the two [UNCLOS] geographic conditions required for applying straight baselines."[236] China's lawfare tactics here are clear: interpret the law to allow for maximal Chinese sovereignty, promulgate domestic laws in support of this claim, and publicize that its territorial claims are based on internationally accepted legal grounds.

China's creative interpretations of UNCLOS amount to a form of instrumental lawfare. It is using legal claims to assert sovereignty over the South China Sea, together with its military actions laying facts on the ground. By adopting domestic laws supporting its interpretations of UNCLOS, China bolsters its domestic law enforcement capacity against supposed encroachment of UNCLOS. It also bolsters domestic legitimacy for its claims and for any actions taken to enforce them.

E. Proxy Lawfare: Huawei v. U.S.

The U.S. is now also engaged in proxy lawfare against the Chinese corporate giant Huawei. Huawei is a telecommunications behemoth and one of the biggest players in competition for 5G. In these actions, the U.S. is treating Huawei as a proxy for the Chinese state. Huawei is fighting back hard in court, with the support of the Chinese government.[237] Huawei's lawsuits, however, are unlikely to be successful in U.S. court, and its most prominent effort to date so far has failed.[238] Many observers believe these lawsuits are part of a broader campaign by the company—and by extension, China—to sway the court of public opinion by making the U.S. look like it is flouting its own laws and Constitution by attacking the company.[239]

1. Huawei v .U.S.

The U.S. fired the first shots in its legal war against Huawei. The 2019-2020 National Defense Authorization Act (NDAA), enacted in August 2018, blocks the U.S. government from procuring, extending, or renewing a procurement contract with Huawei for telecommunications equipment,

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[236] *Id.*

[237] *See generally*, Complaint at 10, Huawei v. United States, No. 4:19-CV-00159, 2019 WL 1076892 (E.D.Tex. Mar. 6, 2019).

[238] Huawei v. United States, No. 4:19-CV-00159, 2019 WL 1076892 (E.D.Tex. Feb. 18, 2020).

[239] Noah Feldman, *Huawei's Lawsuit Against U.S. Won't Win in Court*, BLOOMBERG NEWS (Mar. 11, 2019), https://www.bloomberg.com/opinion/articles/2019-03-12/huawei-technologies-v-u-s-constitutional-argument-won-t-work.

systems, or services.[240] It also prohibits the U.S. government from entering into, extending, or renewing contracts with other entities that use Huawei equipment, systems, or services.[241] Third, it prohibits executive agency heads from obligating or expending money to contract with any "equipment, system, or service" if Huawei products are "a substantial or essential component" or "critical technology" of any system involved.[242] Huawei was not the only telecommunications contractor affected by the ban. The NDAA specifies that the banned telecommunications equipment and services refers to any equipment produced by Huawei or ZTE or any of their subsidiaries or affiliates, as well as video surveillance and telecommunications equipment produced by three other named firms.[243] The ban was motivated by a national security concern that Chinese telecommunications providers could provide a backdoor in their technology that would enable them to spy on the U.S. government.[244] This concern was especially important in light of a Chinese law that states that all Chinese corporations must allow the state to use their products for government use upon request.[245] Huawei also has a history of industrial espionage and close ties to the Chinese Communist Party.[246]

Huawei vociferously denied allegations that its products would or could be used for spying.[247] On March 6, 2019, Huawei responded by filing suit against the U.S. government, as well as the secretaries of labor, health and human services, education, agriculture, veterans affairs, and the interior, along with the administrator of the General Services Administration.[248] In its complaint before the U.S. District Court for the Eastern District of Texas, Huawei argued that the ban was equivalent to an unconstitutional

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[240] John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-332, § 889, 132 Stat. 1636, 1917.

[241] *Id*.

[242] *Id*.

[243] *Id.*, § 889(f)(3).

[244] Stephanie Zable, *Huawei Technologies v. U.S.: Summary and Context*, LAWFARE (Apr. 9, 2019), https://www.lawfareblog.com/huawei-technologies-v-us-summary-and-context.

[245] *Id.*

[246] *Id.*; *see also* Robert Chesney, *Is Huawei a 'Foreign Power' or an 'Agent of a Foreign Power' Under FISA? Insights From the Sanctions Case*, LAWFARE (Apr. 8, 2019), https://www.lawfareblog.com/huawei-foreign-power-or-agent-foreign-power-under-fisa-insights-sanctions-case.

[247] Dan Strumpf & Josh Chin, *Huawei's Mysterious Founder Denies Spying for China, Praises Trump*, WALL ST. J. (Jan. 15, 2019), https://www.wsj.com/articles/huawei-ceo-hits-back-at-claims-company-spies-for-china-11547542616.

[248] *See generally* Complaint at 10, Huawei v. United States, No. 4:19-CV-00159, 2019 WL 1076892 (E.D.Tex. Mar. 6, 2019).

bill of attainder, that the ban violated its due process, and that the ban violated the separation of powers.

Huawei's primary argument was that NDAA section 889 was tantamount to an unconstitutional bill of attainder. Article I, Section 9 of the U.S. Constitution prohibits bills of attainder, defined by the Supreme Court as laws that "legislatively determine[] guilt and inflict[] punishment upon an identifiable individual without provision of the protections of a judicial trial."[249] Congress has not passed a bill of attainder since 1965.[250] The Court has established three tests for determining whether a legislative act imposes punishment.[251] The first, the historical test, examines whether the burden borne by the allegedly punished party is similar to the kinds of burdens that have historically been deemed punishment. Second, the functional test examines "whether the burden is a means to an end or an end in and of itself." To determine this, a court would balance the purpose of the act and the burdens it imposes. Third, the motivational test examines whether Congress's intent was to punish a given person or entity.

Huawei argued that the NDAA was tantamount to a bill of attainder because it "singled out" Huawei with the intent to punish it. Allegedly, Congress punished Huawei without any evidence of wrongdoing on the company's part, and without any trial.[252] Huawei argued that Section 889 also removed it from positions of trust and tarred it and its employees as disloyal and infamous. Congress's reasons for punishing Huawei were unsubstantiated, but appeared to stem from a belief that the Chinese Communist Party owns or improperly influences Huawei. Huawei argued that the U.S. had produced no evidence of its alleged collaboration with the Chinese government. The complaint cited a 2012 report of the House Permanent Select Committee on Intelligence (HPSCI) which noted that "it could not prove wrongdoing" by Huawei, although the Committee also noted that Huawei did not proactively alleviate congressional security concerns.[253] Huawei, meanwhile, claimed that it had been transparent in its business dealings and in full compliance with Congressional investigations. Huawei noted that Congress raised the HSPCI report in 2017 during debates over the NDAA. It cited floor statements from members that appeared to single out Huawei for punishment, including statements that Huawei deserved the 'death penalty' and was an extension of the Chinese

[249] Nixon v. Admin. of Gen. Servs., 433 U.S. 425, 468 (1977).

[250] U.S. v. Brown, 381 U.S. 437 (1965) (holding that criminalizing a Communist Party member's service on a labor union board amounted to a bill of attainder).

[251] *Id.*

[252] Complaint at 10, Huawei v. United States, No. 4:19-CV-00159, 2019 WL 1076892 (E.D.Tex. Mar. 6, 2019).

[253] *Id.*

Communist Party.[254] In Huawei's view, these statements provided evidence that the NDAA singled out Huawei for punishment.[255] Applying the historical test, Huawei argued that a permanent ban on doing business with the U.S. government is equivalent to acts that were traditionally considered punitive. Huawei alleged that the passage of the NDAA caused it significant injury, including constitutional harm, economic injury from competitive disadvantage loss of contracts, and reputational injury.[256] It claimed the U.S. ban was overbroad because contractors will now need to choose between federal contracting and using Huawei equipment, even if that equipment is unrelated to government work.[257] Huawei would thus suffer secondary and devastating economic effects from the ban. Thus, Huawei argued, Section 889 of the NDAA constituted an unconstitutional bill of attainder.[258]

Huawei further argued that the punishment without trial violated its due process rights. Huawei emphasized that neither it nor Huawei USA have any Chinese government ownership.[259] Huawei argued that the ban deprived it of the freedom to conduct business with federal agencies, and caused it tremendous reputational harm, without any trial or opportunity to defend itself. The Constitution specifies that a legislative deprivation of liberty must be "imposed in accordance with general rules."[260] Meanwhile, the U.S. singled out Huawei for punishment without applying the usual rules that it would when imposing punishment on another person or corporate entity. Thus, Section 889 of the NDAA violated Huawei's due process rights.

Third, Huawei argued that the NDAA violated the vesting clauses, or separation of powers.[261] Huawei argued that by banning Huawei from contracting with the U.S. government after a Congressional investigation, Congress made a "legislative adjudication" of Huawei's alleged wrongdoing. According to Huawei, the Constitution requires that such a determination should be made by the executive or judiciary.[262] Legislative

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[254] *Id.*, ¶ 89(c).

[255] *Id.*

[256] See generally Complaint, Huawei v. United States, No. 4:19-CV-00159, 2019 WL 1076892 (E.D.Tex. Mar. 6, 2019).

[257] Id. at 10.

[258] *Id.*; U.S. CONST. art. I, § 9, cl. 3.

[259] Complaint at 10, Huawei v. United States, No. 4:19-CV-00159, 2019 WL 1076892, ¶ 30 (E.D.Tex. Mar. 6, 2019).

[260] *Id.*, ¶ 103(b); U.S. CONST. amend. V.

[261] Complaint at 10, Huawei v. United States, No. 4:19-CV-00159, 2019 WL 1076892 (E.D.Tex. Mar. 6, 2019).

[262] *Id.*

adjudication deprived Huawei of the opportunity to contest the ban through avenues like executive consultation and judicial review.[263]

At the time of the lawsuit, Huawei simultaneously hired two public relations firms to help press its case in the media, tying together the Chinese strategies of Media Warfare and Lawfare.[264] Both promptly registered with the State Department under the Foreign Agents Registration Act and escalated the public relations battle.[265] Huawei was clearly as concerned, if not more concerned, with public opinion warfare as lawfare.

Most observers found Huawei's arguments to be unlikely to succeed, if not laughable.[266] Harvard Law Professor Noah Feldman commented that Huawei probably did not expect to win the suit, but filed it anyway so that it could win in the court of public opinion.[267] Huawei would portray its arguments, and presumably its defeat, as evidence that the U.S.'s much-vaunted rule of law is a sham. Instead, Huawei would argue that the U.S. Constitution was being used as an instrument of lawfare for the U.S. government's own political gain. Around the same time, Huawei executives began to make comments disparaging the National Security Agency wiretapping scandal and supporting Edward Snowden, and to claim that Chinese law prohibits the Chinese government from interfering with Huawei.[268] Other commentators have suggested that the lawsuit was motivated by Huawei's or China's desire to compel discovery, thereby allowing them access to U.S. government information; or to deter other countries who are considering banning Huawei telecommunications equipment under U.S. pressure.[269]

On February 18, 2020, Judge Amos Mazzant of the U.S. District Court for the Eastern District of Texas dismissed Huawei's complaint.[270] While the Judge found that Huawei had been named with specificity in the NDAA, he found that Congress had not imposed punishment on Huawei such that Section 889 constituted a bill of attainder. Rather, Congress had imposed a "permissible burden" on Huawei. Congress had the right to enact Section 889 of the NDAA, which had the non-punitive purpose of protecting national security. Section 889 was not overbroad, he said,

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[263] *Id.*

[264] Zable, *supra* note 244.

[265] *Id.*

[266] *See, e.g.*, *The Hidden Issue in Huawei's Suit Against the United States*, JUST SECURITY, https://www.justsecurity.org/63408/the-hidden-issue-in-huaweis-suit-against-the-united-states/; Feldman, *supra* note 239.

[267] Feldman, *supra* note 239.

[268] Zable, *supra* note 244.

[269] *Id.*

[270] Huawei v. United States, No. 4:19-CV-00159, 2019 WL 1076892 (E.D.Tex. Feb. 18, 2020).

because it "tailors the covered equipment to the types of technology that pose a risk of being disrupted by 'hostile actors' who engage in cyber-attacks and espionage."[271] Section 889 did not rise to the level of a statute that imposes punishment based on infamy and disloyalty. Isolated, pejorative statements by senators about Huawei are not sufficient to prove a punitive intent by Congress as a whole. The judge found that Huawei overstated its injury, noting that it "can still conduct business with every other company and individual in America as well as the remaining 169 countries and regions it currently does business with throughout the world."[272] The judge likened Section 889 to a customer's decision to take its business elsewhere. Dismissing Huawei's Due Process arguments, the judge noted that "Contracting with the federal government is a privilege, not a constitutionally guaranteed right—at least not as far as this court is aware."[273] Finally, the judge dismissed Huawei's separation-of-powers agreement, noting that Congress's investigative function is essential to its ability to make laws and did not amount to an unconstitutional adjudication by the legislative branch.

In response, Huawei continued to assert that its rights had been violated. It released a statement that "[w]hile we understand the paramount significance of national security, the approach taken by the US government in the 2019 NDAA provides a false sense of protection while undermining Huawei's constitutional rights."[274] Huawei USA's security chief, Andy Purdy, stated that Huawei needs to provide more assurance to the public that its products are safe.[275] He argued that Huawei's products had already passed a U.S. national security review. He asserted that the U.S. should have adopted a risk mitigation program for Huawei equipment of the type that it has for Nokia and Ericksson products.[276] Purdy emphasized that those companies, both Finnish, have "deep ties to China."[277]

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[271] *Id.* at *24.

[272] *Id.* at *13.

[273] *Id.* at *28.

[274] Sherisse Pham, *US judge rejects Huawei lawsuit challenging a ban on its products*, CNN (Feb. 19, 2020), https://www.cnn.com/2020/02/19/tech/huawei-us-lawsuit-rejected/index.html; *see also* Steven Overly, *Court rejects Huawei's lawsuit over federal defense spending law*, POLITICO (Feb. 18, 2020), https://www.politico.com/news/2020/02/18/court-rejects-huawei-lawsuit-spending-115838.

[275] Jessica Bursztynsky, *Huawei security chief, after court setback, says the Chinese tech giant needs to do more explaining*, CNBC (Feb. 19, 2020), https://www.cnbc.com/2020/02/19/huawei-security-chief-calls-for-talks-after-legal-setback.html

[276] *Id.*

[277] *Id.*

2. Arrest of Huawei's CFO

Meanwhile, four months after signing NDAA section 889 into law, the U.S. picked another legal battle with Huawei. On December 6, 2018, Canada arrested Meng Wanzhou, Huawei's CFO, on the U.S.'s behalf.[278] Meng, also known as Sabrina Meng or Cathy Meng, is also the deputy chairwoman of Huawei's board and the daughter of its founder. Meng was charged with bank fraud and violations of the U.S.'s sanctions on Iran. On March 3, 2019, three days before Huawei filed suit against the U.S. over the NDAA, Meng sued the Canadian government for violations of the Canadian constitution related to her arrest.[279] In arguments reminiscent of those in Huawei v. U.S., Meng argued in Canadian court in January 2020 that her extradition would violate the Canadian constitution because her alleged infractions were not crimes in Canada.[280] Here, Meng also appeared to be making arguments that would play to the Chinese public as if Western legal systems were mockeries of themselves, and that would make Canada look like it was in the pocket of the U.S. if it complied. As of this writing, Meng remains in house arrest in Canada pending the outcome of her extradition hearings.

3. U.S. v. Huawei

On February 13, 2020, the U.S. struck another legal blow against Huawei. A U.S. District Court in Brooklyn returned a superseding indictment against Huawei and its official and unofficial U.S. subsidiaries, plus Sabrina Meng.[281] The indictment came just days after four PLA members were charged with hacking Equifax in 2017, stealing trade secrets and personal data of about 145 million Americans, an escalation of other U.S. lawfare against China.[282] The indictment included sixteen charges involving racketeering, fraud, money laundering, and theft of source code, conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (RICO),

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[278] Daisuke Wakabayashi & Alan Rappeport, *Huawei C.F.O. Is Arrested in Canada for Extradition to the U.S.*, N.Y. TIMES (Dec. 5, 2018), https://www.nytimes.com/2018/12/05/business/huawei-cfo-arrest-canada-extradition.html?searchResultPosition=31.

[279] Zable, *supra* note 244.

[280] See Dan Bilefsky and Tracy Sherlock, *Huawei Executive Meng Wanzhou's Extradition Fight: What to Know*, N.Y. TIMES (Jan. 19, 2020) https://www.nytimes.com/2020/01/19/world/canada/19meng-wanzhou-extradition-huawei.html

[281] Superseding Indictment, United States v. Huawei, Docket No. 1:18-cr-00457 (E.D.N.Y. Jan. 24, 2019).

[282] David McCabe, Nicole Hong, and Katie Benner, *U.S. Charges Huawei With Racketeering, Adding Pressure on China*, N.Y. TIMES, (Feb. 13, 2020).

and conspiracy to steal trade secrets.[283] All of these were related to Huawei's alleged practice of fraudulently and deceptively misappropriating technology from six U.S. technology companies. Andy Purdy, Huawei's chief security officer in the U.S., denied these charges and claimed they are a part of a broader U.S. "campaign to carpet bomb Huawei out of existence."[284] Purdy said that the U.S.'s pressure on its allies to avoid business with Huawei and its attempts to block American companies from selling parts to Huawei will ultimately hurt the U.S.[285] As of this writing, a trial date has not been set.

F. China's Institutional Lawfare

China has also been engaging in institutional lawfare. China defines the creation of law and legal institutions to create its goals as part of its Three Warfares. The U.S. has advanced its interests for years as the primary funder of the world's most prominent international organizations, including the United Nations (U.N.), the World Bank, and the International Monetary Fund.[286] China occupies a prominent position within the U.N. through its seat on the Security Council, but exerts far less influence over the U.N.'s many agencies than the U.S. does, and gives them far fewer dollars. Instead, China has begun to form its own institutions, such as the Asian Infrastructure Investment Bank (AIIB) and the New Development Bank (NDB) as an alternative to the U.S.-led international organizations.

Most prominent among Chinese-led international organizations is the AIIB. Around 2009, Chinese leaders began to discuss forming a multilateral development bank to rival the Japanese-led Asian Development Bank. This desire grew out of the then-global financial crisis as well as China's desire to increase its role in international monetary policy. Chinese President Xi Jinping proposed the creation of the Asian Infrastructure Investment Bank (AIIB) in 2013, and by 2015 the bank's articles of agreement went into force. The bank expanded rapidly. In January 2016, the AIIB had 57 founding member states, and it currently has 100 from around the world, including close allies of the U.S. from Asia and Western Europe.[287] The U.S. and Japan are not members. It is now the second largest development bank in the world, behind the World Bank.

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[283] Superseding indictment, *supra* note 281.

[284] McCabe et al., *supra* note 284.

[285] Id.

[286] On the U.S.'s role in the creation and running of these organizations, see MARK MAZOWER, GOVERNING THE WORLD: THE HISTORY OF AN IDEA (2012).

[287] ASIAN INFRASTRUCTURE INVESTMENT BANK, https://www.aiib.org/en/index.html.

The AIIB's stated mission is "to improve social and economic outcomes in Asia" through investment in sustainable infrastructure.[288] More specifically, China intended the bank to finance infrastructure that is part of its Belt and Road Initiative (BRI, also known as the One Belt, One Road Initiative).[289] BRI, Xi's most ambitious foreign policy effort, is a vast infrastructure-building program throughout Asia.[290] China has ambitious plans to connect rural China to Europe through Central Asia, as well as a "Maritime Silk Road" that would connect Southeast Asia through China's southern provinces through ports and railways. Many observers question China's ability to fairly administer a multi-lateral development bank while simultaneously pursuing BRI, given potential conflicts of interest.

China's ability to form multilateral financial institutions like the AIIB and NDB with breathtaking speed shows both its commitment to institutional lawfare and its potential for using it to wield significant power. China has convinced half of the world's states to join the AIIB, despite its transparent conflict of interest between administering the bank fairly while prioritizing BRI in its foreign policy goals. International organizations exert significant force through "soft law," and conditionality programs by the World Bank and IMF have been highly successful at causing states to fall into line with U.S. foreign policy goals.[291] China will likely follow the U.S.'s playbook to exact demands from clients of the AIIB and to advance its own foreign policy goals, especially via BRI.

IV. GLOBAL ESCALATION OF LAWFARE

Lawfare has been on the rise elsewhere in recent years. Countless examples abound, from Palestine's use of the International Court of Justice, International Criminal Court, and United Nations to gain the recognition as a state that it could not achieve militarily, to information lawfare used against the U.S. by Iran following its killing of General Qassem Soleimani in January 2020, to border disputes in the International Court of Justice that

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[288] *Id.*; *About AIIB: Introduction*, ASIAN INFRASTRUCTURE INV. BANK, https://www.aiib.org/en/about-aiib/index.html ("By investing in sustainable infrastructure and other productive sectors in Asia and beyond, we will better connect people, services and markets that over time will impact the lives of billions and build a better future.").

[289] MARTIN A. WEISS, CONG. RESEARCH SERV., R44754, ASIAN INFRASTRUCTURE INVESTMENT BANK (AIIB) 6 (2017).

[290] Peter Cai, *Understanding China's Belt and Road Initiative*, LOWY INST. FOR INT'L POL'Y (Mar. 1, 2017).

[291] Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000).

were unresolved through military conflict.[292] Thorough discussion of these and other examples of lawfare lies beyond the scope of this paper. Case studies of lawfare efforts by Russia in Ukraine and the Arctic and by the U.S. in Afghanistan will demonstrate the need for a U.S. lawfare strategy to counter our adversaries' strategic and military objectives and bolster our own. Russian use of lawfare demonstrates how another U.S. adversary implements lawfare in a sophisticated way against the U.S., and how the U.S. has failed to respond. U.S. use of lawfare to support its efforts building the rule of law in Afghanistan presents a positive use of lawfare, offensively, to achieve a military objective. However, these efforts had limited success, partially because of the lack of a comprehensive U.S. lawfare strategy to support them.

A. Lawfare by Russia

Russia's lawfare doctrine is not as explicitly developed as China's Three Warfares. No Russian term for lawfare exists. However, lawfare is at least implicitly part of the "Gerasimov Doctrine" that drives current military operations against its adversaries. The Gerasimov Doctrine, first espoused by Russian general Valery Gerasimov in 2013, defines Russia's strategy of hybrid warfare.[293] The doctrine advocates non-military tactics over conventional warfare to achieve political and strategic goals.[294] The doctrine prioritizes political, economic, and informational means of defeating an adversary. Updating the doctrine in 2016, Gerasimov stated that "Hybrid Warfare requires high-tech weapons and a scientific

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[292] On Palestine, see e.g., Liron Libman, *The ICC's Prosecutor [sic] Decision to Investigate the Situation in Palestine and Palestinian Statehood*, LAWFARE, Jan. 15, 2020, https://www.lawfareblog.com/iccs-prosecutor-decision-investigate-situation-palestine-and-palestinian-statehood; On Soleimani, see Jill Goldenziel, *Iran and the Rhetoric of International Law*, BALKINIZATION (Jan. 10, 2020), https://balkin.blogspot.com/2020/01/iran-and-rhetoric-of-international-law.html. On border disputes in the ICJ, see Jill I. Goldenziel, *Law as the Weapon of the Weak?: Parties and Politics in the International Court of Justice* (forthcoming, 2021).

[293] Hybrid warfare by an adversary can be defined as "[a]ny adversary that simultaneously and adaptively employs a fused mix of conventional weapons, irregular tactics, terrorism and criminal behavior in the battle space to obtain their political objectives." Frank G. Hoffman, *Hybrid vs. compound war, The Janus choice: Defining today's multifaceted conflict*, ARMED FORCES J. (Oct. 1, 2009).

[294] Valery Gerasimov, *Contemporary Warfare and Current Issues for the Defense of the Country,* MIL. REV. 22 (Harold Orenstein trans., Nov. – Dec. 2017), https://www.armyupress.army.mil/Portals/7/military-review/Archives/English/Contemporary-Warfare-and-Current-Issues-for-the-Defense-of-the-Country.pdf; Ben Sohl, *Influence Campaigns and the Future of International Competition*, REALCLEAR DEFENSE (Sept. 12, 2017), https://www.realcleardefense.com/articles/2017/09/12/influence_campaigns_and_international_competition_112280.html.

substantiation."[295] Russia has used law to provide the substantiation behind its actions in hybrid warfare. Like China, Russia uses lawfare in connection with information warfare.[296] It uses law to provide legal justification for its aggressive actions, both to its own population and the international community.

Russian lawfare must be understood in the context of Russia's criticism of international law. In general, Russia views international law as a tool that the West selectively wields against it.[297] The current Chairman of Russia's Investigative Committee, Aleksander Bastrykin, has claimed that the Russian constitution has supremacy over all norms of international law and argued that international law is a Western hybrid warfare tool that must be fought through social, informational, and financial means.[298] Russia's Ombudsman, Major General Moskalkovska, has deemed human rights to be a theme exploited by the West to destabilize Russia, and that Russia should protect Russian compatriots abroad as a result.[299] He also defines his role as protecting Russian values within Russia, which do not include international human rights law.[300] Since the Cold War, Russia has spoken out against Western use of international law and called out the West for hypocrisy in using and flouting it.[301] Defensively and offensively, Russia has developed a strategy of lawfare to defend itself against these Western actions and also to offensively and proactively achieve its own military goals.

Russia has a long history of enacting or adopting laws to justify foreign intervention. Mark Voyger, a preeminent scholar of Russian lawfare, marks the birth of Russian lawfare in 1774, when Catherine the Great attempted to use the Treaty of Kucuk-Kakarca to grant Russia the power to intervene militarily in the Balkans in support of Orthodox Christian populations within the Ottoman Empire.[302] Russia has similarly used international humanitarian law to justify Russian "humanitarian operations" as part of its "responsibility to protect" Russian-friendly populations—whether or not they are ethnically Russian, speak Russian, or Russian Orthodox—in Moldova in 1992, Georgia in 2008 and 2014, Syria

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[295] Valery Gerasimov, *Based on the Experience of Syria*, 97 MIL. REV. 8-17 (2016).

[296] Voyger, *supra* note 297, at 36.

[297] Mark Voyger, *Russian Lawfare – Russia's Weaponization of International Law and Domestic Law: Implications for the Region and Policy Recommendations*, 4 J. BALTIC SECURITY 35, 37 (2018).

[298] *Id.* at 40.

[299] *Id.*

[300] *Id.*

[301] *See generally* THOMAS D. GRANT, *The West's Interventions and Russia's Argument*, *in* AGGRESSION AGAINST UKRAINE: TERRITORY, RESPONSIBILITY, AND INTERNATIONAL LAW 171 (2015).

[302] *Id.*

since 2011, and Ukraine in 2014.[303] In a similar vein, the Duma passed a 2018 law commemorating 1783 as the date of Crimea's 'accession' to the Russian empire to retroactively justify its annexation of Crimea.[304] This law was the capstone of a hybrid warfare strategy in which lawfare played a major role in hostilities involving Russia and the Ukraine in 2014.

1. Russian Lawfare in Ukraine

Russia used lawfare to justify its illegal actions against Ukraine in 2014. On February 23, 2014, Ukraine's pro-Russian president, Victor Yanukovych, was ousted from power by a parliamentary vote.[305] Political unrest ensued, with the U.S. and the EU supporting the parliamentary decision.[306] Within days, on February 27, armed men stormed the Crimean parliament and hoisted the Russian flag. They similarly occupied airports and additional government buildings, seizing the Crimean peninsula in a nearly bloodless coup.[307] Although they wore what appeared to be Russian military uniforms, these men did not wear any distinctive insignia, as required by international law. Locals began to refer to them as "little green men," a play on the toy soldiers popular with children, and also a reference to alien creatures from American movies who are not to be trusted.[308]

In March and April, these "little green men," together with local protestors and the backing of Russian troops amassed at the border, began a similar takeover of majority-Russian areas of Eastern Ukraine.[309] On April 6, protestors and little green men occupied government buildings and broadcast facilities in the Donbas region, including Donetsk, Luhansk, Slovyansk, and more than a dozen other towns,. The little green mean used similar tactics to what they did in Crimea. This time, the fight was not bloodless.

Putin initially denied that these "little green men" were Russian or sent by Russia, claiming that they were local Crimean self-defense forces. Only on April 17, 2014 did Putin finally admit that they were actually

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[303] *Id.* at 37; *Here's why the Russian Orthodox Church is deeply connected to the Syrian War*, WASH. POST (Dec. 19, 2018), https://www.washingtonpost.com/video/world/heres-why-the-russian-orthodox-church-is-deeply-connected-to-the-syrian-war/2018/12/19/63f60dbe-e35c-11e8-ba30-a7ded04d8fac_video.html.

[304] Voyger, *supra* note 297, at 36.

[305] Shane R. Reaves & David Wallace, *The Combatant Status of Little Green Men and Other Participants in the Ukraine Conflict*, 91 INT'L L. STUD. 361, 365-66 (2015).

[306] *Id.* at 366.

[307] *Id.*

[308] John R. Haines, *How, Why, and When Russia Will Deploy Little Green Men—and Why the US Cannot*, Foreign Policy Research Institute, March 9, 2016.

[309] Reaves & Wallace, *supra* note 305, at 369.

SPETNATZ, or Russian Special Forces.[310] However, he claimed that all of the fighting in Eastern Ukraine was being done by local residents.[311]

Russia accompanied its military efforts in Ukraine with a legal assault. A draft law was waiting in the Duma on February 28, 2014 that would have allowed Russia to legally incorporate regions of neighboring states following controlled local referenda.[312] The following day, the "little green men" appeared in Crimea. The draft law was later withdrawn following the Crimea referendum, presumably because it was unnecessary after the successful and bloodless occupation of Crimea. Voyger notes that the timing of the law exemplifies Russia's high level of integration of lawfare with its military functions.[313] On March 16, 2014, Russia again used legal means to justify its actions by manipulating a referendum in Crimea, in which the vast majority voted to have the peninsula join Russia.

In April 2014, the Duma updated Russia's citizenship laws to factor in historical, cultural and ethnic links to Russia and grant automatic citizenship to populations of contested regions.[314] Russia also prosecuted high-ranking Ukrainian leaders *in absentia* for the humanitarian crisis in Eastern Ukraine, helping to bolster the Russian case for intervention (even as Russia claims no intervention is actually taking place).[315] Russia followed this tactic by engaging in "passporting," distribution of Russian passports in Crimea to boost the numbers of citizens there.[316] Russia had previously used this technique against Georgia in the contested regions of Abkhazia and South Ossetia. Russia justified this action under its "responsibility to protect" Russian citizens as well as the right to self-determination. In April 2016, Russia amended its citizenship law to allow granting of Russian citizenship based on historical, cultural, and linguistic principles.

Few in the international community have given much credence to Russia's justifications for its interventions in Ukraine. However, they nonetheless serve to undermine the international legal regimes designed to prevent such actions, effectively allowing Russia to erode the system.[317] As

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[310] *Id.*

[311] *Id.*

[312] *See* Eur. Comm'n for Democracy through Law, *Opinion on "Whether Draft Federal Law No. 462741-6 on Amending the Federal Constitutional Law of the Russian Federation on the Procedure of Admission to the Russian Federation and Creation of a New Subject Within the Russian Federation Is Compatible with International Law,"* 98th Sess., Opinion No. 763/2014 (Mar. 21, 2014).

[313] Voyger, *supra* note 297, at 38.

[314] *Id*.

[315] *Id*.

[316] *Id.* at 38-39.

[317] *Id*. at 37.

with China's use of "little blue men," Russia likely wished to have plausible deniability for the little green men's actions. If Ukrainian troops had fired on the little green men, Russia would have been able to both deny its involvement and to point a finger at Ukraine for targeting civilians. Sending in little green men instead of SPETNATZ in its regular uniforms thus lessened the risk of escalation and made the optics of the conflict look less aggressive—a similar strategy to China's use of its maritime militia. Russia also blurred the lines of whether any conflict could be seen as an international armed conflict or a non-international armed conflict, further complicating the legality of any military actions by Ukraine or foreign interventions.[318]

2. Russian Lawfare in the Arctic

Russian lawfare threatens to undermine global cooperation in the Arctic. Though the region was a source of significant tensions between the U.S. and the U.S.S.R, it has been a model for global cooperation since the end of the Cold War. The eight states with territory above the Arctic Circle—Canada, Denmark, Finland, Iceland, Norway, Russia, Sweden and the U.S.— signed the Ottawa Declaration in 1996, establishing a framework for cooperative governance through the Arctic Council and agreeing to decide all disputes by consensus.[319] The Arctic Council has enjoyed strong cooperation, with member states working to establish "rules of the game" on issues like pollution, shipping, climate change, search-and-rescue infrastructure, and security coordination.[320] Most importantly, the coastal states (Canada, Denmark, Norway, Russia and the U.S.) agreed to rely on UNCLOS for the demarcation of maritime boundaries and settlement of territorial disputes in the region.[321] All Arctic countries except Norway, however, have opted out of UNCLOS's binding dispute resolution provisions.[322]

In 2013, Russia issued a Strategy of Development of the Arctic Zone of the Russian Federation and ensuring National Security up to

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[318] *See generally* Reaves & Wallace, *supra* note 305.

[319] Declaration on the Establishment of the Arctic Council, art. 7, Sept. 19, 1996.

[320] Ilulissat Declaration, May 29, 2008; Nuuk Declaration, May 12, 2011.

[321] EKATERINA KLIMENKO, RUSSIA'S ARCTIC SECURITY POLICY: STILL QUIET IN THE NORTH? 6 (2016).

[322] Thomas C. Farrens, *Shrinking Ice, Growing Problems: Why We Must Act Now to Solve Emerging Problems Posed by an Ice-Free Arctic*, 19 TRANS. LAW & CONTEMP. PROBS. 655-579 (2010), at 671; see also Sascha-Dov Bachmann & Andres B. Munoz Mosquera, *Current Developments: Battleground Arctica and Lawfare Opportunities*, 108 AMICUS CURIAE 19, 20 (2016).

2020."[323] This strategy had the goal of enforc[ing] Russia's sovereignty, and reinforcing its military capabilities, in the Arctic."[324] Russia began to build up its forces and bases in the Artic region. Arctic Council Cooperation began to wither as a result, just as tensions began to fester over Russia's actions in Ukraine.[325] Sanctions by the U.S. and the European Union against Russia ended a period of collaboration between Russian and Western oil companies in the Arctic, forcing Russia to suspend projects and scramble to find viable partners—at precisely the moment that plummeting oil revenues put Russia's resource-driven economy in peril.[326] Russia continued to build up its military forces in the region and engage in lawfare to assert claims to sovereignty over large swaths of the Arctic. It also passed domestic legislation to support its sovereignty over the region. Russia has thus ensured that any Western interference in its Arctic activities will violate its domestic law, and positioned itself to argue that they violate international law as well. For this reason, Bachmann and Mosquera Munoz call this strategy "time bomb" lawfare.[327]

a. Straight Baselines and the Northern Sea Route

One major Russian strategic interest in the Arctic is the Northern Sea Route (NSR)—the path through the Arctic Sea running from the Barents Sea in the West to the Bering Strait in the East.[328] The sea route connects manufacturing centers in East Asia with consumer markets in Europe. The NSR has several advantages over the better-traveled southern shipping route through the Suez Canal: it avoids congestion in the Strait of Malacca, piracy in the Horn of Africa, and ongoing geopolitical instability in the Middle East, and can potentially shave weeks off of transit times.[329] This strategic potential, especially as an easy conduit to move Arctic oil and gas to both Western and Eastern markets, has made the NSR a significant focus of Russia's lawfare efforts.

Russia has used lawfare to assert sovereignty over much of the NSR. To do so, it interprets UNCLOS to its advantage. Using the concept of the

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[323] Cited in Bachmann and Munoz Mosqera, id., at 21.

[324] Id.

[325] VEERA LAINE, TOIVO MARTIKAINEN, KATRI PYNNÖNIEMI & SINIKUKKA SAARI, ZUGZWANG IN SLOW MOTION: THE IMPLICATIONS OF RUSSIA'S SYSTEM-LEVEL CRISIS 5 (2015).

[326] Klimenko, *supra* note 321, at 7-8.

[327] Bachmann and Munoz Mosqera, *supra* note 322, at 21.

[328] L.G., *The Economist Explains: What is the Northern Sea Route?*, ECONOMIST (Sept. 24, 2018), https://www.economist.com/the-economist-explains/2018/09/24/what-is-the-northern-sea-route.

[329] *Id*.

straight baseline, Russia has attempted to enlarge the domain of its territorial sea using lines that connect the dots around several island groups off the Arctic Coast. Under UNCLOS, straight baselines are technically only available to archipelagic states, and in cases of small island chains in the "immediate vicinity" of states' coastlines.[330] Russia bases its claims on three large archipelagos, Novaya Zemlya, Severnaya Zemlya, and the New Siberian Islands. These islands are located some 20 miles off the Russian coast—a distance which strains the term "immediate vicinity."[331] By asserting that these straits are Russian internal waters, Russia can use them as choke point and effectively exercise complete control over the NSR. Russia can restrict entry, charge steep transit tariffs, and impose stringent regulations on shipping vessels.[332]

The U.S. and EU have argued that Russia's straight baselines are incompatible with international law, and that UNCLOS' regime on international navigation trumps any Russian claim to control over the straits. Russia counters that the straits are not used by other states with sufficient frequency for international transit rules to apply.[333] This claim has not been resolved; indeed, it has been outstanding since 1963, when the U.S. and USSR exchanged diplomatic protests after a U.S. survey of the Laptev Sea.[334] The persistent American objection may be enough to prevent the Russian claim from solidifying, especially given the Arctic Council's rules on unanimity in decision-making. However, the U.S. legal position presents other challenges. The U.S. must effectively argue that UNCLOS rules regarding transit passage represent a codification of pre-existing customary international law. Both Russia and Canada, both members of the Arctic Council, dispute this claim.[335]

b. Pollution and Shipping Regulations

Russia has also attempted to exercise significant control over the NSR by instituting strict regulations on pollution and shipping safety. These efforts rely on Article 234 of UNCLOS, which grants states the ability to regulate

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[330] UNCLOS, *supra* note 69, art. 2, 8.

[331] *Russia: Straight Baseline Claim*, NAT'L GEOSPATIAL INTELLIGENCE AGENCY, https://www.jag.navy.mil/organization/documents/mcrm/RussiaChart.pdf.

[332] EUROPEAN COMMISSION, LEGAL ASPECTS OF ARCTIC SHIPPING: SUMMARY REPORT 7 (2010).

[333] *Id*. at 8.

[334] Andrey Todorov, *The Russia-USA legal dispute over the straits of the Northern Sea Route and similar case of the Northwest Passage*, 29 ARCTIC & NORTH 62, 63 (2017). Canada has attempted to assert straight baselines in its own Northwest Passage, and thus generally supports Russia in the NSR dispute.

[335] *Id*. at 68.

pollution, including indirect pollution prevention by way of safety and navigation rules to lower the risk of accidents and oil spills, in ice-covered parts of their exclusive economic zone (EEZ), "where particularly severe climatic conditions…create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance."[336] Russia uses this rule to its advantage in the NSR, applying regulations that are significantly stronger than the generally accepted international rules and standards (GAIRAS). These rules include mandatory insurance and ice-breaker escorts (both of which are expensive and exclusively controlled by Russia), as well as requirements for state approval and carrying of state pilots.[337] These rules effectively allow Russia to exclude foreign military and government vessels, and to blur the boundary between the territorial sea and the EEZ, effectively allowing Russia to assert stringent control over a vastly larger area of the NSR than UNCLOS would permit.[338] Once again, an impasse exists between U.S. claims that transit passage rules trump any right Russia has under Article 234, and Russian responses that the U.S. lacks any basis to claim transit passage rights in the NSR under UNCLOS or customary law.[339] Indeed, until shipping through the NSR becomes a major factor in global trade, which is unlikely to occur until oil prices rise significantly, this dispute will likely remain unresolved.[340] Meanwhile, Russia continues to build military bases and search-and-rescue capacity on its Arctic coast to strengthen its claims to sovereignty in the NSR.[341] It has also held snap military exercises in the region, in violation of an OECD agreement, to support its intent.[342] Analysts have pointed to this buildup as a "lawfare time bomb," which will give Russia the pretext to claim Western interference with the NSR as an invasion of Russian sovereignty.[343]

c. The Lomonosov Ridge and Mendeleev Ridges and the Quest for Oil

In 2007, a team of Russian underwater "scientists" audaciously planted a Russian flag on the sea floor below the North Pole, some 600 miles to the

[336] UNCLOS, *supra* note 69, art. 234.

[337] EUROPEAN COMMISSION, *supra* note 332, at 16.

[338] Munoz Mosquera & Bachmann, *supra* note 322, at 14-15.

[339] EUROPEAN COMMISSION, *supra* note 332, at 18.

[340] JUHA KAÄPYLAÄ, HARRI MIKKOLA & TOIVO MARTIKAINEN, MOSCOW'S ARCTIC DREAMS TURNED SOUR? ANALYSING RUSSIA'S POLICIES IN THE ARCTIC 5 (2016).

[341] Andres Munoz Mosquera & Sacha Dov Bachmann, *Russia's Lawfare in the Arctic*, 17-1 OPERATIONAL L. Q. 14, 15 (2016).

[342] Voyger, *supra* note 297, at 39.

[343] Munoz Mosquera & Bachmann, *supra* note 322, at 15.

north of the northernmost point in Russia's territory.[344] Russia thus tried to create facts on the ground where prior efforts to claim the territory legally had failed. In 2001, Russia filed a claim to before the UNCLOS Commission on the Limits of the Continental Shelf (CLCS). Russia argued that, under UNCLOS, it was justified in extending its EEZ by 460,000 square miles, giving it exclusive right to vast reserves of oil and broadening the area over which it can attempt to assert *de facto* control under Article 234 by orders of magnitude.[345] To support its claim, Russia cited UNCLOS' provisions on the continental shelf, which allow states to delineate the outer reaches of their EEZ based on "the natural prolongation of its land territory to the outer edge of the continental margin" extending from its landmass.[346] Russia has asserted since shortly after ratifying UNCLOS in 1997 that its continental shelf includes the Lomonosov and Mendeleev Ridges, underwater land formations which extend out from the Russian territorial sea and run for hundreds of miles below the Arctic Ocean.[347] The audacity of this claim has been compared to Chinese machinations in the South China Sea.[348]

Russia's claim was initially rejected in 2002 based on a lack of sufficient evidence.[349] Russia then made scientific discovery in the region a top strategic priority, launching at least 10 scientific expeditions to gather evidence over the next decade, including the 2007 flag-planting expedition.[350] Russia submitted a revised claim in 2015, but it has been countered by [351] Denmark (on behalf of Greenland) in 2014,[352] and Canada in 2019.[353] Canada and Denmark also assert that the Lomonosov and

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[344] Tom Parftt, *Russia plants flag on North Pole seabed*, GUARDIAN (Aug. 2, 2007), https://www.theguardian.com/world/2007/aug/02/russia.arctic.

[345] Munoz Mosquera & Bachmann, *supra* note 322, at 15.

[346] UNCLOS, *supra* note 69, art. 76, 77.

[347] Klimenko, *supra* note 321, at 11.

[348] *Id*.

[349] Klimenko, *supra* note 321, at 11-12.

[350] *Id.*

[351] PARTIAL REVISED SUBMISSION OF THE RUSSIAN FEDERATION TO THE COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF IN RESPECT OF THE CONTINENTAL SHELF OF THE RUSSIAN FEDERATION IN THE ARCTIC OCEAN: EXECUTIVE SUMMARY (2015), https://www.un.org/Depts/los/clcs_new/submissions_files/rus01_rev15/2015_08_03_Exec_Summary_English.pdf

[352] PARTIAL SUBMISSION OF THE GOVERNMENT OF THE KINGDOM OF DENMARK TOGETHER WITH THE GOVERNMENT OF GREENLAND TO THE COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF: THE NORTHERN CONTINENTAL SHELF OF GREENLAND (2014), https://www.un.org/Depts/los/clcs_new/submissions_files/dnk76_14/dnk2014_es.pdf.

[353] PARTIAL SUBMISSION OF CANADA TO THE COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF REGARDING ITS CONTINENTAL SHELF IN THE ARCTIC OCEAN: EXECUTIVE SUMMARY (2019), https://www.un.org/Depts/los/clcs_new/submissions_files/can1_84_2019/CDA_ARC_ES_EN_secured.pdf.

Mendeleev Ridges extend from their own continental shelves, thus putting a vast area of the sea and the oil and gas reserves beneath it in contest between all three countries.[354] The scientific validity of the claims is difficult to evaluate, and if the ridges in question do extend fully from one continental shelf to another, multiple claims could have merit. In the meantime, the fact of multiple existing claims will likely freeze the dispute for now. CLCS rulings are strictly recommendatory, and UNCLOS Article 83 marks international agreements between states as the sole format for decisively adjudicating contested claims. Thus, a conclusive answer will likely involve a settlement.[355] In the meantime, Russia is likely to continue to create facts on the ground to make it more likely that the settlement will be in its favor.

3. Lawfare Against Russia?: Ukraine and China

Recently, Ukraine has combatted Russian lawfare by using lawfare of its own. The Ukraine filed suit against Russia in the International Court of Justice, arguing that Russia's activities in Donbas and Crimea support terrorism and violate the Convention Against Racial Discrimination.[356] On November 8, 2019, the Court ruled that it has jurisdiction in the case, and as of this writing, a hearing on the merits is pending. Ukraine has also filed a case before an International Tribunal for the Law of the Sea (ITLOS) alleging that Russia violated UNCLOS regarding its coastal rights in the Black Sea, the Sea of Azov, and the Kerch Strait by detaining three Ukrainian naval vessels and their 24 servicemen.[357] On May 25, 2019, the tribunal ordered Russia to release the boats and the servicemembers while the case is pending.[358]

It remains to be seen how successful Ukraine's lawfare will be in achieving military objectives and/or setting the conditions for negotiation with Russia. Some of Russia's other neighbors may follow suit. Estonia and

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[354] *Frozen Conflict*, ECONOMIST (Dec. 17, 2014), https://www.economist.com/international/2014/12/17/frozen-conflict.

[355] Yumiko Iuchi & Asano Usui, *The Functions and Work of the Commission on the Limits of the Continental Shelf*, REV. OF ISLAND STUD. (Sept. 19, 2013), https://www.spf.org/islandstudies/readings/b00005.html; UNCLOS, *supra* note 69, art. 83.

[356] Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Judgment, 2019 I.C.J. 1 (Nov. 8).

[357] Press Release, Int'l Tribunal for the Law of the Sea, Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation), Provisional Measures (May 25, 2019), https://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR_284_En.pdf.

[358] *Id.*

Latvia have announced that they are exploring legal options to obtain compensation from Russia for Soviet occupation damages.[359] Russia will likely attempt to spin Ukraine's use of these international fora as a Western-backed attempt to use illegitimate Western legal tools against it.

China may be a legal supporter or adversary in future Russian lawfare. China has recently developed an Arctic strategy, despite its lack of proximity to the Arctic. Given the decline in oil prices of the past decade, combined with sanctions against Russia, many Russian oil projects in the Arctic are underfunded.[360] The funding gap in many of the Russian projects has been filled by investors and state-run companies from China.[361] Chinese vessels have also been testing the NSR as a potential shipping corridor to link Chinese factories with European shipping hubs like Rotterdam.[362] In addition to new shipping routes and energy sources, China seeks to build up polar research capacity to study how sea ice melt may affect China in the future.[363] To enable this strategy, China joined the Arctic Council as an observer in 2013, a move that Russia reluctantly supported.[364] China has thus far remained silent on Russian claims to sovereignty over the NSR. However, China seems to be positioning itself to challenge Russia's continental shelf claims and assert the Arctic Sea as a region open to all nations, if and when the opportunity and capacity materialize to exploit Arctic energy resources.[365] It remains to be seen whether Russia and China will use lawfare against each other to achieve their strategic goals.

B. U.S. Institutional and Information Lawfare in Afghanistan

The U.S. has used institutional and information lawfare to support its efforts in Afghanistan. The U.S. established a Rule of Law Field Force in Afghanistan (ROLFF-A) in September 2010 to build legal institutions within Afghanistan and bolster the legitimacy of counterinsurgency (COIN) efforts. The idea behind ROLFF-A was that the U.S. needed to establish Afghan legal institutions to win the trust of the Afghan population and keep them from supporting violent non-state actors instead. The Rule of Law thus served to legitimize the new Afghan government while delegitimizing

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[359] Voyger, *supra* note 297, at 41.
[360] Klimenko, *supra* note 321, at 7.
[361] *Id.* at 32.
[362] *Id*. at 8.
[363] *Id*. at 1.
[364] Steven Lee Myers, *Arctic Council Adds 6 Nations as Observer States, Including China*, N.Y. TIMES (May 15, 2013), https://www.nytimes.com/2013/05/16/world/europe/arctic-council-adds-six-members-including-china.html.
[365] CAMILLA T. N. SØRENSEN & EKATERINA KLIMENKO, EMERGING CHINESE–RUSSIAN COOPERATION IN THE ARCTIC 39 (2017).

adversaries through institutional lawfare. Building these institutions would also provide an information lawfare function that would bolster the narrative of building just and functional government of Afghanistan and building public trust in those institutions. Then-Brigadier General Mark Martins, the commander of ROLFF-A, defined its actions as "lawfare."[366] In building the rule of law in Afghanistan, Martins defined rule of law as "hold[ing] all entities in society, public and private, including the state itself, [] accountable to laws."[367] He further notes that "The rule of law increases in proportion to which the laws are made by a legislature or by some process representative of the people, enforced by police and security forces that themselves follow the law, and interpreted and applied by judges who are evenhanded, honest, and independent."[368] Use of lawfare—including portraying U.S. efforts as legal—creates a legitimacy and authority for the Afghan government that the enemy cannot match.[369] People generally prefer a government that adheres to the rule of law.[370] However, this only applies if the government has legitimacy: both the power to protect its people and the authority to do so.[371]

Building the Rule of Law and legal institutions was thus considered a powerful weapon: ROLFF was deployed in the area where the Pashtun insurgency was the strongest. ROLFF-A had four primary objectives in ten provinces: "(1) develop human capacity, (2) build sustainable infrastructure, (3) facilitate justice sector security, and (4) promote awareness of the law and access to justice."[372] Specific activities included improving judicial infrastructure, training judges and law enforcement, and public outreach regarding law and trials. They also improved criminal justice capacity, dispute resolution services, and anti-corruption institutions.[373] It also placed importance on emphasizing the legality of other U.S. COIN actions, including "conventional warfare, counterterror operations, security force capacity building, intelligence collection, physical security measures, public

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[366] Mark Martins, *Lawfare: So Are We Waging It?*, LAWFARE (Nov. 25, 2010), https://www.lawfareblog.com/lawfare-so-are-we-waging-it.

[367] Jack Goldsmith, *supra* note 55.

[368] *Id.*; *see also* Mark Martins, Brigadier Gen., U.S. Army, *Rule of Law in Iraq and Afghanistan?* (Apr. 18, 2011) (transcript available at https://harvardnsj.org/wp-content/uploads/sites/13/2011/04/Forum_Martins_.pdf).

[369] Mark Martins, *Reflections on "Lawfare" and Related Terms*, LAWFARE (Nov. 24, 2010), https://www.lawfareblog.com/reflections-lawfare-and-related-terms.

[370] Martins, *supra* note 366.

[371] *Id.*

[372] SPECIAL INSPECTOR GENERAL FOR AFGHANISTAN RECONSTRUCTION, RULE OF LAW IN AFGHANISTAN: U.S. AGENCIES LACK A STRATEGY AND CANNOT FULLY DETERMINE THE EFFECTIVENESS OF PROGRAMS COSTING MORE THAN $1 BILLION 10 (July 2015) [hereinafter SIGAR Report].

[373] Goldsmith, *supra* note 367.

information, cyber security and warfare, economic development, electoral and other initiatives to connect government to the people."[374] These efforts served to delegitimize and weaken the enemy's will on a political level. Professor Ganesh Sitaraman further emphasizes the importance of building the rule of law for counterinsurgency and integrating it into military operational planning.[375] Sitaraman notes that transitional justice, too, can build legitimacy in a new government and help keep infighting from harming unity of effort.[376] By building judicial and law enforcement capacities, and by using those for transitional justice efforts, a government can build legitimacy and win the hearts and minds of people.

ROLFF's efforts had mixed success. The Special Inspector General for Afghanistan Reconstruction (SIGAR) reported that efforts to develop the rule of law in Afghanistan were hampered by at least four factors.[377] Two of those were funding-related: most of the interagency was unable to account for the total funds spent in support of rule of law development.[378] The agencies also did not implement appropriate measurement mechanisms and evaluations of the performance of their efforts.[379] Unsurprisingly, pervasive corruption in Afghanistan also hindered rule of law development efforts.[380]

The primary reason rule of law building efforts were impaired, however, was the lack of "a comprehensive rule of law strategy to help plan and guide" the efforts of U.S. agencies.[381] The report notes that "Without an approved strategy in place, U.S. efforts may not be properly coordinated across agencies, monitored for alignment with U.S. and Afghan development goals and objectives, or managed effectively to ensure proper expenditure of U.S. taxpayer monies."[382] The agencies did not have a consistent policy for the scope of their rule of law-building activities. The 66 programs that DoD, DoJ, State, and USAID developed for rule of law assistance between 2003 and 2014—at the cost of more than $1 billion—thus suffered from lack of coordination.[383] The development of a U.S. lawfare strategy could have made U.S. rule of law-building efforts in Afghanistan far more effective, and likely less expensive as well.

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[374] Martins, *supra* note 369.

[375] GANESH SITARAMAN, THE COUNTERINSURGENT'S CONSTITUTION: LAW IN THE AGE OF SMALL WARS 241 (2013).

[376] *Id.* at 109.

[377] SIGAR Report, *supra* note 372.

[378] *Id.*

[379] *Id.*

[380] *Id.*

[381] *Id.* at 1-2.

[382] *Id.*

[383] *Id.*

With respect to ROLFF-A in particular, the DoD failed to implement the performance management guidelines for DoD rule of law activities, including assessment, monitoring, and evaluation of progress.[384] It also could not account for all of the funds spent. [385] ROLFF-A never conducted a baseline study of rule of law efforts in Afghanistan, which made it difficult to measure progress. A 2011 data collection effort to assess performance on certain rule of law indicators was poorly designed, insufficiently tied to ROLFF-A's primary operational efforts, and poorly measured and reported.[386] DoD could not even keep track of some basic, easily measurable statistics. In recording the number of public trials held by province, officials only recorded data for 8 of 10 program provinces in 2011, only 3 in mid-2012, and only one in late 2012.[387] As a general matter, performance indicators were measured inconsistently across programs and provinces.[388] Officials cited insufficient training and lack of security support as reasons for this.[389]

The program did have some successes. These included improved security at justice facilities; training, mentoring, and technical support programs such as the Justice Center in Parwan. The latter efforts measurably led to more efficient case management, higher conviction rates, and improved quality of evidence in the legal process.[390] However, frequent staff turnover, lack of institutional knowledge, and lack of information-sharing by the staff hampered these efforts. Furthermore, lack of security for justice staff also hampered ROLFF-A's efforts."[391]

The development of a lawfare strategy could have solved many of the problems with ROLFF-A that were identified by SIGAR. SIGAR recommended the creation and implementation of a comprehensive rule of law strategy for Afghanistan.[392] It should include a common definition and clarification of the scope of rule of law activities that should be conducted by U.S. agencies.[393] It also recommended improved mechanisms for evaluating program performance and for tracking funding. It recommended ongoing assessment of the sustainability of rule of law programs by the U.S., and eventually by the Afghan government, given the security situation

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[384] *See generally*, RULE OF LAW HANDBOOK: A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES, CENTER FOR LAW AND MILITARY OPERATIONS (Mike Cole ed., 2011).

[385] SIGAR Report, *supra* note 372, at 10.

[386] *Id.*

[387] *Id.*

[388] *Id.*

[389] *Id.*

[390] *Id.*

[391] SIGAR Report, *supra* note 372, at 11.

[392] *Id.* at 22.

[393] *Id.*

and persistent corruption in Afghanistan, and the level of the Afghan government's commitment to these programs.[394] As discussed below, a lawfare strategy, implemented by a lawfare office within the U.S. government, could have anticipated these recommendations and implemented them.

V. ANALYSIS: WHY THE U.S. NEEDS A LAWFARE STRATEGY

The U.S. must develop a lawfare strategy in order to effectively coordinate with our allies and other law-abiding states and combat our adversaries. Indeed, the U.S. has already fallen behind in this area due to lack of a lawfare strategy. U.S. efforts building the rule of law in Afghanistan exemplify how an improved lawfare strategy could have enhanced and reduced the need for our military efforts there. Proactive use of lawfare by the U.S. in the future would improve efforts to advance our national strategy, reduce costs to the government, and potentially save lives.

A. Using the Legal Instrument of National Power

The U.S. has failed to include lawfare as part of its traditional discussion of the instruments of military power. The military has long taught that the traditional instruments of military power are encompassed by the acronym DIME: diplomatic, informational, military, and economic power. Some scholars have expanded this acronym to "DIMEFIL," or "MIDLIFE," adding financial, intelligence, and law enforcement to the instruments of power.[395] With the exception of economic sanctions, the use of lawfare is not included in any of these, and thus barely considered as an instrument of possibility for the U.S. to assert power.

Skeptics might argue that the U.S. does not need a lawfare strategy. After all, the U.S. has achieved a relatively successful foreign policy without one. Without a written strategy, the U.S. is not constrained by any particular doctrine in its use of lawfare, and may benefit from strategic ambiguity. However, the benefits of creating a lawfare strategy far outweigh the costs. The ability for the U.S. to coordinate its efforts and better collaborate with our partners and allies will strengthen its efforts and may obviate the need for some military actions. Furthermore, the U.S. needs lawfare more than ever before. First, with more of warfare shifting to the information realm, the U.S. needs to use law as part of its information

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[394] *Id.*

[395] DEP'T OF THE ARMY, FIELD MANUAL-INTERIM 3-07.22, COUNTERINSURGENCY OPERATIONS (2004).

strategy to bolster the legitimacy of its own actions and delegitimize the enemy's. Failure to do so will allow the enemy to dominate the narrative of conflict and undermine U.S. actions. Even if a battle is won on the ground, it will be lost in the court of public opinion if the public does not believe that U.S. actions are legal. Backlash against the U.S. government after the Soleimani strike provides a prime example of this.

Second, a U.S. lawfare strategy will be more effective the sooner that it is implemented. The U.S. has enjoyed decades of supremacy as the world's strongest superpower and the primary shaper of international law and international affairs. However, with the rise of China and with the ability of adversaries like Russia and Iran to challenge the U.S. by non-kinetic means, the age of U.S. supremacy in shaping international affairs may be coming to an end. Now is thus the time for the U.S. to take advantage of its current standing and reputation and history of following and shaping the rule of law to develop a comprehensive lawfare strategy.

B. Lawfare's Shaming Function

A lawfare strategy may be particularly useful against China because of China's association of shame with illegality. China's reaction to the Philippines/China arbitration exemplifies China's shame at being accused of violating international law. As Professor Tom Ginsburg and Taisu Zheng have documented, the importance of following law to the legitimacy of the Chinese government has only increased.[396] Xi Jinping's government has used law to centralize its power and bolster its own legitimacy.[397] The use of law to bolster Chinese government power dates back to the 1840s and 1850s, when law began to be seen as key to China's modernization.[398] Many felt that China needed to adopt Western law and legal norms in order to modernize and have China compete in the global marketplace, maintain political stability, and gain geopolitical stature.[399] Slow adoption of Western-style law and legal institutions proceeded. Ginsburg and Zheng argue that with the exception of the Cultural Revolution years, China has pursued throughout its modern history a program of elite-driven legalization, including a gradual adoption of Western-style legalization.[400] Although the Hu Jintao regime displayed some resistance to Western

[396] Taisu Zheng & Tom Ginsburg, *China's Turn Toward Law*, 60 VA J. INT'L L. 306 (2019).
[397] *See generally*, *id.*
[398] *Id.* at 384.
[399] *Id.*
[400] *Id.*

legalism, the Xi Jinping regime has adopted it enthusiastically since 2012, pushing domestic legal reforms.

Why has Xi's government done so? Ginsburg and Zheng cite bottom-up pressures from the Chinese people as one primary reason.[401] The Chinese population increasingly considers law and legality to be crucial to sociopolitical legitimacy.[402] Social demand for legality strongly affects government legitimacy in the eyes of the Chinese people and the people's support for government.[403] Toward the end of his rule, Hu noted that the rule of law was one of the fundamental demands of the Chinese people, and because of this "the Party and the state must operate strictly according to the law."[404]

Ginsburg and Zheng suggest several reasons why the Chinese people place a premium on legality. China's people believe that law improves the predictability and reliability of its government's actions, and that it may also be important for economic growth and personal enrichment.[405] The Chinese people tend to be very afraid of government abuse, and believe in law as a way to check this.[406] The population has also absorbed the government's pro-legality rhetoric of approximately the last 30 years.[407] As a result, the majority of Chinese citizens, and especially intellectual and political elites—although not the CCP itself—share a political commitment toward law, rule-oriented government, and adjudication.[408]

While Ginsburg and Zheng focus primarily on Chinese domestic law, it follows that the Chinese people attach strong significance to China's following international law. Adherence to international law would seem key for China's legitimacy and success as a state, and by extension, the legitimacy of its government. Other scholars have also noted China's turn to international law and international organizations to bolster its legitimacy, both domestically and in the international community.[409] Whether or not

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[401] *Id.* at 367.
[402] *Id.*
[403] *Id.*
[404] *Id.* at 378.
[405] *Id.* at 380.
[406] *Id.*
[407] *Id.* at 382.
[408] *Id.* at 388.
[409] *See* Xue Hanqin, *China and International Law: 60 Years in Review*, CHATHAM HOUSE 3 (Mar. 8, 2013) ("Since late 1970s, China has joined almost all major intergovernmental organizations and become party to over 300 multilateral conventions. From a defiant challenger to an active participant, it is now taking part in the international law-making process in all fields.").

China adheres to the norms of most international organizations, it has engaged more frequently with them in recent years.

The international community's "naming and shaming" of China as a violator of international law may also be significant to the Chinese population. Scholars have recognized the important role of shame and guilt in Asian culture, and Chinese culture and particular, which differs from the way that these emotions are experienced in Western culture.[410] The cultural experience of shame stems from a blend of Confucian and Taoist beliefs. Confucian cultures emphasize that one's life is an inheritance from one's ancestors.[411] Family is conceptualized as part of the "great self " (da wo), and individuals are obligated to protect the family from threat.[412] An individual's identity is defined by one's system of relationships, which form part of the self.[413] To remain a member of the group, one must be held in esteem by the group and therefore abide by its expectations.[414] Shame stems from the fear that one's inadequacies will result in being rejected from or expelled by the group.[415]

The Asian cultural conception of shame is perhaps best known in Western culture through the example of the Japanese samurai. These warriors would perform hara-kiri, a gruesome suicide ritual, to preserve their honor if they were disgraced. In recent years, many middle-class Koreans who were unable to repay debts incurred during the global financial crisis also committed suicide in hopes of clearing their families from shame. The strength of shame as a cultural norm persists for Asians in the diaspora. Asian-Americans have been shown to be more shame-prone than whites in the U.S.[416]

Researchers have defined at least three sub-types of guilt and shame in Asian cultures. One type of shame, *fan zui gan*, is literally translated as the feeling of breaking a law. It is guilt associated with committing a crime, breaking a rule, or otherwise violating negative duties and externally-defined obligations to others.[417] Another form of guilt concerns law-abidingness as a form of social responsibility. It is experienced as a response to one's own violations of negative duties that originate from an

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[410] *See* Olwen Bedford & Kwang-Kuo Hwang, *Guilt and Shame in Chinese Culture: A Cross-cultural Framework from the Perspective of Morality and Identity*, 33 J. FOR THE THEORY OF SOCIAL BEHAVIOUR 127 (2003).

[411] *Id.*

[412] *Id.*

[413] *Id.*

[414] *Id.* at 130.

[415] *Id.*

[416] *Id.*

[417] *Id.* at 136.

external source.[418] An associated concept is loss of face, another type of guilt and shame that researchers have identified. In traditional Confucian societies, one's dignity and self-respect are tied to one's ability to fill social obligations in front of others. This form of guilt and shame stems from not having lived up to standards or values.[419]

The importance of guilt and shame related to law-breaking in Chinese culture suggests that the nation's perceived violations of law would be especially culturally significant. Indeed, China's shame at being found to violate UNCLOS in the Philippines/China violation is evident in its attempts to denounce the arbitration as a violation of law itself, and in the massive domestic and international media campaigns that it launched at the time the arbitration was filed, at the time of the decision on jurisdiction, and at the time the decision came out. The government appeared afraid of not living up to the international community's standards or values, and thus had to frame its denunciation of the decision in terms of those same values. China's strict warnings to Vietnam and other countries considering filing lawsuits over their South China Sea claims also suggest how scared China is of being accused of violating international law, and potentially losing in an international tribunal.[420]

VI. WHAT A US LAWFARE STRATEGY SHOULD LOOK LIKE

The U.S. must develop a lawfare strategy to effectively counter our adversaries and work with our partners and allies. It must reconceive lawfare as part of warfare, as our chief adversaries have done long ago. Lawfare can be used strategically for offensive and defensive purposes. It can be used for legal preparation of the battlefield, and to anticipate and counter enemy actions within and outside of combat. It should be used in close connection with information operations to shape and control the narrative of conflict. It must be part of each government agency's strategy to achieve its mission. And it must be incorporated into planning at the strategic, operational, and tactical levels of war.

Observers have noted that the U.S. has fallen behind in combatting our adversaries due to its lack of a whole-of-government strategy to combat lawfare or wage it proactively.[421] Moreover, our allies and partners are

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[418] *Id.* at 139.

[419] *Id.* at 136.

[420] *Id.* at 138.

[421] For example, The U.S. Army Judge Advocate General School, the Legal Advisor to NATO's Supreme Allied Commander in Europe, and the Foundation for Defense of Democracies convened two "Lawfare Workshops" in January 2020 including military and

highly concerned about lawfare and have devoted far more resources to using lawfare and developing a lawfare strategy. Israel, for example, has an office in its Ministry of Justice devoted to lawfare.[422] The Office of the Legal Advisor at NATO's SHAPE, has personnel working on lawfare, which they call "Legal Operations," and convenes an annual conference on the topic.[423] More, better, and coordinated use of lawfare can enable mission success, improved coordination with our partners and allies, and help to save lives.

A. Implementing a Lawfare Strategy: A U.S. Lawfare Office

A lawfare strategy must involve a high level of coordination between all government agencies involved in lawfare. These currently include the Department of Defense, the Department of Justice, Department of State, USAID, Department of the Treasury, the Department of Commerce, and the U.S. Trade Representative. The National Security Staff and the intelligence community must also be involved in any lawfare coordination strategy. Civilian and military intelligence personnel must be trained in legal intelligence, including identification of when our adversaries are using lawfare, such as by creating facts on the ground. The intelligence community can also help identify and implement optimal strategies for countering it.

A central lawfare office should be tasked exclusively with developing and coordinating U.S. lawfare strategy and supporting these agencies' lawfare efforts. Part of the reason that the U.S. government is behind in developing a lawfare strategy is that no single office in the U.S. government "owns" lawfare. Few individuals within the U.S. government or military are trained and educated in lawfare. The staff of the lawfare office, then, would be the primary subject matter experts (SMEs) on lawfare within the U.S. government.

Where this lawfare office would be located will ultimately be determined by politics and the priorities of any particular presidential administration. Ideally, the office would be part of the National Security Staff, or an interagency effort, to avoid bureaucratic wrangling over the office's function and assure interagency coordination. Short of that, the

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civilian officials from NATO, the US military and executive branch agencies, think tanks, and academics (including the author). The workshops created recommendations for what the U.S. government should do to better use lawfare.

[422] The Counter-Terrorism and Foreign Litigation Division at the Israeli Ministry of Justice has personnel devoted to lawfare.

[423] See Office of the Legal Advisor to NATO's Commander of the Supreme Headquarters Allied Power Europe (SHAPE).

Departments of Defense or State are logical places for a lawfare office. DoD, as the agency manned, trained, and equipped to fight our nation's foreign adversaries, is well-poised to coordinate whole-of-government approaches to identifying and stopping opportunities for adversary lawfare, including making plans for military actions. DoS, as the agency in charge of implementing U.S. foreign policy, is best positioned to integrate lawfare into the U.S.'s strategic foreign policy goals. Given the history of DoD and DoS turf wars and failure to coordinate, however, an interagency effort may be more likely to achieve the synchronization of efforts that is crucial for a lawfare strategy to succeed. Regardless of where the office is located, it must work closely with lawfare liaisons from all of the government agencies listed above, and possibly others.

B. Developing and Implementing a Lawfare Strategy

The primary functions of the lawfare office would be the development of a lawfare strategy, development and provision of lawfare expertise; and training and education. The office would also be responsible for coordinating with our partners' and allies' lawfare efforts and identifying opportunities for collaboration and support for their efforts.

1. Creating a Lawfare Strategy

The lawfare office should devise a lawfare strategy in coordination with the interagency and provide expertise and support for implementing that strategy throughout the U.S. government. The strategy should be developed with regard to achieving particular objectives toward particular adversaries, and also toward general actions that will prepare the legal battlefield or shape the operational environment for future U.S. military actions or to forestall future adverse actions by other states.

To develop the strategy, the lawfare office should identify circumstances where the U.S. and its adversaries can create or are creating facts on the ground for their future advantage.[424] It should also identify areas vulnerable for lawfare, such as unresolved territorial disputes between Russia and China and their neighbors, and unresolved claims to Arctic EEZs. China's dispute with Japan over claims in the East China Sea have simmered in recent years, but China is attempting to seed facts on the ground there as well.[425] China may also seek to exploit "fault lines"

[424] Trachtman, *supra* note 54, at 281.

[425] See generally Congressional Research Service, *supra* note 10; see also Cheng, *supra* note 31.

between U.S. laws and the laws of its allies and partners, particularly during combat.[426] With these vulnerabilities identified, the office can then make recommendations on how to proactively use lawfare against these adversaries or defend against potential lawfare by them.

The support of the intelligence community and military intelligence will be critical to enable these functions. For example, tracking Russian attempts to create legislation to justify foreign intervention, triangulated with identification of Russia's attempts to create facts on the ground, will enable the U.S. and its allies to better predict Russian political and military actions.[427] Russia's legislative efforts take time to prepare and are generally done publicly, because of their information function to the Russian public, enabling easy observation by U.S. intelligence. Tracking Russian lawfare efforts will better able the U.S. and its allies to take action against Russian lawfare and related military actions, perhaps by getting ahead of the conflict narrative, or by filing lawsuits of their own.

Like Russia, China is engaging in legal efforts that a lawfare office should monitor to determine whether they will later be used to support military action. China has passed laws that eventually could be used to support potential military action against Taiwan.[428] In March 2005, the 10th National People's Congress adopted the Anti-Secession Law. This law, by implication, says that Taiwan is part of China and thus subject to its law. Passage of this law alone does not qualify as lawfare. However, this law could easily be used to justify Chinese military actions against Taiwan if it should move for independence, just as Russia has used similar legislation to justify foreign aggression. The law could be used to counter claims that Chinese military action would violate international law. A lawfare office should monitor China's legislation involving Taiwan and related military actions to anticipate if, when, and how China might act next against Taiwan.

The lawfare office should also proactively identify opportunities for instrumental lawfare, or legal alternatives to potential kinetic conflicts with its adversaries. It should also identify opportunities for institutional lawfare, such as avenues for the U.S. to advance its foreign policy and military objectives through international law and institutions. Conversely, it should also monitor how our adversaries are using international law and institutions to advance their own aims and make recommendations on how to counter their efforts. For example, if China is using conditional aid through AIIB to advance its foreign policy goals, the U.S. might support the

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[426] See Cheng, *supra* note 31.

[427] Voyger, *supra* note 297, at 40-41.

[428] Kim Holmes, *Lawfare, Chinese Style*, HERITAGE FOUND. (May 2, 2012), https://www.heritage.org/asia/commentary/lawfare-chinese-style.

World Bank in offering more attractive terms, or warn target states of China's intents in offering these loans. The lawfare office should also identify opportunities for proxy lawfare by the U.S. and its allies and adversaries. The U.S. might, for example, commence legal actions at Chinese and Russian companies besides Huawei and Kapersky. In the past, non-state actors or their proxies have used NGOs to advance legal claims against their adversaries.[429]

The lawfare office could also provide tactical support for military activities. For example, it could leverage its expertise to conduct baseline feasibility studies for future lawfare and rule of law-building initiatives, rectifying a key mistake made with ROLFF-A in Afghanistan. It could analyze compliance with international legal rulings and the soft law of international institutions to enable the military and interagency to "name and shame" those who violate international law.

More broadly, the lawfare office could also work with the State Department to strengthen the norms of international law that China, Russia, and its other adversaries are trying to erode.[430] It can create publications and send experts to advance the interpretations of international law favored by the U.S. It could also advocate for our partners and allies to resolve disputes in legal fora whenever possible to bolster their use.

The lawfare office could also evaluate the importance of ratifying international treaties, developing new international legal instruments, or participating in international courts to U.S. strategy or military efforts. For example, experts have made strong arguments that ratification of UNCLOS would positively or negatively affect U.S. foreign policy.[431] When the U.S. declines to ratify a treaty but says that it will follow customary international law, as it does with UNCLOS, the lawfare office could work to delineate and publicize the U.S. position so as to bolster the relevant legal norms. If the U.S. can better articulate what areas of customary international law it follows and why, it can help shape the international narrative in its favor,

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[429] See generally Kittrie, supra note 4, Chapter 6 (detailing NGO lawfare against Israel on behalf of Palestinian causes).

[430] See Aurel Sari, *Blurred Lines: Hybrid Threats and the Politics of International Law*, Hybrid CoE, STRATEGIC ANALYSIS, at 5 (arguing that Russia and other states are instrumentalizing international law for their strategic objectives and that some of the methods they employ threaten the rule of law).

[431] For an argument supporting ratification of UNCLOS, see *Before the Seapower and Projection Forces Subcomm.: Hearing on Seapower and Projection Forces in the South China Sea*, 114th Cong. 4 (2018) (statement of James Kraska, Professor, Stockton Center for the Study of International Law, U.S. Naval War College); for an argument against ratification of UNCLOS, see Cheng, *supra* note 31. For a balanced discussion, see Congressional Research Service, *supra* note 10.

influence legal strategies by other states, and delegitimize its adversaries' positions.

Such a strategy of bolstering particular legal norms may be particularly effective against China and Russia. As noted above, China's and Russia's use minority interpretations of UNCLOS to further their territorial claims. The office can bolster the more commonly accepted interpretations of UNCLOS's straight baseline and other relevant provisions to influence state opinions and eventual court rulings in its favor. It can work with the State Department to pressure Canada and other allies to change their interpretations of UNCLOS, if they support U.S. adversary states. The lawfare office can also identify provisions of UNCLOS and other laws that are ripe for exploitation in adversary lawfare efforts. The UNCLOS example suggests that a broader strategy by the lawfare office of bolstering relevant international norms can constitute lawfare against particular adversaries, even as it may primarily serve a foreign policy goal.

The office should also identify opportunities for reforms of U.S. laws that restrict the U.S.'s ability to combat lawfare by our adversaries, or hamper our ability to proactively fight lawfare. For example, Jill Goldenziel and Manal Cheema have documented how the First Amendment and Privacy Act have hindered the U.S.'s efforts to combat Russian disinformation campaigns such its electoral interference in the 2016 presidential election.[432] Goldenziel and Cheema proposed changes to legislation, doctrine, and policy to enable civilian agencies to better combat disinformation while protecting the civil liberties of U.S. persons.[433] A lawfare office could identify similar opportunities for foreign adversaries to exploit U.S. law and situations in which law hampers U.S. efforts, and propose and advocate for policy and legislative efforts to fix them. Additionally, the lawfare office could work with relevant agencies to advocate for the passage of any statutory authorities necessary to enable their lawfare efforts. New authorities may be necessary for the military to employ lawfare and to collaborate with intelligence agencies to do so.[434]

2. Coordination with Allies, Partners, and Experts

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[432] Jill Goldenziel and Manal Cheema, The New Fighting Words?: How U.S. Law Hampers the Fight Against Information Warfare 22 U. PA. J. CONST. L. 81 (2019) (with Manal Cheema).

[433] Id.

[434] See Jill Goldenziel and Manal Cheema, *A Covert Problem?: Reforming the U.S. Code to Enable Civil/Military Cooperation in the Intelligence Community* (forthcoming, 2021) (arguing for the creation of a new framework to enable civilian intelligence agencies and military operations to be mutually supporting).

The lawfare office should also cultivate a network of trusted experts who can assist its efforts. Many academics and think tanks in the U.S. and throughout the world are already studying lawfare. Mark Voyger has proposed organizing these into a "lawfare defense network" that coordinates with a proposed NATO Lawfare Centre of Excellence.[435] The U.S.'s network, by contrast, should be concerned with offensive and defensive lawfare. Coordination with government offices in partner and allied countries that deal with lawfare, if they exist, will also be critical to development and updating of a U.S. lawfare strategy. Independent experts in partner and allied countries, who are experts in foreign languages and legal systems, will be critical to track lawfare efforts and update a U.S. lawfare strategy accordingly. The lawfare office can also help partners and allies develop lawfare strategies to help it achieve its goals.

The lawfare office can also help identify opportunities for information lawfare. It can identify opportunities for our adversaries to spin U.S. actions as illegal, and work to counter this. For example, if a lawfare office had existed before the recent strike on General Soleimani, it could have easily anticipated that commentators—and Iran itself—would spin the U.S.'s actions as illegal.[436] Accordingly, the U.S. government could have gotten ahead of the narrative and provided substantiation that the strike was legal from the moment the strike became public. Judge Advocates trained in lawfare may have cautioned commanders against making the strike without clear evidence and strong argument for the legality of the strike, given the potential for retaliation using information lawfare.[437] Before potential combat, the U.S. could engage in information lawfare by publicizing adversary violations of international law, thus framing a narrative to support the legality of its future military actions.

3. Lawfare Training and Education

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[435] Voyger, *supra* note 297, at 42.

[436] *See, e.g.*, Oona A. Hathaway, *The Soleimani Strike Defied the U.S. Constitution*, ATLANTIC (Jan. 4, 2020); Rebecca Ingber, *If there was no 'imminent' attack from Iran, killing Soleimani was illegal*, WASH. POST (Jan. 15, 2020), https://www.washingtonpost.com/outlook/2020/01/15/if-there-was-no-imminent-attack-iran-killing-soleimani-was-illegal/; Rebecca Ingber & Adil Ahmad Haque, *Iran's Shifting Views on Self-Defense and 'Intraterritorial' Force*, JUST SECURITY (July 3, 2019), https://www.justsecurity.org/64800/irans-shifting-views-on-self-defense-and-intraterritorial-force/. For an example of how the U.S. could have gotten ahead of the narrative, see Major General (ret.) Charlie Dunlap, The killing of General Soleimani was lawful self-defense, not "assassination, Lawfire, January 3, 2020, available at https://sites.duke.edu/lawfire/2020/01/03/

[437] The author takes no position on the legality of the strike itself.

The lawfare office should provide training and education at all levels of the military and interagency. Given the importance of identifying our adversaries' use of lawfare, especially during legal preparation of the battlefield and combat itself, it is critical that such training and education not be limited to military lawyers. At a minimum, military commanders their executive and operations officers, and intelligence officers should also be trained to identify opportunities for lawfare, and to identify when our adversaries have the opportunity to use it. For example, our adversaries may seek to raise doubts about which nation started a conflict through legal arguments.[438] Commanders, judge advocates, and servicemembers should be trained to carefully observe and record facts and work to seize the initiative on the information narrative to avoid false accusations.

The lawfare office should also support military planning at the strategic, operational, and tactical levels. The lawfare office can help proactively identify opportunities to use lawfare at these levels, whether through the U.S. or its partners and allies; and how our adversaries might use lawfare against us during combat.

To train and educate servicemembers, the lawfare office might develop a lawfare doctrine or joint publication in conjunction with relevant units such as the Army's Training and Doctrine Command. In the military, training and education on theory, concepts, and doctrine often crystallizes around the study of a central text or publication that serves to state a service's or the Joint Forces' position on a particular topic.[439] These publications are then taught throughout professional military education, and the ideas and terminology within them seep into the consciousness of the armed services. If such a publication on lawfare is designed correctly, it could be used for educational purposes in the interagency as well.

The lawfare office can help educate military commanders and judge advocates in appropriate operational tactics to combat lawfare. For example, knowing that Hamas would use human shields against it in 2014, Israel launched massive counter-efforts to win the narrative in its favor. Israel increased precautions and warnings issued to civilians in Gaza to levels unprecedented in modern warfare.[440] The Israeli Defense Forces (IDF) made thousands of phone calls and leaflet drops and used the media to reach Gaza residents in an effort to avoid casualties.[441] It also called influential citizens and asked them to evacuate civilians. Israel used these tactics at great risk, since it gave its plans to its enemy. However, Israel likely

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[438] See Cheng, *supra* note 31.

[439] *See, e.g.*, JOINT CHIEFS OF STAFF, JOINT CONCEPT FOR INTEGRATED CAMPAIGNING (Mar. 16, 2018); Joint Chiefs of Staff, *supra* note 44.

[440] Munoz Mosquera and Bachmann, *supra* note 61, at 76.

[441] *Id.* at 77.

wagered that protecting civilians and being able to bolster its own legitimacy and counter Hamas's narrative with evidence was worth these risks. The lawfare office can prepare commanders and judge advocates for such battlefield exploitation lawfare contingencies and prepare defensive measures and an information lawfare response.

The lawfare office must train military commanders and judge advocates to spot opportunities for potential lawfare by adversaries and make decisions on how to counter them quickly. It will be critical for these servicemembers to train using scenarios that require quick formulation of moral and legal cases for military actions, that have high political consequences, and that will likely be reviewed by a future court or international organization.[442]

During combat, the lawfare office can continue to emphasize the legality of U.S. actions. To do so, servicemembers junior and senior, officers and enlisted, must be educated on the legality of their mission and how to interface with the media on the topic. Emphasizing the legality of U.S. actions can engender public support for military actions and also bolster our own servicemembers' will to fight. Conversely, portrayal of our adversaries' actions as illegal can help break the will of their forces if they do not believe they are fighting for a just cause.

Such use of law as messaging can be a powerful tool in affecting the will to fight. The importance of the will to fight cannot be overstated. As discussed above, China has identified the will to fight as crucial to military victory from the time of Sun Tzu through its most recent publications on the Three Warfares. The Department of Defense has gone so far as to name "honor" as a principle of the law of war, in addition to the traditional international humanitarian law principles of necessity, proportionality, distinction, and humanity.[443] DoD has done so because it recognizes that servicemembers' belief that their actions are legal is integral to their being able to serve with honor and maintain the will to fight. Compliance with international law is what separates the actions of servicemembers in combat from murder and other criminal actions. For servicemembers to believe in what they are tasked to do in combat, they must believe that their actions are legal and just.

VII. CONCLUSION

[442] *Id.* at 79.

[443] DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL vii (Dec. 2016) (listing honor under principles in the table of contents, along with military necessity, humanity, proportionality, and distinction).

Like the maritime and cyber realms, law has increasingly become a contested domain—much like a battlefield.[444] U.S. adversaries, like China and Russia have highly developed lawfare strategies. China goes as far as to define lawfare as one of the pillars of its military strategy. Law serves to substantiate actions taken under Russia's current military strategy, the Gerasimov Doctrine. The U.S. has used lawfare in only a haphazard manner and has not developed a lawfare strategy or even a point of contact within the U.S. government to focus on lawfare. Because of this, the U.S. has lost opportunities to use lawfare against our adversaries, and lost control of narratives critical to military success.

To prevail against adversaries, and to better collaborate with our partners and allies, the U.S. must develop a lawfare strategy. A lawfare strategy would unify and improve coordination of our government's efforts to combat our adversaries using law through the interagency and at the strategic, operational, and tactical levels. If the goal of war is to achieve a better peace, lawfare may help us reach that aim faster. The increased use of lawfare, despite its problematic implications, is overall a positive development in the history of war. States will never beat their swords into ploughshares and begin to use gavels instead. However, increased use of lawfare can conserve military resources, prevent destruction of civilian property, and save civilian and servicemembers' lives. Law is a non-lethal but potent weapon that leaves few bodies on the battlefield.

[444] See Sari, *supra* note 430.