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INTEGRATING LAWFARE AND WARFARE

JOEL P. TRACHTMAN*

Abstract: Current military campaigns are not waged solely on the physical battlefield, but in multiple other arenas. One such arena is lawfare: legal activity that supports, undermines, or substitutes for other types of warfare. In today's law-rich environment, with an abundance of legal rules and legal fora, strategists must evaluate the full scope of possible legal argumentation. Lawfare can substitute for warfare where it provides a means to compel specified behavior with fewer costs than kinetic warfare, or even in cases where kinetic warfare would be ineffective. As a result, lawfare can be strategically integrated into military command structures to bring about desired outcomes.

INTRODUCTION

Both kinetic warfare and legal dispute are forms of contestation.¹ Contestation can be physical or symbolic.² Legal arguments or claims are one type of symbolic contestation.³ Other types of symbolic contestation may be based on historical justification, moral philosophy, or religious doctrine.⁴ Symbolic contestation may be used alongside or in place of physical contestation.⁵ Although we may plan strategy around geographically defined contested arenas like the South China Sea, the Crimea, or Syria, we may also consider functionally defined arenas such as the cyber or biological arenas.⁶ Arenas for contestation may be geographic or functional, physical, or symbol-

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¹ See ORDE F. KITTRIE, *LAWFARE: LAW AS A WEAPON OF WAR* 1, 3 (2016); Timothy Noah, *Birth of a Washington Word*, SLATE (Nov. 20, 2002, 6:40 PM), http://www.slate.com/articles/news_and_politics/chatterbox/2002/11/birth_of_a_washington_word.html [<https://perma.cc/A4AU-B6JW>].

² See KITTRIE, *supra* note 1, at 6–7.

³ See *id.*

⁴ See Gerrie Ter Haar, *Religion: Source of Conflict or Resource for Peace?*, in BRIDGE OR BARRIER: RELIGION, VIOLENCE, AND VISIONS FOR PEACE 1, 13 (Gerrie Ter Haar & James J. Busuttill eds., 2005).

⁵ See KITTRIE, *supra* note 1, at 6–7.

⁶ See Peter Navarro, *China's Non-Kinetic "Three Warfares" Against America*, NAT'L INT. (Jan. 5, 2016), <http://nationalinterest.org/blog/the-buzz/chinas-non-kinetic-three-warfares-against-america-14808> [<https://perma.cc/S4R8-XJCC>]; see, e.g., *infra* notes 49–70, 85–91 and accompanying text.

ic.⁷ Any particular conflict may play out on multiple boards at once, and a move that is advantageous to a cause on one board may be disadvantageous on another board. The legal battlefield is largely a symbolic functional arena.⁸ We may refer to legal activity that supports, undermines, or substitutes for other types of warfare as “lawfare.”⁹ Because of its capacity to support, undermine, or substitute, lawfare must be integrated into military strategy.¹⁰

I. DEFINING LAWFARE IN THE 21ST CENTURY

Retired Air Force General, now a professor, Charles Dunlap has defined “lawfare” as “the strategy of using—or misusing—law as a substitute for traditional military means to achieve a warfighting objective.”¹¹ Is this a good thing or a bad thing? When the school at which I teach, The Fletcher School of Law and Diplomacy, was founded in 1933, the idealistic motivation was to make law applicable to conflicts between countries and thereby to eliminate war.¹² To those people, lawfare as a substitute for kinetic warfare seemed pretty good.¹³

The modern conventional idea of lawfare stems from the idea that a political group will seek to use humanitarian law—the law of armed conflict—to hamper or punish military action by another political group.¹⁴ The initial way that lawfare was considered by Dunlap and others was in an asymmetric circumstance where the weaker party, such as ISIS, the Taliban, or Hamas, would use humanitarian law improperly to hamper or punish op-

⁷ See, e.g., Navarro, *supra* note 6.

⁸ See KITTRIE, *supra* note 1, at 6–7.

⁹ See Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT’L AFFAIRS 146, 146 (2008), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5892&context=faculty_scholarship [<https://perma.cc/G6GQ-6Z7Y>].

¹⁰ See *Lawfare, the Latest in Asymmetries*, COUNCIL ON FOREIGN REL. (Mar. 18, 2003), <http://www.cfr.org/defense-and-security/lawfare-latest-asymmetries/p5772> [<https://perma.cc/7KT3-Q38T>].

¹¹ Charles J. Dunlap, Jr., *Lawfare Today . . . and Tomorrow*, in INTERNATIONAL LAW AND THE CHANGING CHARACTER OF WAR 315, 315 (Raul A. “Pete” Pedrozo & Daria P. Wollschlaeger eds., 2011) [hereinafter Dunlap, *Lawfare Today*]; see also Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* 4 (Nov. 29, 2001), <http://people.duke.edu/~pfeaver/dunlap.pdf> [<https://perma.cc/7J5V-MG3D>] [hereinafter Dunlap, *Law and Military Interventions*]. Dunlap’s 2001 paper was the first modern use of the concept, although in 1999 Qiao Liang and Wang Xiangsui, two officers in China’s People’s Liberation Army, began referring to warfare through law, by which they meant “seizing the earliest opportunity to set up regulations.” LIANG QIAO & XIANGSUI WANG, UNRESTRICTED WARFARE (1999) <http://redreform.com/unrestrictedwarfare.htm> [<https://perma.cc/4X94-64RV>]. This concept is familiar to lawyers and may bear some similarity to the U.S. freedom of navigation operations and other efforts to shape international law, but it is not directly related to Dunlap’s idea of lawfare. See *id.*

¹² See *Mission & Impact*, FLETCHER SCH. OF L. & DIPL., TUFTS U., <http://fletcher.tufts.edu/About/Mission-and-Impact> [<https://perma.cc/6YK8-YBJL>] (last visited Apr. 28, 2016).

¹³ See *id.*

¹⁴ See Dunlap, *Lawfare Today*, *supra* note 11, at 316.

posing forces.¹⁵ Jack Goldsmith—now a professor at Harvard Law School but then a lawyer in the George W. Bush Justice Department¹⁶—wrote in 2002 that “various nations, NGO’s, academics, international organizations, and others in the international community have been busily weaving a web of international laws and judicial institutions that today threatens [U.S. Government] interests.”¹⁷ This pejorative perspective is dependent on a view that the law will be misapplied by international public opinion or any available authoritative tribunals.¹⁸ The pejorative view of lawfare risks rejecting the democratic values and rule of law that we seek to defend.¹⁹

There are a number of other ways in which lawfare may operate.²⁰ David Kennedy, also a professor at Harvard Law School, provided a more neutral definition of lawfare.²¹ He called it the art of “managing law and war together.”²² In this Essay, I will develop a taxonomy as well as examples of different types of lawfare, cultivate a method for assessing the power and utility of lawfare, and suggest some parameters for an integrated lawfare command that would maximize the ability of a country to integrate lawfare in its offensive and defensive operations.

II. OPERATING IN A LAW-RICH ENVIRONMENT

In advanced market-based societies, there is a growing amount of law.²³ This law addresses all sorts of issues, including but not limited to personal security, taxes, environmental protection, and anticompetitive

¹⁵ See *id.*; QIAO & WANG, *supra* note 11, at 12.

¹⁶ Goldsmith served in the George W. Bush administration as Special Counsel at the Department of Defense and then Assistant Attorney General for the Office of Legal Counsel. JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 18, 21 (2007).

¹⁷ *Id.* at 60 (internal quotations omitted).

¹⁸ See *id.* at 59, 61.

¹⁹ See *id.* at 63.

²⁰ See DAVID KENNEDY, *OF WAR AND LAW* 125 (2006).

²¹ See *id.*

²² *Id.*

²³ See, e.g., Laurie Burkitt & Kersten Zhang, *Cough It Up: A Guide to China’s New Foreigner Social Security Tax*, WALL ST. J.: CHINA REAL TIME REP. (Oct. 28, 2011, 9:38 PM), <http://blogs.wsj.com/chinarealtime/2011/10/28/cough-it-up-a-guide-to-chinas-new-foreigner-social-security-tax/> [<https://perma.cc/F7RK-UC4Z>]; U.S. CHAMBER OF COMMERCE, *INCREASING ENVIRONMENTAL REGULATION*, <https://www.uschamber.com/regulations/increasing-environmental-regulations> [<https://perma.cc/DYC4-MTEN>] (last visited Apr. 28, 2016). See generally ALLEN & OVERY LLP, *GLOBAL ANITRUST TRENDS IN 2013*, http://www.allenoverly.com/SiteCollectionDocuments/Global_Antitrust_Trends_in_2013.PDF [<https://perma.cc/E6PG-ET78>] (presenting discussions of competition laws in the global context).

practices of businesses.²⁴ In the international law context, there is also a growing body of law of armed conflict, human rights law, environmental law, trade law, investment law, and tax law among many others.²⁵ Human rights proliferate.²⁶ Military forces must take into account environmental obligations, the health of the local population, local criminal responsibility for operations, and a host of other legal issues that have not traditionally been military concerns.²⁷

Sometimes a particular action or set of facts can be subject to multiple legal rules.²⁸ Some of the legal rules might be permissive while others are restrictive.²⁹ Traditional humanitarian law competes with human rights law for applicability.³⁰ More and more often, the outcome of a legal argument or case will depend on how the case is characterized or framed.³¹ This provides an incentive for legal creativity—seeking to frame issues in innovative ways and taking advantage of legal rules that help your side.³²

In addition to the increase in the number of legal rules, there is a proliferation of legal fora with the possibility to apply either different rules or the same rules differently.³³ The International Criminal Court is now a reality but so is the possible exercise of universal or other broad jurisdiction by

²⁴ See, e.g., Burkitt & Zhang, *supra* note 23; U.S. CHAMBER OF COMMERCE, *supra* note 23. See generally ALLEN & OVERY LLP, *supra* note 23 (presenting discussions of competition laws in the global context).

²⁵ See Tseming Yang, *The Top 10 Trends in International Environmental Law*, SANTA CLARA L. DIGITAL COMMONS (2013), <http://digitalcommons.law.scu.edu/facpubs/769/> [<https://perma.cc/EFG8-Z6C6>]; Dr. Shavit Matias, Deputy Att’y Gen., Int’l Affairs, State of Isr., Keynote Speech at Georgetown U. L. Center’s Event on Globalization: Globalization, International Law, and the State (Oct. 17, 2008), <http://www.justice.gov.il/Units/InternationalAgreements/Publications/Variance/SMatiasGolbalizationGeorgetownKeynoteSpeech08.pdf> [<https://perma.cc/K7R5-2632>]. See generally HOLMAN FENWICK WILLAN LLP, *GLOBAL TRENDS IN INTERNATIONAL TRADE AND THE LAWS THAT UNDERPIN THEM* (2015), <http://www.hfw.com/HFW-Global-trends-in-international-trade-February-2015> [<https://perma.cc/J2WY-DF5W>] (discussing legal issues that must be resolved for the development of international trade).

²⁶ See Jacob Mchangama & Guglielmo Verdirame, *The Danger of Human Rights Proliferation: When Defending Liberty, Less Is More*, FOREIGN AFF. (July 24, 2013), <https://www.foreignaffairs.com/articles/europe/2013-07-24/danger-human-rights-proliferation> [<https://perma.cc/8RGF-H4KS>].

²⁷ See, e.g., *id.*

²⁸ See Yuval Shany, *Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror*, in INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW 13, 13–14 (2011); William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUR. J. INT’L L. 741, 743–44 (2005).

²⁹ See Shany, *supra* note 28, at 14; Abresch, *supra* note 28, at 764–67.

³⁰ See Shany, *supra* note 28, at 13, 24–27; Abresch, *supra* note 28, at 742–43.

³¹ See Abresch, *supra* note 28, at 752–53.

³² See JOEL P. TRACHTMAN, *THE TOOLS OF ARGUMENT: HOW THE BEST LAWYERS THINK, ARGUE, AND WIN* 40–46 (2013).

³³ See Donald L. Morgan, *Implications of the Proliferation of International Legal Fora: The Example of the Southern Bluefin Tuna Cases*, 43 HARV. INT’L L.J. 541, 541–42 (2002).

judges in places like Spain, the Netherlands, Argentina, or even the United States.³⁴ Indeed, the United States also has, at times, heard—and may hear again—cases relating to foreign actions against foreign citizens.³⁵ The recent indictment of FIFA officers is an example of the United States exercising a broad scope of jurisdiction and is not completely different from the U.S. application of international rules against torture to Paraguayan police, except that in the FIFA context, the United States obtained arrest and extradition assistance from the Swiss government.³⁶

Not only is it a law-rich environment, it is also a surveillance-rich environment in which information about possible violations and evidence of possible violations are much more readily available than in the past.³⁷ What do Gaza and Ferguson, Missouri have in common? Both represented circumstances in which kinetic activities were under extraordinary scrutiny due to increasing availability of new recording technologies, drones, satellites, social media, and extended traditional media concern.³⁸ Governmental records of action seem less secure in this post-Snowden era than in the past.³⁹ These new sources of surveillance and evidence empower legal argumentation and prosecution like never before.⁴⁰

III. STRATEGIC DENIAL/VICTORY

The Nuremberg Principles and Article 2(4) of the Charter of the United Nations made aggressive war illegal.⁴¹ The Rome Statute of the International Criminal Court also includes a crime of aggression.⁴² Now, it is true that aggressive war has not ceased, and there are several important examples.⁴³ But the fact that murders occur does not mean that there is no law against murder or that the law against murder is ineffective. A more careful analysis is required.

³⁴ See *Universal Jurisdiction*, GLOBAL POL'Y F., <https://www.globalpolicy.org/international-justice/universal-jurisdiction-6-31.html> [<https://perma.cc/44AR-MKX5>] (last visited Apr. 28, 2016).

³⁵ See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980).

³⁶ See *id.*; Evan Perez & Shimon Prokupez, *U.S. Charges 16 FIFA Officials in Widening Probe*, CNN (Dec. 3, 2015), <http://edition.cnn.com/2015/12/03/sport/fifa-corruption-charges-justice-department/> [<https://perma.cc/WMH3-VC6S>].

³⁷ See KITTRIE, *supra* note 1, at 48.

³⁸ See Jonathan Rosenblum, *Think Again: What Do Gaza and Ferguson Have in Common?*, JERUSALEM POST (Sept. 4, 2014, 1:48 PM), <http://www.jpost.com/Opinion/Think-again-What-do-Gaza-and-Ferguson-have-in-common-374418> [<https://perma.cc/PJ4N-U77T>].

³⁹ See KITTRIE, *supra* note 1, at 48.

⁴⁰ See *id.*

⁴¹ See U.N. Charter art. 2(4); Formulation of the Nuremberg Principles, [1950] 2 Y.B. Int'l L. Comm'n 374, U.N. Doc. A/CN.4/L.2.

⁴² See Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 3.

⁴³ See, e.g., *Ukraine Crisis: Timeline*, BBC NEWS (Nov. 13, 2014, 3:16 PM), <http://www.bbc.com/news/world-middle-east-26248275> [<https://perma.cc/3JSP-NULH>] [hereinafter *Ukraine Crisis*].

In its most attractive form, lawfare would be used in place of kinetic warfare to prevent or even to roll back aggressive war and to restrict unjust actions.⁴⁴ The question is not whether this is a theoretical possibility—it is—but rather whether it is a practical possibility in particular situations. Part of the planning for war ought to include the question of whether assertions of the laws against aggressive war, along with available sanctions, will be sufficient to prevent aggressive war.⁴⁵ Part of the development of a comprehensive lawfare strategy would involve identifying ways of increasing the non-kinetic costs of aggressive war in circumstances where additional costs might induce an opponent to abstain. This apparently was not the case when Russia decided to separate Crimea from the Ukraine,⁴⁶ but the question remains: could Russia's opponents have found a way credibly to threaten higher costs with the effect of causing Russia to refrain?

One way to increase the costs of aggression is to prevent the aggressor from relying on possible claims of the legality of intervention.⁴⁷ This is costly in reputational terms as well as in reciprocity terms—it may be tougher for a violator to convince other countries to respect their international legal obligations to the violator or to accept its promises in the future.⁴⁸

In the case of the Crimea, Russia claimed that it was engaging in the right of self-defense on behalf of the ethnic Russian minority in Crimea, a claim that echoed Hitler's claim to protect the Sudeten Germans in Czechoslovakia.⁴⁹ There was no factual support for this claim, the persons alleged-

⁴⁴ See Charles J. Dunlap, Jr., *Lawfare: A Decisive Element of 21st-Century Conflicts?*, 54 JOINT FORCE Q. 34, 35 (2009), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6034&context=faculty_scholarship [<https://perma.cc/ES4M-CCPX>].

⁴⁵ See Julie Veroff, Note, *Reconciling the Crime of Aggression and Complementarity: Unaddressed Tensions and a Way Forward*, 125 YALE L.J. 730, 762–64 (2016); Paul Temnycky, *Are Sanctions Against Russia Enough?*, FORDHAM POL. REV., <http://fordhampoliticalreview.org/are-sanctions-against-russia-enough/> [<https://perma.cc/8QN4-D8D4>] (last visited Apr. 28, 2016).

⁴⁶ See William Mauldin, U.S. Sanctions Not Effective Against Russia, Senators Say, WALL ST. J.: WASH. WIRE (Aug. 31, 2014, 12:54 PM), <http://blogs.wsj.com/washwire/2014/08/31/u-s-sanctions-not-effective-against-russia-senators-say/> [<https://perma.cc/3MMP-WULQ>]; Peter Feaver & Eric Lorber, *Understanding the Limits of Sanctions*, LAWFARE BLOG: FOREIGN POL. ESSAY (July 26, 2015, 10:00 AM), <https://www.lawfareblog.com/understanding-limits-sanctions> [<https://perma.cc/BY6B-QJEK>].

⁴⁷ See Rory Finin & Thomas Grant, *Don't Call It a Civil War – Ukraine's Conflict Is an Act of Russian Aggression*, CONVERSATION (Aug. 24, 2015, 11:35 AM), <http://theconversation.com/dont-call-it-a-civil-war-ukraines-conflict-is-an-act-of-russian-aggression-46280> [<https://perma.cc/7U4E-FCD6>]; Thomas Grant, *Russian's Invasion of Ukraine: What Does International Law Have to Say?*, LAWFARE BLOG (Aug. 25, 2015, 7:45 AM), <https://www.lawfareblog.com/russias-invasion-ukraine-what-does-international-law-have-say> [<https://perma.cc/3T37-AAAS>].

⁴⁸ See Finin & Grant, *supra* note 47; Grant, *supra* note 47.

⁴⁹ See *Ukraine Crisis*, *supra* note 43; Simona Kralova, *Crimea Seen as 'Hitler-Style' Land Grab*, BBC NEWS (Mar. 7, 2014), <http://www.bbc.com/news/world-europe-26488652> [<https://perma.cc/YWT4-723A>].

ly at risk were not Russian citizens, and there is probably no legal right to use force to protect citizens overseas.⁵⁰ The Ukraine or its allies might have been wise to make a pre-emptive legal strike by seeking to demonstrate the good treatment of Russian ethnics in the Crimea. Russia sought to legitimize its action based on the emergent doctrine of humanitarian intervention, drawing analogies to the NATO action in Kosovo.⁵¹ Russia was also emboldened by the U.S. actions in Panama, Iraq, and elsewhere.⁵² These actions—perhaps distinguishable on their facts—were costly to the international rule of law and to future arguments against aggression.⁵³ Russia also made the claim that it had been invited on behalf of the legitimate government, but the invitation came from Viktor Yanukovich after he had already lost effective control of the government of the Ukraine.⁵⁴

Of course, China has territorial objectives in the South China Sea.⁵⁵ In 2009, China made its famous “nine-dash line” claim in a formal notification to the United Nations.⁵⁶ These territorial goals seem to combine an assertion of regional power with the desire for mineral and other resources in the South China Sea.⁵⁷ China’s claim is based on certain alleged land features as the basis for marine entitlements under international law.⁵⁸

As an example of an integrated lawfare strategy, China is actively enhancing some of those land features in order to enhance its claims.⁵⁹ This type of behavior was foreshadowed by the 1999 People’s Liberation Army

⁵⁰ See Ben Saul, *The Battle for Legal Legitimacy in Crimea*, ABC: DRUM (Mar. 2, 2014, 9:18 PM), <http://www.abc.net.au/news/2014-03-03/saul-the-battle-for-legal-legitimacy-in-crimea/5294828> [<https://perma.cc/3YHB-56LN>].

⁵¹ See Bob Dreyfuss, *Full Text and Analysis of Putin’s Crimea Speech*, NATION (Mar. 19, 2014), <http://www.thenation.com/article/full-text-and-analysis-putins-crimea-speech/> [<https://perma.cc/72EU-CTPH>].

⁵² See *id.*

⁵³ See Neil Clark, *Kosovo and Ukraine: Compare and Contrast*, RT (Aug. 20, 2014, 10:14), <https://www.rt.com/op-edge/181580-kosovo-ukraine-compare-contrast/> [<https://perma.cc/X9LY-2E4R>]; Dreyfuss, *supra* note 51; Sarah de Geest, *Russian Intervention in Ukraine: R2P Limits and Reclaiming the Concept and Narrative*, HUM. SECURITY CTR. (Apr. 11, 2015), <http://www.hscentre.org/russia-and-eurasia/russian-intervention-ukraine-r2p-limits-reclaiming-concept-narrative/> [<https://perma.cc/PHJ9-4XMA>].

⁵⁴ See Louis Charbonneau, *Russia: Yanukovich Asked Putin to Use Force to Save Ukraine*, REUTERS (Mar. 3, 2014, 7:09 PM), <http://www.reuters.com/article/us-ukraine-crisis-un-idUSBREA2224720140304> [<https://perma.cc/SKF2-J3RU>].

⁵⁵ See generally CTR. FOR STRATEGIC & INT’L STUDIES, EXAMINING THE SOUTH CHINA SEA DISPUTES (Sept. 2015), http://csis.org/files/publication/151110_Hiebert_ExaminingSouthChinaSea_Web.pdf [<https://perma.cc/4VNN-AHHV>] (compiling articles discussing the South China Sea disputes).

⁵⁶ *Id.* at 61, n.2.

⁵⁷ See *Q&A: South China Sea Dispute*, BBC (Oct. 27, 2015), <http://www.bbc.com/news/world-asia-pacific-13748349> [<https://perma.cc/YFP9-ZH5J>].

⁵⁸ See *id.*

⁵⁹ See *id.*

paper on “Unrestricted Warfare.”⁶⁰ This is what the Naval War College’s Peter Dutton has characterized as China’s power and law approach, utilizing a force-structure component and a legal component.⁶¹

Part of an integrated lawfare strategy is to enhance facts as a basis for legal claims as well as to argue for beneficial rules in the development of customary international law and treaty law.⁶² One U.S. response is its freedom of navigation operations, designed also to enhance facts as a basis for legal claims.⁶³

The Philippines has responded to China’s South China Sea ambitions by trying to undermine China’s claims through a challenge before an arbitral tribunal under the United Nations Convention on the Law of the Sea (UNCLOS).⁶⁴ This tactic is unavailable to the United States because it is not party to UNCLOS.⁶⁵ The United States often makes the calculation whether to enter into conventions like UNCLOS—anticipating that it will be on the defense—but perhaps it does not sufficiently value the possibility of using these rules on the offense. China refused to participate in UNCLOS arbitration, arguing that it opted out of the UNCLOS’s mandatory jurisdiction under Article 298(1)(a) of UNCLOS.⁶⁶ The tribunal, however, held that it has jurisdiction.⁶⁷ On July 12, 2016, the tribunal found that there was no legal basis for China’s historic rights-based claim to sea resources within the nine-dash line.⁶⁸ China responded with a public relations campaign

⁶⁰ See QIAO & WANG, *supra* note 11, at 31–32.

⁶¹ *Testimony Before the Subcomm. on Asia & the Pacific & the Subcomm. on Seapower & Projection Forces of the Armed Serv. Comm. of the H. Foreign Affairs Comm. Hearing on China’s Maritime Disputes in the East and South China Seas*, 113th Cong. (2014) (statement of Peter A. Dutton, Prof. & Dir., U.S. Naval War College), <http://docs.house.gov/meetings/FA/FA05/2014/0114/101643/HHRG-113-FA05-Wstate-DuttonP-20140114.pdf> [<https://perma.cc/6CQQ-STFY>].

⁶² See Sean Mirski, *How America Should Wage ‘Lawfare’ in the South China Sea*, NAT’L INT. (June 4, 2015), <http://nationalinterest.org/feature/how-america-should-wage-lawfare-the-south-china-sea-13040> [<https://perma.cc/Y25L-VRGM>].

⁶³ *See id.*

⁶⁴ See Greg Torode, *Philippines South China Sea Legal Case Against China Gathers Pace*, REUTERS (Sept. 27, 2013), <http://www.reuters.com/article/2013/09/27/us-china-philippines-idUSBRE98Q0BX20130927> [<https://perma.cc/3QFJ-NAXC>].

⁶⁵ See *South China Sea Puts Pressure on US to Ratify UNCLOS*, BLANK ROME LLP: NEWS (July 18, 2015), <https://www.blankrome.com/index.cfm?contentID=31&itemID=3462> [<https://perma.cc/8598-6J29>].

⁶⁶ See U.N. Convention on the Law of the Sea, art. 298(1)(a), Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter UNCLOS]; Torode, *supra* note 64.

⁶⁷ See *Phil. v. China*, Case No. 2013-19, Award on Jurisdiction & Admissibility, at 149 (Perm. Ct. Arb. 2015), <http://www.pcacases.com/web/sendAttach/1506> [<https://perma.cc/9WD8-8YD9>]; Gregory Poling, *The Philippines-China Arbitration: What Next?*, DIPLOMAT (Aug. 1, 2015), <http://thediplomat.com/2015/08/the-philippines-china-arbitration-what-next/> [<https://perma.cc/VP2E-KUSP>].

⁶⁸ See *Phil. v. China*, Case No. 2013-19, Award (Perm. Ct. Arb. 2016), <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf> [<https://perma.cc/W56T-C269>].

against the tribunal's determination, including displaying its response on a video billboard in Times Square, New York.⁶⁹

IV. OPERATIONAL DENIAL

When General Dunlap began using the term “lawfare,” it was often seen as a pejorative term for a combined legal and public relations program aimed at hampering or restricting enemy operations, often in asymmetrical warfare.⁷⁰ Dunlap argued that “there is disturbing evidence that the rule of law is being hijacked into just another way of fighting (lawfare), to the detriment of humanitarian values as well as the law itself.”⁷¹ This pejorative view is based on a certain perspective and an assumption that audiences—whether the public or courts like the International Criminal Court—will extend the rules beyond what was intended or what is appropriate.⁷² Thus, in Dunlap's 2001 article, he saw a dual goal of lawfare: (i) to deprive U.S. forces of certain weapons or tactics and (ii) to undermine the support of the U.S. public for U.S. military goals.⁷³

If legal rules are not to be simply victor's justice and if they are to be consistent with the rule of law, however, we must counter, but in the end accept, the consequences of misinformed public opinion.⁷⁴ This is one reason why a robust public diplomacy program is important.⁷⁵ Moreover, the rules must be applied by independent tribunals that are structured so as to maximize integrity and legal regularity. For the United States, if we could trust an international tribunal to apply law that the United States has accepted with the integrity and legal regularity of our domestic courts, why would we not accept the jurisdiction of that tribunal as a way *ex ante* to show our audiences that we intend to comply with the law, and as a way *ex post* to definitively legitimize our actions? Not only do we achieve that benefit, but

⁶⁹ *South China Sea Video Displayed at NY Times Square*, XINHUA (July 27, 2016), http://news.xinhuanet.com/english/2016-07/27/c_135544744.htm [<https://perma.cc/YX4N-36WQ>].

⁷⁰ See Dunlap, *Lawfare Today*, *supra* note 11, at 316; U.S. DEP'T OF DEF., *THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 6* (2005), <http://archive.defense.gov/news/Mar2005/d20050318nds1.pdf> [<https://perma.cc/ZK5C-X95T>]; THE LAWFARE PROJECT, <http://www.thelawfareproject.org> [<https://perma.cc/2ESW-CH34>] (last visited Apr. 30, 2016).

⁷¹ See Dunlap, *Law and Military Interventions*, *supra* note 11, at 2.

⁷² See *id.* at 17.

⁷³ See *id.* at 18–20.

⁷⁴ See James Jay Carafano et al., *U.S. Comprehensive Strategy Toward Russia*, HERITAGE FOUND. (Dec. 9, 2015), <http://www.heritage.org/research/reports/2015/12/us-comprehensive-strategy-toward-russia> [<https://perma.cc/K9YS-49G6>]; Dean Cheng, *Winning Without Fighting: Chinese Public Opinion Warfare and the Need for a Robust American Response*, HERITAGE FOUND. (Nov. 26, 2012), <http://www.heritage.org/research/reports/2012/11/winning-without-fighting-chinese-public-opinion-warfare-and-the-need-for-a-robust-american-response> [<https://perma.cc/PXH3-73C5>].

⁷⁵ See Carafano, *supra* note 74; see, e.g., Cheng, *supra* note 74.

we also achieve the benefit of more effective and more legitimate discipline on our opponents' violations.

The Palestinians and Israelis have raised this type of lawfare and counter-lawfare to a high art with much at stake in terms of domestic and international support and legitimacy.⁷⁶ We might say that the Palestinian use of lawfare in this context is a kind of defensive lawfare, hampering the Israelis in using their preferred weapons.⁷⁷ In addition, it has an offensive component insofar as it seeks to lure Israel to take action that is subsequently used in a public relations and litigation campaign against Israel.⁷⁸

We can identify in the 2014 Gaza conflict—known by the Israelis as Operation Protective Edge—a rising challenge to existing conventional doctrine.⁷⁹ The law of armed conflict rule of proportionality allows collateral damage to civilians so long as the collateral damage is necessary and justified by the value of the target.⁸⁰ In connection with Operation Protective Edge, Hamas and its allies made persistent claims that Israeli action was illegally disproportionate because the number of Palestinian civilians killed was far greater than the number of Israeli civilians killed.⁸¹ The law of armed conflict principle of proportionality, however, prohibits military attacks anticipated to result in “incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”⁸² Although the death of civilians on both sides is deeply regrettable, this fact is legally irrelevant under current law.⁸³ The Hamas claims may be seen as a first salvo in an effort

⁷⁶ See Janina Dill, *Israel's Use of Law and Warnings in Gaza*, OPINIO JURIS (July 30, 2014), <http://opiniojuris.org/2014/07/30/guest-post-israels-use-law-warnings-gaza/> [<https://perma.cc/6NEF-CPVA>].

⁷⁷ See Charles J. Dunlap, Jr., *Will 'Lawfare' Define Palenstinian-Israeli Conflict?*, AL MONITOR (July 30, 2014), <http://www.al-monitor.com/pulse/originals/2014/07/lawfare-palestine-israel-gaza-conflict-dunlap.html> [<https://perma.cc/53ZQ-NXY9>].

⁷⁸ See *id.*

⁷⁹ See generally INST. FOR NAT'L SECURITY STUD., *THE LESSONS OF OPERATION PROTECTIVE EDGE* (Anat Kurz & Shlomo Brom eds., 2014), http://www.inss.org.il/uploadImages/systemFiles/ZukEtanENG_final.pdf [<https://perma.cc/JB9L-QUPP>] (exploring the military, civilian, political, and strategic aspects of Operation Protective Edge and the lessons taught by the conflict).

⁸⁰ See INT'L COMM. OF THE RED CROSS, *PRACTICE RELATING TO RULE 14: PROPORTIONALITY IN ATTACK*, https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 [<https://perma.cc/L4KP-Q7T6>] (last visited Mar. 17, 2016) [hereinafter ICRC].

⁸¹ See Deema El Ghouli, *Israel/Palestine: Unlawful Israeli Airstrikes Kill Civilians*, HUM. RIGHTS WATCH (July 15, 2014), <https://www.hrw.org/news/2014/07/15/israel/palestine-unlawful-israeli-airstrikes-kill-civilians> [<https://perma.cc/9WBZ-3LWB>].

⁸² See ICRC, *supra* note 80.

⁸³ See Louis Rene Beres, *Putting Israel's Self-Defense in Context*, U.S. NEWS (July 30, 2014, 3:30 PM), <http://www.usnews.com/opinion/articles/2014/07/30/why-israels-response-to-hamas-isnt-disproportionate> [<https://perma.cc/9G2F-5PB8>].

to change current law—or at least to change the public perception of current law—in order to restrain use of force against Hamas.⁸⁴

Another type of offensive use of lawfare is to use existing legal rules, such as trade and investment law, to undermine defensive actions that an opponent may take.⁸⁵ For example, trade law may be used to restrict the ability of an enemy to avoid imports of Trojan horse-impregnated telecommunications network equipment or bio-hazard contaminated food.⁸⁶ A 2013 law requires certain U.S. government agencies to consider cybersecurity threats when sourcing telecommunications equipment from abroad.⁸⁷ Around the same time, India began blocking imports of certain Chinese telecommunications equipment based on similar concerns.⁸⁸ World Trade Organization (WTO) law permits security exceptions from all of its obligations, including obligations to permit imports and obligations to liberalize government procurement, but these security exceptions are generally conditioned on there being in existence at the time the exception is used a war or other emergency in international relations.⁸⁹

V. RESPONDING TO MATERIEL DENIAL

Availability of materiel has an important effect on the ability to wage war.⁹⁰ One of the early predecessors of today's European Union was the European Coal and Steel Community.⁹¹ It was proposed by French foreign minister Robert Schuman in 1950 with the goal of making war “not merely unthinkable, but materially impossible.”⁹² The European Coal and Steel Community integrated production of coal and steel, both reducing inde-

⁸⁴ See Jonathan F. Keiler, *Israel Does Not Violate the Laws of War in Gaza*, AM. THINKER (July 30, 2014), http://www.americanthinker.com/articles/2014/07/israel_does_not_violate_the_laws_of_war_in_gaza.html [<https://perma.cc/44ZL-QB35>].

⁸⁵ See, e.g., Carlos Barria, *U.S. Law to Recruit Government Purchases of Chinese IT Equipment*, REUTERS (Mar. 27, 2013, 5:49 PM), <http://www.reuters.com/article/us-usa-cybersecurity-espionage-idUSBRE92Q18O20130327> [<https://perma.cc/X9MB-GBM4>].

⁸⁶ See *id.*

⁸⁷ See *id.*

⁸⁸ See Heather Timmons, *India Tells Mobile Firms to Delay Deals for Chinese Telecom Equipment*, N.Y. TIMES (Apr. 30, 2010), <http://www.nytimes.com/2010/05/01/business/global/01delhi.html> [<https://perma.cc/68RB-USVZ>].

⁸⁹ See Steven Staples & Miriam Pemberton, *Security Exception & Arms Trade*, FOREIGN POL'Y IN FOCUS (Apr. 1, 2000), http://fpif.org/security_exception_arms_trade/ [<https://perma.cc/9TFW-Q6ER>].

⁹⁰ See *The European Coal and Steel Community*, CARLETON U.: EU LEARNING, <http://carleton.ca/ces/eulearning/history/moving-to-integration/the-european-coal-and-steel-community/> [<https://perma.cc/U899-758X>] (last visited Apr. 30, 2016).

⁹¹ *The History of the European Union*, EUR. UNION, http://europa.eu/about-eu/eu-history/index_en.htm [<https://perma.cc/3BNC-75FY>] (last visited Apr. 30, 2015).

⁹² *The Schuman Declaration—9 May 1950*, EUR. UNION, http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_en.htm [<https://perma.cc/GWP6-PLG3>].

pendent national capacity to wage war and eliminating competition over these resources.⁹³

China has recently sought to restrict exports of rare earth materials, which are used in environmental goods, high tech goods, and weapons systems.⁹⁴ China had important industrial policy reasons for doing so, but it also seemed to wish to make these goods, including weapons, more expensive for its competitors to produce.⁹⁵ The United States and other countries challenged China's restrictions at the WTO as illegal restrictions on trade and were successful in inducing China to eliminate its restrictions.⁹⁶

Neither the United States nor China had sufficient motivation to go to war over rare earths, but here, we can see the application of WTO law and its mandatory adjudication as means for peaceful settlement of certain types of disputes.⁹⁷ What do we learn here? Where the stakes are low enough and the institutions and other punishments are sufficient, law can induce cooperative behavior.

Of course, international legal cooperation to impose sanctions on opponents, such as Soviet Bloc states during the cold war and Iraq, Iran, and Russia in more recent years, is a method of denying materiel to these opponents.⁹⁸

VI. MEASURING THE POWER OF LAWFARE

This raises the question of how we can measure the power of lawfare, and thereby determine where it is a useful tool. It also raises the question of how international legal institutions can be modified to be more effective. Given the ambivalence of lawfare, we do not always want international law

⁹³ See *The European Coal and Steel Community*, *supra* note 90.

⁹⁴ See Jeff Nesbit, *China's Continuing Monopoly over Rare Earth Minerals*, U.S. NEWS (Apr. 2, 2013, 5:10 PM), <http://www.usnews.com/news/blogs/at-the-edge/2013/04/02/chinas-continuing-monopoly-over-rare-earth-minerals> [<https://perma.cc/5DJV-F75C>].

⁹⁵ See *id.*

⁹⁶ See Chuin-Wei Yap, *China Ends Rare Earth Minerals Export Quota*, WALL ST. J. (Jan. 5, 2015, 11:24 AM), <http://www.wsj.com/articles/china-ends-rare-earth-minerals-export-quotas-1420441285> [<https://perma.cc/PE93-2KTK>].

⁹⁷ See *id.*

⁹⁸ See *How Far Do EU-US Sanctions on Russia Go?*, BBC (Sept. 15, 2014), <http://www.bbc.com/news/world-europe-28400218> [<https://perma.cc/T4ZQ-NZ6H>]; Toni Johnson & Robert McMahon, *What Are the Sanctions Against Iran?*, PBS: THE RUNDOWN (June 13, 2013, 9:00 AM), <http://www.pbs.org/newshour/rundown/the-lengthening-list-of-iran-sanctions/> [<https://perma.cc/C4PB-Y8ZB>]; Zachary Laub, *International Sanctions on Iran*, COUNCIL ON FOREIGN REL.: BACKGROUNDS (July 15, 2015), <http://www.cfr.org/iran/international-sanctions-iran/p20258> [<https://perma.cc/F9AR-Q6DB>]; Jan Zielonka, *What Can the Cold War Teach Us About Applying Sanctions to Russia?*, EUR. COUNCIL ON FOREIGN REL.: BLOG (July 23, 2014), http://www.ecfr.eu/blog/entry/what_can_the_cold_war_teach_us_about_applying_sanctions_to_russia [<https://perma.cc/5Q5E-HTBP>].

to be more effective, but we would like to know how to make it more effective where it is desirable.

Political scientists debate the extent to which states in international relations seek absolute gains (to make themselves better off) or seek relative gains (to increase their advantage over competitors even if to do so they must make themselves worse off).⁹⁹ In an implacable, cold war-type competition, it is easy to see the world in relative gains terms, especially where issues are directly related to security.¹⁰⁰ On the other hand, in a less competitive environment—perhaps where there is no other superpower or where issues are less directly related to security—we might see countries willing to cooperate in ways that make them better off, even if competitors are made better off to a greater extent.¹⁰¹

From the standpoint of analyzing lawfare strategy, the only questions are what game are you and your opponent playing, and how does that determination affect your decision?

There are a number of ways in which law can affect decisions. First, there may be direct legal penalties that are designed to have compelling effect—the cost of the penalty is greater than the benefit of violation.¹⁰² Second, there may be domestic audience costs.¹⁰³ It may be that your citizens simply care about compliance with the law.¹⁰⁴ Or, it may be that the legal rules have been set up in a way that involves reciprocal compliance and reciprocal breach so that a domestic constituency will be harmed by your competitor's breach in response to your breach.¹⁰⁵ That domestic constituency will lobby for compliance.¹⁰⁶ We see this dynamic in the trade law context, which involves important elements of reciprocity.¹⁰⁷ Third, there may be foreign political costs.¹⁰⁸ Being seen to be a violator of international

⁹⁹ See DAVID L. ROUSSEAU, RELATIVE OR ABSOLUTE GAINS: BELIEFS AND BEHAVIORS IN INTERNATIONAL POLITICS 3 (1999), <http://www.albany.edu/~dr967231/papers/absrel5.pdf> [<https://perma.cc/FBJ9-2PXS>].

¹⁰⁰ See *id.* at 7–8, 17.

¹⁰¹ See *id.* at 18.

¹⁰² See, e.g., G.A. Res. 260 (III) A, Adoption of the Convention on the Prevention and Punishment of the Crime of Genocide (Dec. 9, 1948).

¹⁰³ See Michael Tomz, *Domestic Audience Costs in International Relations: An Experimental Approach*, 61 INT'L ORG. 821, 821 (2007), <https://web.stanford.edu/~tomz/pubs/Tomz-AudCosts-2007-09.pdf> [<https://perma.cc/6A4M-Q3K3>].

¹⁰⁴ See Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law* 1, 9 (2005).

¹⁰⁵ See Onuma Yasuaki, *International Law in and with International Politics: The Functions of International Law in International Society*, 14 Eur. J. Int'l L. 105, 118 (2003); BENEDETTO CONFORTI, INTERNATIONAL LAW AND THE ROLE OF DOMESTIC LEGAL SYSTEMS 1, 195 (1993).

¹⁰⁶ See Yasuaki, *supra* note 105, at 119–20.

¹⁰⁷ See Rachel Brewster, *The Domestic Origins of International Agreements*, 44 Va. J. Int'l L. 501, 514–17 (2004).

¹⁰⁸ See Yasuaki, *supra* note 105, at 127–28; Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 Cal. L. Rev. 1823, 1829, n.16 (2002).

law may make it tougher to obtain assistance in some areas or to reach international agreements in other areas.¹⁰⁹ Violating international law in one area may undermine the international legal system and diminish its ability to provide benefits in trade, investment, environmental protection, human rights, security, and other fields.¹¹⁰

Here, it is important to get an idea of what drives your opponent's decisionmaking and what will drive it in the future. Are there penalties available for violation that would be meaningful to this country or this non-state actor? Does this country have a lot of other international legal relationships that are important to it? Is it concerned with your compliance with the relevant international legal rules or even with other international legal rules? Then perhaps it will think about the shadow of the future before violating the obligation that concerns you. Do its citizens care about international law? Survey and experimental evidence suggests that U.S. citizens care about compliance with international law and that some other countries' citizens care even more.¹¹¹ Based on your analysis of the domestic political dynamics of your target country, will these factors be sufficient to cause compliance?

VII. LAW AS A SUBSTITUTE FOR KINETIC WARFARE

So it is in this way that we can see lawfare as, in particular circumstances, a substitute for kinetic warfare.¹¹² It substitutes for warfare where it provides a means by which to compel specified behavior with fewer costs than kinetic warfare, or even in cases where kinetic warfare would be ineffective.¹¹³

It is difficult to say with certainty that any particular dispute that has been resolved through legal debate or formal dispute settlement would, if not for the legal resolution, have resulted in war.¹¹⁴ Yet, it seems likely that at least some disputes have had this character.¹¹⁵ Often the reference to in-

¹⁰⁹ See Yasuaki, *supra* note 105, at 127–28; Guzman, *supra* note 108, at 1860–72.

¹¹⁰ See Yasuaki, *supra* note 105, at 127–28; Guzman, *supra* note 108, at 1872 n.167.

¹¹¹ See Sarah Kreps & Geoffrey Wallace, *International Law and US Public Support for Drone Strikes*, Open Democracy (July 2, 2015), <https://www.opendemocracy.net/openglobalrights/sarah-kreps-geoffrey-wallace/international-law-and-us-public-support-for-drone-stri> [https://perma.cc/K3GH-87B5]; *Review of Polling Finds International and American Support for World Order Based on International Law, Stronger UN*, World Pub. Opinion (Dec. 15, 2011), http://www.worldpublicopinion.org/pipa/articles/international_security_bt/703.php [https://perma.cc/4HVC-GTEX].

¹¹² See Philip Carter, *Legal Combat: Are Enemies Waging War in Our Courts?*, SLATE (Apr. 4, 2005, 5:51 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2005/04/legal_combat.html [https://perma.cc/YX8G-NQ69].

¹¹³ *See id.*

¹¹⁴ *See id.*

¹¹⁵ See Jerome Cohen, *Lawfare or Warfare? Let Impartial Tribunals Cool Asia's Maritime Disputes*, DIPLOMAT (May 29, 2014), <http://thediplomat.com/2014/05/lawfare-or-warfare-let-impartial-tribunals-cool-asias-maritime-disputes/> [https://perma.cc/UV6C-F5QQ].

ternational law or a court ruling can reduce pressure on governments to escalate to kinetic warfare.¹¹⁶

VIII. TOWARD A LAWFARE “COMMAND”

I understand that in actual combat operations of sophisticated military forces, rules of engagement and targeting decisions are often evaluated by lawyers or other officers with appropriate training in relevant law. But I wonder how much more extensive the integration of a lawfare command with kinetic commands might be. The following is a list of areas in which an integrated legal component may improve strategic and tactical outcomes:

- a. Identify disputes in which legal resolution is unlikely in order to predict more accurately the context for kinetic disputes.
- b. Join in the planning of new weapons systems and adaptation of existing weapons systems in order to maximize effectiveness given legal restraints.
- c. Anticipate challenges to rules of engagement and target policies and identify methods to maximize effectiveness despite potential challenges.
- d. Identify circumstances where opponents are creating legal facts on the ground that may give them an advantage in future conflicts, such as the Chinese South China Sea operations.
- e. Identify circumstances in which it may be attractive to create legal facts on the ground for advantage.
- f. Identify circumstances in which opponents are seeking to create international legal rules or modify or apply existing international legal rules that will restrict use of weapons in which your forces have an advantage.
- g. Propose international legal rules or modify or apply existing international legal rules that will restrict use of weapons in which your forces are at a disadvantage.
- h. Identify competitors’ efforts to block your access to materiel and formulate legal responses.
- i. Identify competitors’ needs for materiel and seek to block access within applicable law.

CONCLUSION

We may understand lawfare as a modern innovation in international contention—a growing availability and use and sometimes abuse of law to

¹¹⁶ See Carter, *supra* note 112.

supplement or substitute for military operations. Lawfare can be used to bring to bear the power of law in order to win victories or in order to hamper enemies. It would be ignorant to assume that law is irrelevant, but it is also ignorant to assume that law is always effective. A nuanced lawfare strategy will examine the extent to which lawfare can be effective against a particular target in a particular circumstance.