

ON THE COVER

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LAWFARE



"To fight and conquer in all our battles is not supreme excellence; supreme excellence consists in breaking the enemy's resistance without fighting."

Sun Tzu, The Art of War

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LAWFARE is an irregular, or non-kinetic warfare method where a state or an armed group uses or abuses the law in order to defeat the enemy without bloodshed or to win the "case" over the adversary in the court of public opinion. This article will explain both Hybrid Warfare and Lawfare with specific examples as support; examine two points of view on Lawfare; present and analyze the "boomerang" and Russian models of Lawfare; and propose a way ahead for NATO to fully integrate Lawfare into its doctrine. Since Lawfare is a non-conventional form of battle, it is a subset of Hybrid Warfare. Therefore, in order to understand Lawfare, one must be familiar with the accepted characterizations of Hybrid Warfare.

Defining Hybrid Warfare

NATO does not yet have an official Hybrid Warfare doctrine, so there is no authorized definition of the term in the NATO environment.¹ However, NATO commanders, leaders and other thinkers have been writing about and discussing this broad concept at official seminars, conferences and like gatherings for the last decade. The Supreme Allied Commanders, in the NATO 2010 Capstone Concept, defined hybrid threats as "those posed by adversaries, with the ability to simultaneously employ conventional and non-conventional means adaptively in pursuit of their objective."²

At the September 2014 Wales Conference, NATO issued a Declaration stating that Hybrid Warfare occurs when "a wide range of overt and covert military, paramilitary, and civilian measures are employed in a highly integrated design."³ Doctrinal experts from other NATO Troop Contributing Nations (TCNs), to include the United States, agree with these portrayals of Hybrid Warfare, and add pertinent definitions of their own.⁴ Simply, Hybrid Warfare occurs when a force employs any mixture of conventional and non-conventional means of warfare. Some examples include propaganda messaging through sympathetic media, terrorist attacks, use of human shields, taking credit for terrorist attacks, deceptive public announcements, election rigging, social media trolling, financing strikes and demonstrations, and bribery and extortion. One might say that hybrid is often the passive-aggressive side of total warfare. Presently, NATO primarily uses Hybrid Warfare reactively and defensively, preferring the term "Comprehensive Approach."⁵ The following have demonstrated effective offensive use of Hybrid Warfare tactics: ISIL/Da'esh, Russia and Boko Haram:

Islamic State of Iraq and the Levant (ISIL)/Da'esh: ISIL recently became a powerful militia of 20,000+ soldiers through a blend of conventional warfare, social media propaganda programs, and relationship-building in Muslim-majority countries. While Joint Operation Inherent Resolve's counter terrorist operations

in Syria and Iraq have recently reduced its numbers, ISIL still controls territory roughly equal in size to Great Britain.⁶

Russia: As a continuation of her centuries-old quest for warm water ports, Russia utilized stealth and polite engagement with a local populace to sneak its 810th Marine Infantry Brigade into Crimea in March 2014. With faces covered and posing as Ukrainian militia ("Green Men"), the soldiers eased into government buildings and command posts as they quickly occupied Balaklava Bay, the City of Sevastopol, and its airport. With an additional boost from pro-Russia Twitter feeds throughout Ukraine, and other non-lethal means, Russia accomplished this invasion with minimum violence.⁷

Boko Haram: A militant Islamist group based in Nigeria fighting to create an Islamic state, Boko Haram⁸ used its ideological ties with ISIL/Da'esh and al-Qaeda to expand its operations from sporadic hit-and-run skirmishes to coordinated campaigns that include kidnappings of children, IED attacks and raids on police stations. While their methods have drawn worldwide revulsion, they have spun the adverse notoriety to a positive recruiting campaign aimed at disaffected African Muslims living in poverty or perceived Western cultural persecution.⁹ Boko Haram has emerged from obscurity to worldwide name recognition, apparently adhering to the philosophy that "there is no such thing as bad publicity."





NATO Flags are flown at half-staff as a mark of respect for the victims of terrorists attacks. Photo by NATO.

Defining Lawfare

So, how does Lawfare fit under the immense Hybrid Warfare umbrella? It certainly sits on the non-lethal side of hybrid as a part of "influence operations,"¹⁰ a function of NATO Strategic Communications, or StratCom. As with other non-kinetic hybrid methods, Lawfare aims to use communication and informational media to propel certain legal concepts and interpretations into the public mindset that will help achieve strategic objectives.¹¹

As in the case of Hybrid Warfare, there is no NATO doctrinal definition of Lawfare, but some eminent legal thinkers have crafted some cogent interpretations. The term "Lawfare" apparently first appeared in 1975, in a paper published by John Carlson and Neville Yeomans, where the authors used the term metaphorically, and not in the context of war-fighting.¹² Then, two and a half months after the September 11, 2001 attacks, Charles J. Dunlap, Jr., now a retired U.S. Airforce Major General and Duke University Law Professor, introduced the Lawfare concept in his seminal work, *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts*.¹³ In this work, he asserted that "Lawfare, that is, the use of law as a weapon of war, is the newest feature of 21st Century combat."¹⁴ In a later work, he defined Lawfare as "the strategy of using – or misusing – law as a substitute for traditional military means to achieve an opera-

tional objective."¹⁵ Both Munoz and Bachman place Lawfare in the hybrid communications-based perspective by explaining that Lawfare "reaches the desired target as the warhead of a missile, while media Information Operations (InfoOps)/StratCom would be the power flight of that missile."¹⁶

Now, to go from the theoretical to the practical, we turn to how some states and groups have made Lawfare work. The real world examples below depict three main types of Lawfare: the straightforward type used by the United States; the frequently-occurring and more complex "boomerang" style; and, finally, the sophisticated, methodical style that Russia has mastered.

The United States: In October 2001, the U.S. Government negotiated a straightforward legal action, execution of a contract, with SPACE IMAGING INC. to obtain exclusive rights to imaging of its then-expected operational areas in Afghanistan. This action both allowed the U.S. military to obtain unimpeded, exclusive use of the finest imaging technology available, and also prevented other individuals or states from taking satellite pictures in a war zone.¹⁷ The advantages of this type of Lawfare is that it gets neutral private businesses involved and tends to mask the strategic intentions with a veneer of businesslike detachment.

NATO and the Taliban: This is the classic, or "boomerang" model of Lawfare.¹⁸ It consists of an affirmative, authentic use of the law by one side, reciprocated with a malicious use of the same law by the opponent. In this model, the initiating party's first "toss" is a publicized effort to obey the law of armed conflict, and even go beyond it. The party pledges to minimize casualties. Then, the return "toss" is the enemy's taking advantage of the proclamations of the said "good guy." As an example, during the UN-mandated International Security Assistance Force (ISAF) in Operation Resolute Support in Afghanistan, NATO announced in a local media campaign that its forces would not engage areas where non-combatants could become casualties.¹⁹ This was in response to media inquiries after NATO airstrikes in 2007 allegedly killed several civilians. In order to operate above-board and win hearts and minds of the local population, NATO used Lawfare to communicate that its forces would go beyond the requirements of international law to protect civilians.²⁰ In response, the Taliban took advantage of this announcement and deliberately placed civilian non-combatants in strategically valuable areas. Taliban's counter-punch placed NATO in a position where it had to either lose honor by renegeing on its pledge to the world, or let the Taliban operate unopposed in some operational areas.



Israel: Again, this case involved the operation of the "boomerang," except that Israel, the party throwing the first affirmative "toss," learned from NATO's experience in the first example above and reaped benefits from a carefully targeted publicity campaign. In 2014, Israel launched a comprehensive program designed to get local officials to evacuate civilians living in Gaza before conducting military strikes against Hamas in Operation Protective Edge.²¹ The purpose was to counter the persistent world opinion that Israel's military constantly used lethal means indiscriminately. Hamas retaliated by taking advantage of the advance notice of military strikes and won a short-lived victory in the press. Overall, the endeavor yielded successes and losses for both sides, as shown in the analysis further in this article.

Russia: In a subtle misuse of treaty law after Russia's "Green Men" invasion of Crimea (see above), the Russian Ministry of Foreign Affairs used denial and interpretative obfuscation in response to public accusations that Russia had violated the 1994 Budapest Memorandum on Security Assurances.²² By creatively misconstruing the agreement and dismissing allegations that Russia's Special Forces had invaded Crimea, the spokesman deflected bad publicity and advanced a positive narrative that Russia was graciously not interfering with the will of Crimeans who wanted the peninsula returned to Russia. The result was chaos in press accounts that bought Russia time to concoct a story that NATO caused the invasion. President Putin used this storyline to shift the focus from his Foreign Affairs' previous disingenuous press release when he announced that Russia had, indeed, invaded Crimea.²³

Points of View on Use of Lawfare

Now that we have demonstrated how Lawfare works through examples, let us look at how the thinkers and analysts view the ethics and morality of Lawfare. One can break it down into two camps: Pragmatists who have no qualms about using or manipulating the law to gain a military advantage, and the purists who believe that Lawfare perverts the Rule of Law²⁴ regardless of the user's motive.

The practical and pragmatic approach acknowledges the universal applicability of the



Russia annexes Crimea: Russian armoured trucks on 4 March 2014 in Perevalne, Crimea, Ukraine. On 28 February 2014 Russian military forces invaded Crimea peninsula. Photo by photo.ua/Shutterstock.

law and the place Rule of Law has in a civilian, peacetime society. However, in war, use of the law is a legitimate method to achieve military objectives, and is commended in tradition. Over two millennia ago, a luminary no less than Sun Tzu expressed that bloodless fighting is "the supreme excellence."²⁵

There is both a benign and malicious side of this pragmatic approach. One can argue that NATO and its member states use the benign techniques, where the state follows international law, and even goes beyond its legal obligations in order to reduce casualties of the innocent, and to gain favorable publicity, as shown in previous examples. The malicious side, on the other hand, disregards the high ideals of the Rule of Law when conducting war and sees international law as only as a means to an end. To them, rules do not apply to their conduct. They manipulate their opponents' tendencies to be law abiding by creating situations that might lead their opponent to violate the law of war. Terrorist groups have made an art of this technique, and have even written manuals on it.²⁶

There is also the purist camp, lesser known but with interesting perspectives. This body of opinion objects to any pragmatic use of the law, whether benign or malicious, on the principle that Lawfare is the perversion of the Rule of Law.²⁷ As suggested above, the Rule of Law is a state's deliberative process that

establishes laws to protect people against anarchy and provide advance notice of legal consequences of actions. To the purist, any other use of the law is "inherently negative."²⁸ Israel-based legal experts have been the primary proponents of this theory. Anne Herzberg, a researcher for israelnationalnews.com, contends that Lawfare occurs "because of large amounts of funding" from governments and groups that exploit international law to obtain and publicize condemnations of Israel.²⁹ Herzberg and others also object to states' doing more than the law requires because it creates unreasonable future expectations, and might even set the stage for customary law in the future that will be too stringent. The purist would argue that this is the case in NATO's and Israel's use of Lawfare, as shown in the analysis below.

Analysis of Use of Lawfare

In the above examples of Lawfare, a nation or group used the law to achieve an operational objective to exact the enemy's submission with a minimum of physical violence. NATO and Israel used the law affirmatively, going beyond what the law requires by passing over some legitimate targets. For air raids based on clear military necessity, international law does not require the attacking party to execute the mission with zero civilian casualties. In fact, minimizing civilian casualties is a shared responsi-



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bility of both the invading state and the state or group that controls civilians and civilian property. Additional Protocol I, Article 48, Section 2.2³⁰ directs the controlling state or group to be the primary layer of protection for the civilians, since that state has the best chance to reduce the risk of harm to them.

Many legal experts believe that the civilians themselves also have an innate responsibility to take protective precautions. For the party conducting the lethal air raids, international law requires that they take reasonable precautions to minimize civilian casualties and property damage of non-military targets.³¹ Therefore, the legal responsibility to protect civilians in these cases was a mutual one between

NATO and the Taliban and between Israel and Hamas. There was no legal duty for NATO to refrain from engaging military threats where civilians were present, and there was no duty for Israel to take such detailed measures to warn civilians and promote their evacuation. However, consistent with much of today's coalition-style decision-making, states will often refrain from taking "legal" aggressive action if doing so will lose public support for the operations. The Israel-Hamas example is illustrative of two sides using Lawfare with each side gaining a strategic advantage.

Israel and Hamas in Operation Protective Edge: A Lawfare Case Study of a Stalemate

So, why did NATO and Israel take more precautions than the law required in the examples above? Were they hoping to gain a military benefit from this? If yes, then, they engaged in Lawfare of the affirmative variety. By this technique, the party enjoyed favorable publicity from acting "above board" and going beyond the minimum requirements to save civilian lives. Israel's Lawfare actions were successful in that they were proactive, affording Israel more freedom of maneuver in its battlespace. Hamas, on the other hand, engaged in counter-Lawfare by prevailing on a sympathetic press to publicize its opponents' measures as a phony "good guy" routine³² and promote a case that Israel was the party in violation of international law by targeting civilians.³³ By providing first-responding journalists in the field with skewered figures of casualties, Hamas succeeded in influencing a world press to issue lead stories that Israel was indiscriminately engaging civilians.³⁴ Fortunately, more balanced press accounts prevailed later, but first impressions matter, and Hamas won that part of the media campaign. Even though the UN Human Rights Council presented a report later that condemned the conduct of both sides in the conflict,³⁵ Hamas arguably succeeded because Israel eased her military endeavors in Gaza.

In conclusion, the operation resulted in a stalemate. Even though Hamas, like the Taliban in Afghanistan, violated international laws by using civilians as human shields,³⁶ Hamas has shed enough public doubt on Israel's conduct to advance a "both sides are guilty" argument. The specter of this gives Hamas per-

petual victim status and deters Israel from exercising the full range of its options against the group, one of which is its destruction. While not a triumph for Hamas, it gives them time to renew their resources and regroup.

The Russia model is distinct from the boomerang scenario of NATO/Israel in that it engages deeply in Lawfare, then dodges tangible repercussions from the other side. Russia's "reflexive control" actions in Crimea flow from the old Soviet Union playbook³⁷ and its own Hybrid Doctrine, where Lawfare is embedded.³⁸ Russia goes well beyond the affirmative model by carefully planning and synchronizing its military moves with the whole panoply of hybrid tactics. As shown, their information operations is capable of developing complex narratives that combine truths, fabrications and twists on legal interpretations that create chaos and develop innovative nuances to international law.

Conclusions

While NATO and its Allies have had moderate success in use of Lawfare and hybrid, Russia's military has taken the lead in advancing and implementing these non-lethal tools. It is urgent that NATO organize its efforts to harness these critical non-kinetic weapons. NATO should not restrict its Lawfare efforts to the examples that it displayed in Operation Resolute Support, or to Israel's similar example in Operation Protective Edge, where NATO and Israel did more than the law required in order to win over hearts and minds. The results, overall, were mediocre; stalemate is not victory.

It is time to advance. On December 1, 2015, NATO Secretary General Jens Stoltenberg's announcement of a NATO Hybrid Warfare Strategy provides a good starting point and possible beginning to the integration of a comprehensive Lawfare program in operations and exercises.

I do not propose that NATO employ the underhanded tactics that subvert the law and treaties. Through doctrinal structure and knowledge of our adversaries' tactics, NATO can anticipate potential abuses of Lawfare and consider counter-measures. NATO need not adopt a purist method as described above and avoid all "unnatural" uses of the law. Good doctrine will stimulate creative thinking and planning that will lead to effective first-use



Lawfare that prevents the boomerang effect while staying within legal boundaries.

NATO has sufficiently defined the issue of Lawfare and its role in writings, conferences and discussions. There are also plenty of lessons learned in past uses of Lawfare, to include the examples shown above. The leadership must bring the discussions, papers, and lessons learned together to develop a formal Hybrid Warfare doctrine that includes a section on Lawfare.

All NATO planners and LEGADs must study Russia's Gerasimov Doctrine³⁹ on Hybrid Warfare to help understand Russia's strategic goals and to consider an example of well-considered guidelines. Planners should set up working groups to bring together the abundant experience and wisdom of our officers, civilians, legal experts and Senior Mentors. There is no need for a perfect product immediately; this can come about in the long run through the intricate NATO staffing methods. For the short term, NATO planners and exercise creators need definitive, official guidance in order to keep pace with potential adversaries in this field. This can be in the form of a memorandum from the leadership, or a working draft form of a manual. ✦

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END NOTES:

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- ² Patryk Pawlak, Understanding Hybrid Threats, European Parliamentary Research Service, quoting NATO, Bi-SC Input to a New NATO Capstone Concept for the Military Contribution to Countering Hybrid Threats (2010), https://www.act.nato.int/images/stories/events/2010/20100826_bi-sc_cht.pdf.
- ³ Wales Summit Declaration, Paragraph 13, June 28, 2016. http://www.nato.int/cps/en/natohq/official_texts_112964.htm?selectedLocale=en
- ⁴ United States Marine Corps, Improving the Decision Making Abilities of Small Unit Leaders 10-13 (The Nationals Academies Press 2012), <https://www.nap.edu/read/13188/chapter/3#19> (Hybrid Warfare "as a blending or blurring of categories that were once treated as distinct rather than as an entirely novel form of warfighting.") "Hybrid (constitutes) a modus of war fighting, where the opponent '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.'" ⁵ <http://defencematters.org/news/hybrid-warfare-strategy/752/>
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- ⁹ See Farouk Chothia, Who Are Nigeria's Boko Haram Islamists?, May 4, 2015 at, <http://www.bbc.com/news/world-africa-13809501>.
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- ¹² John Carlson and Neville Yeomans, Whiterh Goeth the Law-Humanity or Barbarity, The Way Out – Radical Alternatives in Australia, Smith, M. and Crossley, D. (1975). The authors used the term to describe the state of mediation: "Lawfare replaces warfare and the duel is with words rather than swords." p. 3.
- ¹³ Colonel Charles J. Dunlap, Jr, U.S. Air Force, Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts, prepared for the Humanitarian Challenges in Military Intervention Conference Carr Center for Human Rights Policy, Kennedy School of Government, Harvard University, Washington, D.C., November 29, 2001, <http://people.duke.edu/~pfeaver/dunlap.pdf>.
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- ¹⁵ Major General Charles J. Dunlap, Jr, U.S. Air Force, Lawfare Today: A Perspective, Yale J. of Int'l Aff. 146, 146-154 (Winter 2008)
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- ¹⁸ Id., 11-12.
- ¹⁹ Id.
- ²⁰ A law showing that civilian casualties are permissible in international law sometimes.
- ²¹ 12.
- ²² United Nations Document A/49/765, S/1994/1399, 19 December 1994, www.cfr.org/nonproliferation-arms-control-and-disarmament/budapest-memorandums-security-assurances-1994/p32484, cited by Munoz and Bachman, 15. This post-Soviet breakup multinational agreement provided that Ukraine would hand over nuclear weapons to Russia in exchange for Russia's assurance that it would "respect the independence and sovereignty and the existing borders of Ukraine" and "refrain from the threat or use of force against the territorial integrity or political independence of Ukraine." Id.
- ²³ Ben Nimmo, Backdating the Blame. How Russia Made NATO a Party to the Ukraine Conflict, NATO STRATCOM Centre of Excellence, September 20, 2016 at, <http://www.stratcomcoe.org/backdating-blame-how-russia-made-nato-party-ukraine-conflict-author-ben-nimmo>.
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- ²⁶ Author Unknown, "The al Qaida Manual," seized from a computer file by Manchester, UK Metropolitan Police in a raid and admitted as evidence in a terrorist bombing trial. https://www.justice.gov/sites/default/files/ag/legacy/2002/10/08/manualpart1_1.pdf (Introduction, as translated, states that Islamic governments will not be peacefully established, but by "by pen and gun... by word and bullet... by tongue and teeth." Also see: <https://www.idfblog.com/blog/2014/08/04/captured-amas-combat-manual-explains-benefits-human-shields/>).
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- ³⁷ See <http://understandingwar.org/report/putins-information-warfare-ukraine-soviet-origins-russias-hybrid-warfare>
- ³⁸ See note 31, infra.
- ³⁹ There is a reprint of the Doctrine with cogent commentary from blogger Dr Mark Galeotti: The "Gerasimov Doctrine" and Russian Non-Linear War (Blog: In Moscow's Shadows, 2014), inmoscowsadows.wordpress.com/2014/07/06/the-gerasimov-doctrine-and-russian-non-linear-war/.