ARTICLES

International Law and Military Strategy: Changes in the Strategic Operating Environment

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INTRODUCTION

> "The power of law is that it legitimizes power."
> – Ganesh Sitaraman, *"The Counterinsurgent's Constitution: Law in the Age of Small Wars,"* 17.

Strategy, the British military historian Hew Strachan reminds us, "is a profoundly pragmatic business: it is about doing things, about applying means to ends."[1] Before doing things – before getting to effective action – strategists must first understand the operating environment in which they are acting. International law is part of that strategic operating environment. International law is undergoing a period of transition marked in part by greater emphasis on humanitarian principles. Strategists must consider how the evolving nature of international law is changing the strategic operating environment.

The thesis of this paper is that developments in international humanitarian law (IHL) are introducing fundamental changes to the international strategic operating environment, primarily by challenging the principle of sovereignty. The analysis is not intended to judge whether or not this trend is politically desirable, but to recognize that lethal force is but one of many factors affecting outcomes in war. Strategists and policymakers must understand the legal dynamics that are exerting an increasingly powerful influence on the legitimate use of violence.

This paper will examine some of the unintended consequences of trends in international law that are likely to increasingly affect strategy. For example,

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1. HEW STRACHAN, THE DIRECTION OF WAR: CONTEMPORARY STRATEGY IN HISTORICAL PERSPECTIVE 12 (2013).

Hew Strachan argues that the state no longer dominates the direction of war, in part because "international law has arrogated the decision to go to war, except in cases of national self-defence, to the United Nations."[2] The state has lost uncontested control over the direction of war to international law, as evidenced by the expansion of humanitarian justifications for using force, and the enhanced powers of non-state actors on the international stage.

Strategy and international law are inextricably linked by the growing reach of international laws, treaties, and tribunals. There has probably always been a connection between law and strategy. "Silent enim leges inter arma" noted Cicero, suggesting that law's influence in war has historically been weak.[3] Centuries later, Carl von Clausewitz could still dismiss international law as a "self-imposed, imperceptible limitation, hardly worth mentioning."[4] Clausewitz, however, understood the influence of politics on war, and although his assessment of international law's political weight was probably accurate enough for his era, his analysis of the importance of political considerations in war foreshadowed the law's potential influence on strategy.[5]

Today, the power of the state is being limited at the same time as other influences are empowering individuals and non-state actors. The shift in emphasis in international law from sovereignty to humanitarian principles has helped create a gap between peace and war that state and non-state actors exploit through various measures short of war. Such measures – the unintended consequences of IHL – include the growing use of lawfare, the emergence of so-called "hybrid" warfare, and the loosening of the state's monopoly on the use of force. These developments have implications for strategy, such as the significance of international borders and the acceptability to the international community of using overwhelming force.

The origins of IHL are found in the desire to restrict the ruthless application of hard power. International law had its modern beginnings following a period of unrestricted warfare, when the states of Europe reflected on the consequences of the excessive military violence inflicted during the Thirty Years' War. In the 1648 Treaty of Westphalia, principles first set forth by Dutch lawyer Hugo Grotius helped usher in an age of limited wars.[6] An important

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2. *Id.* at 42.

3. "In times of war, the laws fell silent." Marcus Cicero, Pro Milone (52 BCE) (transcript available at http://www.thelatinlibrary.com/cicero/milo.shtml) (excerpt *translated in* Ilya Somin, *Justice Scalia on* Kelo *and* Korematsu, Washington Post (Feb. 8, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/08/justice-scalia-on-kelo-and-korematsu/?utm_term=.5353d05007ad).

4. CARL VON CLAUSEWITZ, ON WAR 75 (Michael Howard & Peter Paret eds. & trans., Princeton University Press 1976) (1832).

5. Some scholars argue that Clausewitz's observations on international law do not necessarily reflect those of his age or of his model, Napoleon Bonaparte. *See* NAPOLEON: ON WAR 37 (ed. Bruno Colson, trans. Gregory Elliott, Oxford University Press 2015) (2011). A recent study of Napoleon's writings suggests he incorporated international law into his strategy, and "the extent to which he adhered to the limitations fixed by the law of nations has not been sufficiently stressed." *Id.*

6. Stephen C. Neff, *Introduction* to HUGO GROTIUS, ON THE LAW OF WAR AND PEACE xiv-xxxv (ed. Stephen C. Neff, Cambridge: Cambridge University Press 2012) (1625).

feature to the international system as inspired by Grotius was that war was conducted between sovereign states, and the inviolable sovereignty of states emerged as one of the guiding principles of international law.

Prior to the Treaty of Westphalia, sovereignty was divided among a variety of actors, such as the Catholic Church, who vied with the state over which would exercise basic political, legal, and military authorities. The state emerged from the struggle of the Thirty Year's War as the dominant actor in international affairs. From the beginnings of the Westphalian system to the end of the Cold War, the principle of state sovereignty stood as a pillar of international law that in theory limited the intervention of one state into the internal affairs of another state.

The sovereignty-based international order is now under stress as humanitarian principles affect the system. One former UN official warns that "sovereignty in its traditional state-centered form is being challenged throughout the international system."[7] The balance is being tested "between an emerging global norm of protecting people from violence and a traditional norm of states insisting on absolute sovereignty."[8] International law has evolved to exercise a limiting effect on sovereignty through institutions such as UN criminal tribunals that are not treaty-based and can act without prior agreement by the affected states.[9] The result is that the "legal institution of external sovereignty is no longer identical with the traditional Westphalian order."[10] Greater deference to humanitarian law principles conflicts with the principle of sovereignty, and the evolving relationship between these two principles exerts an increasing influence on strategy.

Humanitarian concerns in war also emerged after the Thirty Years' War as a curb on the extremes of violence. Humanitarian law incrementally grew in importance over the ensuing centuries, but progress accelerated in the wake of the highly destructive wars of the 19th and 20th centuries. The trend toward emphasis on humanitarian law over sovereignty has manifested itself in the UN's adoption of a principle called the Responsibility to Protect (R2P) that now declares it a potential duty for member states to intervene in the internal affairs of another sovereign state. As humanitarian law principles receive greater emphasis, the relative importance of sovereignty becomes less clear. This has implications for strategy as various actors seek to take advantage of the shifting priorities. As one current strategist notes, "there is also a time for the ruthless application of hard power."[11] However, will the growth of humanitarian law allow states room for the legitimate application of hard power?

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7. MICHAEL W. DOYLE, THE QUESTION OF INTERVENTION: JOHN STUART MILL & THE RESPONSIBILITY TO PROTECT, at ix (2015).

8. *Id.*

9. *See* DIETER GRIMM, SOVEREIGNTY: THE ORIGIN AND FUTURE OF A POLITICAL AND LEGAL CONCEPT 86 (2015).

10. *Id.* at 87.

11. James Stavridis, *NATO's Turn to Attack*, FOREIGN POLICY (Nov. 14, 2015), https://foreignpolicy.com/2015/11/14/natos-turn-to-attack-paris-terrorist-isis/.

Grappling with such questions must begin by recognizing that adherence to international law is vitally important to sound strategy for at least two reasons. First, strategy must be consistent with a people's national character by being firmly grounded in the values and ethics of the society it serves. In particular, "[d]emocracies require that their strategies be rooted in domestic and international law."[12] Second, respecting international law bolsters the very system of international rights and obligations upon which the security of states is based. "Even tyrannies have an interest in law, although they may not profess it or know it. All states, whatever their governmental type, have certain rights; each, therefore, should have an interest in respect for such rights."[13] To ensure that the decision to resort to force always remains properly within the bounds of international law, strategists must understand how the modern legal environment is evolving to set new boundaries on the legitimate use of violence.

Clausewitz noted that "the aims a belligerent adopts, and the resources he employs, must be governed by the peculiar characteristics of his own position; but they will also conform to the spirit of the age and to its general character."[14] If we live in an age of increasing emphasis on IHL, then it is necessary to understand how to develop effective strategy that draws strength from furthering the spirit of our age. Domestic and international legitimacy for military actions depend a great deal on adhering to widely accepted norms of international law. When considering how international law affects strategy, strategists must not only understand how to develop plans that obey the law, they must also understand the potential abuses of international law, and how their adherence to law could be used against them by less scrupulous opponents. Our goal is to better understand potential abuses of law, and while we learn from studying them we must keep in mind that our own strategies must always be grounded in a sincere adherence to international law.

In this paper, changes in the international legal operating environment will be linked to some emerging developments in strategy. The first section will examine how weak powers – generally non-state actors and small states – have developed strategies to exploit the shifting priorities of international law. Examples will include Central Asian states that use the norms and values of Western powers to shield their oppressive regimes, non-state actors such as Hamas that leverage humanitarian law to extract battlefield advantages from their opponents, and the use of lawsuits by private organizations and individuals to intimidate critics of Islamist causes. These practices are often cited as examples of "lawfare," a controversial term whose recent emergence exemplifies efforts to come to intellectual grips with the effects of international law on strategy.

12. Nicholas Rostow, *Grand Strategy and International Law*, 277 INST. FOR NAT'L STRATEGIC STUDIES STRATEGIC FORUM 2 (Apr. 2012).

13. *Id.*

14. CLAUSEWITZ, *supra* note 4, at 594.

The second part of this paper will address how the major powers themselves use international law in strategy. The concept of lawfare also applies to some of these state actions, but strong states practice lawfare differently than weaker powers. Lawfare for major states is used to support the legitimacy of military action because international law is one of the keys to the politics of justifying force. States also use lawfare as part of a more complex campaign to exploit the gap between war and peace by using measures short of war, to include the introduction of non-state military forces – including proxies, contractors, and Private Military Companies (PMC) – onto the battlefield. Examples of major states using lawfare include Russia's manipulation of international law to justify its actions in Ukraine, the growing use of PMCs and mercenaries in war, and the incorporation of lawfare into strategic planning such as the West's counterinsurgency doctrine and modern Chinese strategic theory.

The paper will conclude with observations on some suggested trends in the relationship between strategy and international law. Comparing how states and non-state actors approach lawfare reveals that strong states still retain significant strategic legal advantages. The primary challenge to strategists is to identify which strategic concepts and which deeply embedded assumptions about the nature of war must be re-examined in light of the ongoing transition in international law.

I. A TOOL OF CHOICE FOR THE WEAKER POWER . . .

The shifting relationship between humanitarian law principles and sovereignty provides opportunities that state and non-state actors exploit in numerous ways, with some of the most creative methods being employed by weaker powers who view international law as a tool to extract otherwise unobtainable advantages from major powers. This section will discuss three different examples in which weaker powers have used international law in their relations with stronger powers. One example is Central Asia, where the post-Soviet states of Kazakhstan, Tajikistan, Turkmenistan, and Uzbekistan have used the West's own humanitarian and democratic principles against them to protect their regimes. A second example will examine Hamas' exploitation of IHL to gain battlefield advantages against Israeli Defense Forces in Gaza. The final example is of individuals and private groups aligned with non-state actors engaged in warfare with the West who are using lawsuits to intimidate opponents, quash public criticism, and accuse Western governments of violating international laws. The strongest practitioners of this method have arguably been Islamist supporters.[15]

Although IHL has evolved to justify intervention in the internal affairs of sovereign states, some weak states have found in humanitarian law principles

15. *See* Brooke Goldstein & Aaron Eitan Meyer, *"Legal Jihad": How Islamist Lawfare Tactics are Targeting Free Speech*, 15 ILSA J. INT'L & COMP. L. 395, 395-96.

useful leverage to preserve their sovereignty. The growing emphasis on human rights and democratic values places international pressure on some states to conform to the new norms. These internationally-imposed values are often at odds with their own domestic values or threaten the power of the ruling regime. Some of these states have figured out how to balance their internal concerns against this external pressure.

These states have found that by enacting and paying a minimal amount of lip service to token measures, such as laws to protect minorities, they can manage a certain degree of exploitation of these same minorities without outside interference. By avoiding the most outrageous acts that would trigger intervention, these governments articulate policies with enough rhetorical support to international humanitarian values to ensure they have a relatively free domestic hand.

One way in which Central Asian states balanced international demands with domestic concerns was by conflating democratization with regime integrity in the wake of the Color Revolutions. "In reacting to the perceived threat to regime integrity posed by so-called Western-style democracy and human rights appeals, the Central Asian states grafted a set of alternative norms, practices, and institutions, supported by Moscow and Beijing, which stressed the importance of sovereignty and cultural relativism . . . ."[16] Kazakhstan's President Nursultan Nazarbayev has "been one of the leading proponents of this cultural relativism."[17] Turkmenistan's president "painted with a broader brush, accusing all external efforts to raise issues of democracy or human rights as unacceptable infringements on Turkmen sovereignty."[18] By cloaking their interests in the language of international norms and values, these states sowed enough confusion over the true nature of their programs to block negative international reactions.

Central Asian states "strategically and expediently used the norms and justifications provided by foreign powers to guard and support their own domestic political practices."[19] Besides "cultural relativism," Central Asian countries also added "sovereign democracy" to their list of normative shields. Originally a Russian idea, sovereign democracy argues that democratic reforms must be enacted incrementally and modified to fit the domestic political culture.[20] These regimes protected themselves by exploiting the confusion in international law over whether sovereignty or human rights have primacy; "by grafting their own domestic pushback against Western democratic standards onto Russia's 'sovereign democracy' concept, Central Asian elites mounted an ideological and normative counteroffensive against the West."[21]

16. ALEXANDER COOLEY, GREAT GAMES, LOCAL RULES 98 (2012).
17. *Id.* at 112.
18. *Id.*
19. *Id.* at 9.
20. *Id.* at 112.
21. *Id.* at 114.

Central Asian countries used the sovereign democracy concept to justify crackdowns on non-governmental organizations (NGO) that allegedly threatened their unique domestic form of developing democracy and therefore managed to "de-universalize democratic standards and values."[22] For example, Central Asian governments enacted laws to prevent foreign NGOs from mobilizing political opposition. Primary targets were NGOs such as Freedom House and Amnesty International.[23] Uzbekistan tightened its domestic laws, for example by criminalizing unapproved gatherings, to close approximately 300 NGOs between 2004 and 2007.[24] Kazakhstan passed new tax and security laws to close over 30 NGOs.[25] Using these measures, Central Asian states barred external non-state actors they considered politically destabilizing.

Such instrumentalization of law to achieve security objectives has come to be termed "lawfare." Lawfare is defined as "the strategy of using–or misusing–law as a substitute for traditional military means to achieve an operational objective."[26] Lawfare is a deliberate strategy "to gain advantage from one side's greater allegiance to international law and its processes."[27] Also considered as lawfare is the abuse of IHL to destroy public support for military operations while "making the US fight with one hand tied behind its back."[28] Lawfare is also described as the use of law as a weapon of war and an obstacle to the state's legitimate use of armed force.[29]

Successful strategic performance requires an appreciation for the role of politics in war, and because law is an intensely political matter it is an integral part of the strategic operating environment. In one of the first major works in English on the practice of lawfare, legal scholar Orde F. Kittrie analyzes the increasing effectiveness of using law to achieve objectives that not long ago might only have been achievable using force. Kittrie traces the first attempts at lawfare back to 1609 when Grotius used legal arguments to bolster Dutch maritime power.[30] Kittrie attributes the current rise of lawfare to three factors: the increased number and reach of international laws and tribunals, the rise of NGOs focused on the law of armed conflict (LOAC), and the advance of globalization and economic interdependence.[31] Compliance-leverage disparity – defined as "the phenomenon of law and its processes (or particular laws and their processes) having greater leverage over some states or non-state actors (including individuals) rather than over others" – also drives lawfare.[32]

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22. *Id.* at 112.
23. *Id.* at 109.
24. *Id.*
25. *Id.*
26. Charles Dunlap, *Lawfare Today: A Perspective*, 3 YALE J. INT'L AFFAIRS 146, 148 (2008).
27. Orde F. Kittrie, *Lawfare and U.S. National Security*, 43 CASE W. RES. J. INT'L L. 393, 396 (2010).
28. *Id.*
29. *Id.* at 393.
30. ORDE F KITTRIE, LAWFARE: LAW AS A WEAPON OF War 4 (Oxford University Press 2016).
31. *Id.* at 40.
32. *Id.* at 20.

Lawfare offers advantages that let weak powers compete in the courtroom with strong powers that they could not match on the battlefield.

Of course not all legal advantages lie with the weaker powers, and some question whether labeling adverse legal actions as lawfare is an attempt by stronger states to intimidate weaker powers. To these critics, the lawfare concept is used by some governments to cast legitimate causes of action in a negative light. These critics view lawfare as a politically-charged word "coined within the United States military and subsequently adopted by right-wing ideologues as a way of stigmatizing legitimate recourse to legal remedies, particularly within an international law context."[33] From this perspective, the term lawfare, "is being mobilized by neoconservatives to reframe liberal human rights NGOs as a security threat."[34] Labeling a legitimate cause of action as lawfare implies an improper abuse of the law, and blacklisting as "lawfare" what might be a legitimate grievance "runs counter to the right for a remedy, a firmly established principle of international law."[35]

The US government, according to these critics, depicts some valid legal procedures with which it disagrees as somehow unpatriotic by stigmatizing them as lawfare. Critics charge that:

> The notion of lawfare has been developed to buttress this attitude. Lawfare, as it has been applied recently, is intended to intimidate and silence lawyers; it equates them with the enemy and suggests that their arguments contain at least a seed of treason."[36]

These critics argue that labeling legal actions designed to challenge the state's use of force as lawfare is in reality a public information campaign against valid accusations of excessive government force. Discouraging lawfare is contrary to the purpose of law, because to "insinuate that advancing such arguments is lawfare and hence illegitimate, is to insinuate that law should never constrain armed might. Thus the radical critique of lawfare amounts to an assault on international humanitarian law and international criminal law as such."[37] One study found the threat of lawfare over-politicized and concluded that "litigation lawfare is largely a myth"[38] and that the "threat of lawfare was overstated and

33. William A. Schabas, *Gaza, Goldstone, and Lawfare*, 43 CASE W. RES. J. INT'L L. 307, 309 (2010).

34. Neve Gordon, *Human Rights as a Security Threat: Lawfare and the Campaign against Human Rights NGOs*, 48 LAW & SOC'Y REV. 311, 312 (2014).

35. William J. Aceves, *Litigating the Arab-Israeli Conflict in US Courts: Critiquing the Lawfare Critique*, 43 CASE W. RES. J. INT'L L. 313, 313 (2010).

36. Scott Horton, *The Dangers of Lawfare*, 43 CASE W. RES. J. INT'L L. 163, 168 (2010).

37. David Luban, *Carl Schmitt and the Critique of Lawfare*, 43 CASE W. RES. J. INT'L L. 457, 462 (2010).

38. John Swanberg, Lawfare: A Current Threat or Much Ado about Nothing? 16 (2013) (unpublished Master's thesis, US Army War College) (on file with author).

was adequately handled by our judicial system."[39]

Others claim that the term lawfare abuses the law because it is a blanket term for acts that are already plainly illegal, and do not represent any essential change in the way law is perceived. To these observers of lawfare, "manipulation by belligerents of the law, for instance by hiding amongst the civilian population and leading the other party to commit possible violations of (international humanitarian law), is better described as a war crime than an act of lawfare."[40] The act of using civilians as a shield may be taking advantage of an opponent's respect for IHL, but that act is already considered a LOAC violation. According to these critics, it is unnecessary to create a new "lawfare" category because these violations represent nothing new or unique.

Weaker powers, however, have effectively targeted the legitimacy of military operations by alleging battlefield IHL violations. Examples of this type of lawfare have been used against Israel and its operations in the Gaza Strip. Israel in turn has responded with its own forms of lawfare. The use of lawfare has evolved to such an extent in the Israeli-Palestinian conflict that Kittrie describes it as "the closest thing the world has to a lawfare laboratory."[41]

For example, Hamas has used lawfare on the battlefield against Israel by hiding among the civilian population and using protected sites as shields. Hamas counts on Israel's greater need to comply with the protections to civilian populations, such as those proscribed in Article 48, 51 and 52 of Additional Protocol I to the Geneva Conventions requiring the parties in a conflict to distinguish between military and civilian persons and objects.[42] Hamas's IHL violation – placing civilians at risk by using them as shields – puts Israel in the position of potentially violating international law by targeting sites where civilians will be killed.[43]

Various international investigations have become mired in controversy over whether investigators emphasized Israeli IHL violations while failing to address Hamas's inappropriate use of protected objects such as hospitals. For example, in 2008 Israel launched a three week military offensive in the Gaza Strip that killed approximately 1,300 Palestinians and wounded over 5,000 persons.[44] These military operations led to allegations against both Israel and Hamas of war crimes and IHL violations. The UN set up a "Fact Finding Mission on the Gaza Conflict" led by international lawyer Richard Goldstone that came to be known as the "Goldstone Mission." The mission report – called the "Goldstone Report" – concluded that "both Israel and Hamas committed international law

39. *Id.*

40. Jamie A. Williamson, *The Knight's Code, Not His Lance*, 43 CASE W. RES. J. INT'L L. 447, 448 (2010).

41. KITTRIE, *supra* note 30, at 197.

42. *Id.* at 290.

43. *Id*. at 288.

44. Milena Sterio, *The Gaza Strip: Israel, Its Foreign Policy, and the Goldstone Report*, 43 CASE W. RES. J. INT'L L., 229 (Fall 2011).

violations by indiscriminately targeting civilians."[45]

The controversial Goldstone Report had some far-reaching strategic implications. First, it placed what some criticized as disproportionate blame on the Israelis. Second, it provided Hamas an opportunity to attack the legitimacy of Israel's military operations and claim the moral high ground in the conflict. Finally, the report's conclusions set a potential precedent that could affect the military practices of other states facing a similar dilemma as Israel. Regardless of whether the report was biased or not, the controversy itself contributed to weakening domestic and international support for Israeli military operations in the Gaza Strip.

Critics complained that the report unjustly placed the blame and culpability for human rights violations heavily upon the Israelis. The report was simply "far more willing to draw adverse inferences of intentionality from Israeli conduct and statements than from comparable Palestinian conduct and statements."[46] According to the report, "Israel used the rocket attacks on its citizens as a pretext, an excuse, a cover for the real purpose of the operation, which was to target innocent Palestinian civilians – children, women, the elderly – for death."[47]

The UN investigators laid the blame for war crimes squarely upon the Israeli leadership rather than Hamas. The report concluded that Israel's "failure to distinguish between combatants and civilians appears to the Mission to have been the result of deliberate guidance issued to soldiers, as described by some of them, and not the result of occasional lapses."[48] Furthermore, "responsibility lies in the first place with those who designed, planned, ordered and oversaw the operations."[49] In contrast, investigators found no evidence that Hamas fighters donned civilian clothes or fought from protected sites such as mosques, and concluded that Hamas "was not guilty of deliberately and willfully using the civilian population as human shields."[50]

Hamas, in effect, exploited compliance-leverage disparity to take advantage of Israel's greater interest in abiding by IHL. The less militarily capable side had successfully gained an edge over its opponent because of its willingness to "openly violate the law of war to gain a tactical advantage in specific operations by handicapping the ability of the IHL-compliant military to carry out its mission within the bounds of the law."[51] Hamas succeeded in casting doubt on

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45. *Id.*

46. Alan Dershowitz, *The Case Against the Goldstone Report: A Study in Evidentiary Bias* 1 (Harvard Law. Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 10-26, Feb. 2010), http://nrs.harvard.edu/urn-3:HUL.InstRepos:3593975.

47. *Id.* at 2.

48. U.N. GAOR, 12th Sess., *Report of the United Nations Fact-Finding Mission on the Gaza Conflict,* ¶ 1889, U.N. DOC. A/HRC/12/48 (Sept. 25, 2009), http://www2.ohchr.org/english/bodies/hrcouncil/docs/12s ession/A-HRC-12-48.pdf.

49. *Id.* at 408.

50. Dershowitz, *supra*, note 46, at 3.

51. Laurie R. Blank, *Finding Facts but Missing the Law: The Goldstone Report, Gaza, and Warfare*, 43 CASE W. RES. J. INT'L L., 283, (Fall 2011).

the legitimacy of Israel's military actions by targeting public and international opinion that was critical to political support for Israel's war effort. Hamas's exploitation of IHL exemplified a strategy where the "technologically and militarily disadvantaged forces target public support and seek to force a political end to the fighting."[52]

Supporters of the Goldstone Report fired back against these critics by denouncing the accusations of lawfare and arguing that the report served a useful purpose. Supporters objected to the way critics cast the report as an example of lawfare, claiming that the term lawfare itself was being "used abusively to attack critics who invoke the illegality of the behavior of certain military forces, including those of Israel and the United States."[53] To its supporters, the Goldstone Report deterred future Israeli excesses because it "heightened the risk for Israel that another sovereign state will choose to prosecute its political or military leaders."[54]

The US government did not support the Goldstone Report and stood among the report's critics. An official public response noted that "actions by terrorist groups that have the effect of employing civilians as human shields put enormous pressures on militaries that are trying to protect civilians and their own soldiers, an issue faced by many militaries today."[55] The US government recognized that the dilemma in which Hamas placed Israel was one in which US military forces could also find themselves. The increasing use of international law as a weapon of war is significant to the US because, as one military lawyer explains, resort to such strategic lawfare alters "the traditional warfare paradigm since the effects – real or perceived – of international treaties, laws, and resolutions will not only affect policy choices, but also military decision-making and, indeed, the very legitimacy of American military operations."[56]

Israel learned from the Goldstone Report experience that it needed to play a stronger role in shaping the strategic narrative. Part of the reason the report was so harsh on Israel was that Israel was uncooperative with investigators, leaving the Palestinian Authority (PA) to supply most of the evidence.[57] During military actions in Gaza in 2008-2009, and in 2014, Israel undertook an extensive information recording and media campaign to "push back against accusations that its uses of force violated the laws of war."[58] For example, the Israeli military in 2014 posted a briefing online documenting evidence it collected of Hamas firing from protected sites, concluding that "Hamas' tactics flagrantly

52. *Id.* at 283.

53. Schabas, *supra,* note 33, at 307.

54. Sterio, *supra,* note 44, at 253.

55. Statement by the U.S. Assistant Secretary of State for Democracy, Human Rights and Labor, *U.S. Response to the Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, Twelfth Session of the U.N. H.R.C. (Sept. 2009), https://geneva.usmission.gov/2009/09/29/gaza-conflict/.

56. John W. Bellflower, *The Influence of Law on the Command of Space*, 65, A.F.L. REV., 16, (Mar. 22, 2010).

57. KITTRIE, *supra*, note 30, at 304.

58. *Id.*

violate international law."[59] Israel also instituted new methods to limit civilian casualties, such as issuing warnings before attacks by dropping leaflets, making recorded warning telephone calls, and firing warning rounds.[60] Nevertheless, the UN investigation report issued in June 2015, although arguably more balanced than the Goldstone Report, "failed to address, and thus had the effect of encouraging, Hamas's battlefield lawfare."[61]

Lawfare is a characteristic of an emerging world order where international courts and international law have a stronger role in matters concerning the use of force. Israeli legal scholar Yoram Dinstein warns that we must not underestimate the power of international law and lawfare because it is a "weapon of mass disinformation, attuned to the peculiarities of the era in which we live."[62] As some observers note, it is worth considering whether international investigations, such as the Goldstone Report, suggest emerging trends in how some of the basic principles of LOAC will be applied to the future use of force.[63]

Leveraging the legal system to influence public opinion in a conflict is not limited to legal actions against states. Individuals have also been subject to lawsuits intended to intimidate a group's critics and garner public support for a cause. Perhaps the most notable examples have been of Islamist groups that some claim use lawsuits as a weapon to indirectly augment military force. One observer, Brooke Goldstein, goes so far as to label such lawfare as the "new jihad."[64]

Goldstein emphasizes what she sees as two goals of Islamist supporters within the legal system. The first goal is to "abolish public discourse critical of Islam."[65] The second objective is "to impede the free flow of public information about the threat of Islamist terrorism thereby limiting our ability to understand and destroy it."[66] Her argument is that lawfare has emerged as a legal campaign in domestic and international courts that complements terrorism and asymmetric warfare. The method employed is "often predatory, filed without serious expectation of winning, and undertaken as a means to intimidate, demoralize, and bankrupt defendants."[67] One primary example is that of "the libel tourist" Khalid bin Mahfouz, who often sued American researchers and authors in British courts for libel against Islam.[68] The intent is to instill a fear of resource-

59. *Hamas War Tactics: Attacks from Civilian Centers*, Israeli Defense Force, (Aug. 14 2014), http://acdemocracy.org/wp-content/uploads/2014/08/Hamas-Urban-Warfare-Tactics.pdf.

60. KITTRIE, *supra*, note 30, at 297.

61. *Id.* at 288.

62. Yoram Dinstein, *Concluding Remarks: LOAC and Attempts to Abuse or Subvert it,* 87, INT'L L. STUD., 484 (2011).

63. *See* David E. Graham, *The Law of Armed Conflict in Asymmetric Urban Armed Conflict, ,* 87, INT'L L. STUD., 302 (2011).

64. Goldstein & Meyer, *supra,* note 15, at 395.

65. Brooke Goldstein & Aaron Eitan Meyer, Lawfare: THE WAR AGAINST FREE SPEECH. A FIRST AMENDMENT GUIDE FOR REPORTING IN AN AGE OF ISLAMIST LAWFARE 15 (2006).

66. *Id.*

67. *Id.* at 16.

68. *Id.* at 155.

draining lawsuits for publishing material offensive to Islam, thereby "creat[ing] a detrimental chilling effect on open public dialogue about issues of national security and public concern."[69]

Other examples of Islamists using lawfare to promote their cause include the London Muslim Brotherhood, a group that "employed a dream team of internationally renowned British lawyers . . . to start legal proceedings against the Egyptian government, potentially in the International Criminal Court."[70] This approach – working within the existing institutions of a non-Islamic entity to prepare the way for the eventual introduction of an Islamic system – has long been a method used by Islamists against secular regimes.

The use of Western norms and institutions against the West itself is not new to Islamists. For example, the so-called "Project" memorandums – notes from a 1991 Muslim Brotherhood meeting outlining their strategic goals for North America – advocate gradually using the West's own institutions against it, and "frequently uses the Western-based international legal system."[71] Islam is flexible enough to reconcile alien legal systems with its own, as evidenced by the multicultural Islamic societies that existed in the past such as the Ottoman Empire.

Some interpretations of Islam consider such an accommodation as but a temporary step toward the recreation of a new Islamic-based system modeled on the caliphate. Supporters of the caliphate narrative, such as the Islamic State, find credibility in an interpretation of Islam that historically "refused to recognize legal systems other than its own."[72] For example, "the modern international system, born of the 1648 Peace of Westphalia, relies on each state's willingness to recognize borders, however grudgingly. For the Islamic State, that recognition is ideological suicide."[73] The Islamic State's rejection of the modern secular world takes these beliefs further and "looks nonsensical except in light of a sincere, carefully considered commitment to returning civilization to a seventh-century legal environment and ultimately to bringing about the apocalypse."[74] If this is lawfare, it is lawfare at its most extreme.

II. . . . BUT WIELDED MORE EFFECTIVELY BY THE STRONG

Strong states also use international law in a conflict and appear to do so with more strategic effect. Strong states are able to extract enduring strategic advantages from international law, although some states are more inclined to exploit

69. *Id.* at 16.

70. Bel Trew, *London Underground*, FOREIGN POLICY (Sept. 27, 2013), http://foreignp olicy.com/2013/09/27/london-underground/.

71. THE CLARION PROJECT, THE MUSLIM BROTHERHOOD 16 (June 2015), http://www.clari onproject.org/sites/default/files/Muslim-Brotherhood-Special-Report.pdf.

72. MAJID KHADDURI, WAR AND PEACE IN THE LAW OF ISLAM vii (1955).

73. Graeme Wood, *What ISIS Really Wants*, THE ATLANTIC (Mar. 2015), http://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980/.

74. *Id.* at 80.

these advantages than others. It is one of the conclusions of this paper that strong states are strategically resilient and remain capable of exhibiting rapid innovation and novel adaptations in the changing international legal environment because strong states can draw upon greater legal resources.

First, strong states have the potential to use more sophisticated legal tools, such as financial law, as part of their lawfare. Second, noble sounding humanitarian ideals couched under IHL can provide convenient political cover and legitimacy to state interventions. Rather than international law being a tool to restrain states, strong states can use international law as part of their own narrative to justify using military force. Finally, strong states have developed alternatives to state-sponsored military forces that allow them to exploit some of the gaps in international law, granting them greater flexibility in the use of force. Like weaker powers and non-state actors, larger and more powerful states are also poised to take advantage of the transition in international law by alternatively emphasizing different principles to benefit themselves.

Lawfare is not restricted to weaker powers and non-state actors, and "modern State military forces do legitimately use the law to achieve military outcomes."[75] To depict lawfare solely as a weapon for the weaker side neglects half the phenomenon and "gives a one-sided perspective on the role of law in contemporary conflicts. It largely neglects the many ways in which governments and the military use law strategically and presents the recourse to law and legal procedure as something negative."[76] Clausewitz's insights are relevant here, because he "was keenly aware of the political dimension, and this is the linkage to today's understanding of lawfare."[77] In today's international legal environment, strong states recognize that law – like war – can also be used to compel an enemy to do their will.

Many states, with some notable exceptions, have yet to fully embrace the concept of lawfare. Exceptions include China, which systematically wages lawfare across the strategic operating environment, to include maritime and aviation lawfare, space lawfare, and cyberspace.[78] As China opened up to the world in the post-Mao era, its ability to engage with international law suffered as a result of the suppression of lawyers during the Cultural Revolution. In the last decade, however, China's lawyers have become increasingly more active and proficient on the international scene.[79] China has now incorporated law into its strategic thinking and developed a comprehensive approach to lawfare that is coordinated across the Chinese government. For example, China is using maritime law to justify denying access to international navigation in the South China

75. Dale Stephens, *The Age of Lawfare*, INTERNATIONAL LAW AND THE CHANGING CHARACTER OF WAR 327 (Raul A. Pedrozo & Daria P. Wollschlaeger eds., 2011).

76. Wouter Werner, *The Curious Career of Lawfare*, 43 CASE W. RES. J. OF INT'L L. 61, 71 (2010).

77. Charles Dunlap, *Lawfare: A Decisive Element of 21st Century Conflicts?,* 54 JOINT FORCES QUARTERLY 34, 35 (2009).

78. Kittrie, *supra* note 27, at 165.

79. *Id.* at 186-87.

Sea.[80] China has developed a concept of lawfare it calls "falu zhan" or "falu zhanzheng", or "legal warfare," as part of its strategic thought.[81]

A treatise published by the People's Liberation Army (PLA) in 1999 titled *Unrestricted Warfare* provides some insight into Chinese conceptual thinking on lawfare. Written by two PLA colonels, this study shows that Chinese thinkers draw inspiration from foreign practices, including those of the US. The authors observe that "non-military war operations" are "being waged with greater and greater frequency."[82] Among the examples cited are trade wars that have been waged "with particularly great skill in the hands of the Americans, who have perfected it to a fine art."[83] The treatise lists various measures such as "the use of domestic trade law on the international stage; the arbitrary erection and dismantling of tariff barriers; the use of hastily written trade sanctions; [and] the imposition of embargoes on exports of critical technologies."[84] One lesson the Chinese authors draw from studying these non-military measures is that "these means can have a destructive effect that is equal to that of a military operation."[85]

China demonstrates the potential for law to shape strategy when approached from a more aggressive perspective by also treating international law "as an offensive weapon capable of hamstringing opponents and seizing the political initiative."[86] China's version of lawfare is more "instrumental" and focused on positive results, while "Western military legal experts appear more focused on ensuring that their forces and commanders are not liable to war crimes charges than they are on undertaking offensive legal warfare, unlike their Chinese counterparts."[87] Kittrie provides several examples of Chinese lawfare, including its deliberately inaccurate interpretations of international law to force changes in the customary Law of the Sea.[88]

For example, the Chinese assert that the UN Convention on the Law of the Sea (UNCLOS) provides broad powers over rights of passage and that "foreign naval operations within another nation's 200 nautical mile Exclusive Economic Zone (EEZ) should be subject to the approval of the owning state."[89] This is a deliberate misinterpretation of UNCLOS. However, Chinese claims of broad powers within the EEZ, if left unchallenged, can eventually bear fruit because

80. *Id.* at 165-68.

81. Dean Cheng, *Winning Without Fighting: Chinese Legal Warfare*, THE HERITAGE FOUNDATION (MAY 21, 2012), http://www.heritage.org/research/reports/2012/05/win ning-without-fighting-chinese-legal-warfare.

82. QIAO LIANG & WANG XIANGSUI, UNRESTRICTED WARFARE 50 (1999), https://www.oodaloop.com/wp-content/uploads/2015/01/unrestricted.pdf.

83. *Id.* at 51.

84. *Id.*

85. *Id.*

86. Cheng, *supra* note 81, at 1.

87. *Id.* at 7.

88. KITTRIE, *supra* note 30, at 166.

89. Cheng, *supra* note 81, at 9.

"customary international law can be nullified or even changed through state practice with an assertion that such practice is consistent with international law."[90] By using international law, China can potentially expand its area of control in the South China Sea without using force.

Another adept practitioner of lawfare is Israel, which has been forced to develop a number of lawfare countermeasures to include pre-strike warnings and other changes to its battlefield operations.[91] Israel's experience with lawfare also provides an example of how the state can draw upon its superior legal resources and more sophisticated legal tools to achieve a military objective without using force. In May 2010, Israeli forces intercepted a flotilla of ships from Turkey attempting to violate a blockade of the Hamas-controlled Gaza Strip, killing nine people. A UN fact-finding mission subsequently criticized Israel for its handling of the incident. Faced with a similar flotilla leaving Greece in June 2011, Israeli lawyers used legal measures to stop the ships from leaving port. The measures included threatening legal action against companies providing the ships essential services such as maritime insurance. In letters to these companies, Israeli lawyers referenced the US Supreme Court case of *Holder v. Humanitarian Law Project* to argue that providing services to the flotilla was illegal because it supported terrorism. The legal letters proved persuasive. By rendering the ships unable to secure the necessary services to gain permission to leave their Greek ports, Israel succeeded in stopping the 2011 flotilla without firing a shot.[92]

Another phenomenon arguably resulting from the shifting international legal operating environment has been the use of international law as a component of so-called "hybrid warfare." Russia is a leading example of using "legal arguments as a means to support hybrid warfare."[93] One way to do this is to cast doubt on whether an act is legitimate under international law and cause indecision and hesitation among opponents until it is too late to act. The uncertain relationship between sovereignty and humanitarian law leaves ample room to sow confusion and shape a convincing narrative.

The concept of self-determination and its relationship with humanitarian interventions was central to Russia's justifications for intervening in Ukraine. The self-determination debate arose earlier when NATO intervened in Kosovo. NATO used legitimate humanitarian concerns as justification for trumping Serbia's sovereignty. The West's argument would later be turned on its head and used by Russia with respect to the Crimean crisis.

The Kosovo experience was an instructive one for Moscow. In his Kremlin speech on March 18, 2014, Russian President Vladimir Putin cited the "Kosovo precedent – a precedent our Western colleagues created with their own hands in

90. KITTRIE, *supra* note 30, at 166.

91. *Id.* at 284.

92. *Id*. at 313-314.

93. Christopher J. Borgen, *Law, Rhetoric, Strategy: Russia and Self-Determination Before and After Crimea*, International Law Studies 91 (Jul. 30, 2016) http://stockton.usnwc.edu /ils/vol91/iss1/7/.

a very similar situation, when they agreed that the unilateral separation of Kosovo from Serbia, exactly what Crimea is doing now, was legitimate."[94] Moscow criticized the West over its legal justifications for the Kosovo war at the time and its subsequent independence, but found the arguments useful and "Russia adopted this rhetoric itself, regarding Crimea."[95]

The shifting nature of international law provided an opportunity for Russia "to construct its own 'legal' framework."[96] This legal framework allows Russia to use noble-sounding ideals to justify interventions, portraying these actions as legitimate and securing public support. Russia's strategic approach to "Crimea and eastern Ukraine has been an amalgamation of stealth invasion and quasi-legal rhetoric. The 'stealth' part of the invasion was to maintain a fig-leaf of deniability and to make the uprising in eastern Ukraine seem homegrown, as opposed to Russian-led."[97] Russia used the rhetoric of self-determination and effectively exploited international law to mask its true motivations and further its interests in the Crimea. This strategy "interlocks with Russia's rhetoric, a quasi-legal/nationalist amalgamation that attempts to persuade those who can be persuaded and befuddle those who cannot."[98]

Russia is taking advantage of the shift in sovereignty's priority under international law. Russia used the rhetoric of self-determination to shift the emphasis it traditionally placed on state sovereignty. For Russia "sovereignty moved from being the core value that was protected by international law, to simply a fact that may or may not come into play in a particular circumstance."[99] Russia appears to have recognized that the evolving international legal environment has provided an opportunity for justifying interventions that earlier would have been clear sovereignty violations. Framing the Crimea issue in these terms "gave Russia the opportunity to use the persuasive rhetoric of self-determination to frame its perspective of what was and was not allowed under international law."[100]

Hybrid warfare may not be entirely new, but the expanded opportunities presented under international law are a recent phenomenon, and the exploitation of these gaps in international law contributes to Russia's strategy by allowing it to frame the strategic narrative. Russia's arguments are well-crafted to take advantage of the coalitional nature of NATO because "the use of international legal rhetoric in general, and framing an issue as a self-determination struggle in particular, can put other actors, such as the United States and the EU, on the

94. British Broadcasting Company, *Crimea Crisis: Russian President Putin's Speech Annotated,* (Jan. 23, 2016), http://www.bbc.com/news/world-europe-26652058.

95. *British Broadcasting Company, Crimea Crisis: Russian President Putin's Speech Annotated, (Jan. 23, 2016), http://www.bbc.com/news/world-europe-26652058.*

96. Borgen, *supra* note 93, at 262.

97. *Id*. at 266.

98. *Id*.

99. *Id*. at 260.

100. *Id*. at 266.

wrong foot, making it difficult to marshal an effective response."[101] For example, Russian opportunism and disregard for international law pose a looming dilemma for NATO by threatening the integrity of Article 5 of the North Atlantic Treaty because the "use of the rhetoric of self-determination can be used to befuddle and confuse treaty obligations and military strategy."[102] NATO faces a potential dilemma in considering how it will respond to an unclear Russian threat to seize a small slice of a NATO ally because to ignore such an act undermines Article 5, but to respond with force risks escalation over ambiguous stakes.

The use of alternatives to the state-sponsored military force, whether through proxies, by contractors, or via mercenaries, is another increasing phenomenon since the end of the Cold War. Russia also used proxy forces in the Crimea and Ukraine and concealed the use of its own military forces to sow confusion and obscure its actions. Russia's motives probably were to obscure its involvement in what it wanted to depict as an internal uprising and exploit the gap between peace and war long enough to forestall a more decisive NATO response. By using proxy forces and denying the role of Russian troops, Russia succeeded in depicting the situation in Ukraine as a civil war such that Western media would often refer to Kiev's opponents as rebel forces without acknowledging the presence of Russian personnel.[103] Russia strove to "create doubts and anxieties on the part of western governments and the public whom they serve, knowing that no democratic country commits readily to support a cause fraught with ambiguity."[104] Russia's legal arguments didn't need to be completely convincing to everyone; they merely needed to foster enough uncertainty over the true nature of the conflict for long enough to create facts on the ground that favored its preferred outcome.

Other examples of alternatives to state-run military forces, but with different motives, include the US and its use of contractors in Iraq and Afghanistan. Policy analyst Sean McFate argues that IHL unintentionally helps create a new market for hired military forces because a more humane emphasis in warfare is changing the nature of the Western way of war.[105] Using contracted forces instead of their own troops allows major powers to reduce their casualties "thereby giving the appearance of humanizing warfare."[106] McFate argues that the market for mercenaries opened up because "the rise of the humanitarian rights regime had a hand, as it required UN commanders on Balkan battlefields and elsewhere to fight with human rights lawyers by their sides to parse the

101. *Id*. at 269.

102. *Id*. at 270.

103. Thomas Grant, *Russia's Invasion of Ukraine: What does International Law Have to Say?*, Lawfare, (Aug. 27, 2015), https://www.lawfareblog.com/russias-invasion-ukraine-what-does-international-law-have-say.

104. *Id*.

105. SEAN MCFATE, THE MODERN MERCENARY (New York: Oxford University Press, 2014).

106. *Id*. at 45.

excessively complex and convoluted rules of engagement on the use of force."[107] Using contractors makes it easier to operate under these potentially burdensome rules. The subsequent reintroduction of contracted military force into international affairs may contribute to the weakening of state sovereignty by opening the door wider to non-state actors willing to challenge the state's weakening monopoly on the use of force.

From one perspective, PMCs represent a weakening of the state's monopoly on the use of force, but from a different perspective using PMCs arguably shows that states have the resiliency and flexibility to adjust to the complexities of a changing legal operating environment. State adaptability is also demonstrated by accommodating the use of law into doctrine and strategic thought. The West's doctrine for counterinsurgency operations exemplifies this adaptability, because humanitarian law in a counterinsurgency goes hand in glove with sound strategy. The nature of a counterinsurgency is by necessity more political because it is tied to winning the population over, and one way to lose popular support is to act against accepted international laws and norms. As US counterinsurgency doctrine states, "the international community must see a host nation's security force as a force for good that respects human rights and the international law of war."[108] Law and strategy are closely meshed in counterinsurgency because the nature of these conflicts is intensely political.

The focus of using law in the context of counterinsurgency is arguably more defensive in nature because it relies on avoiding IHL violations the enemy can exploit to undermine the legitimacy of military operations. Counterinsurgency strategy "aligns with the underlying goals of the laws of war because strategic self-interest pushes counterinsurgents to operate in accordance with the dictates of humanity."[109] This "organic relationship between law and strategy thus not only reveals areas of the law that may require revision but also, more importantly, suggest ways in which law and strategy can work together to further their shared aim."[110] Although largely defensive in nature with respect to law, in counterinsurgency doctrine "law does more than constrain actors: it provides pathways for action. Because it is at once enabling and constraining, law can shape strategy."[111]

III. COMPARATIVE ANALYSIS: EXPLOITING THE LAW'S GAPS AND THE IMPORTANCE OF LEGITIMACY

Strong states and weaker actors seek to use international law to further military objectives but in different ways. There are at least three major differ-

107. *Id*. at 44.

108. Field Manual (FM) 3-24/Marine Corps Warfighting Publication (MCWP) 3-33.5, INSURGENCIES AND COUNTERING INSURGENCIES (Washington, DC: Government Printing Office, 2014).

109. *Id*. at 44.

110. GANESH SITARAMAN, THE COUNTERINSURGENT'S CONSTITUTION: LAW IN THE AGE OF SMALL WARS 44 (2013).

111. *Id*. at 83.

ences. First, strong states have more at stake in terms of using international law to legitimize their actions. Non-state actors often have alternative sources of legitimacy, and view legitimacy derived from international law as a state vulnerability that can be exploited. Second, strong states are better equipped to extract long-term advantages from international law. States tend to exploit more sophisticated legal areas such as financial regulations that leverage a non-state actor's greater vulnerability to the disparate costs and benefits of compliance. States have the strategic culture to incorporate international law into their strategic thinking. States control the international law venue that makes the rules. Finally, strong states and weaker actors are both willing to manipulate, change, or simply ignore international law if necessary to further their vital interests. The unintended consequences of this behavior for the international order probably place strong states at risk more than other actors in the system.

First, central to how states and non-state actors leverage international law are their different approaches to legitimacy. International law is a system created by states and it is natural for states to pin their legitimacy to compliance with the agreed-upon rules. States, whether strong or weak, are more concerned with appearing to act in accordance with international law and to depict their use of force as justified and legitimate. Non-state actors use international law to cast doubt on the legitimacy of their state opponents rather than to bolster their own.

Rather than defensive, the use of international law by non-state actors in these terms is almost entirely offensive. It is more difficult for states to use IHL in offensive lawfare against non-state actors, for many non-state actors do not consider all international norms as entirely valid. They find legitimacy through other means such as popular support, leading to a compliance-leverage disparity with respect to international law. At one extreme are the jihadists who dream of an entirely new system of international order based on Islam, and on the other extreme are those who push for humanitarian considerations to trump more traditional concepts of international law.

Chinese thinkers have already contemplated the different approaches various actors take toward lawfare. It is noted in *Unrestricted Warfare* that whether or not states acknowledge the law "often depends on whether or not they are beneficial to themselves." Another difference is that small states "hope to use the rules to protect their own interests, while large nations attempt to utilize the rules to control other nations. When the rules are not in accord with the interests of one's own nation, generally speaking, the breaking of the rules by small nations can be corrected by large nations in the name of enforcers of the law."[112] Weak powers, however, have little inherent power to enforce the rules, and look more often to the growing influence of international tribunals or to the

112. QIAO & WANG, *supra* note 89, at 109.

court of public opinion for leverage over stronger powers.[113]

The use of international law by non-state actors to undermine the legitimacy of state military actions has immediate strategic implications. For example, media reports on "civilian casualties caused by state forces, whether in Gaza, Iraq, or Afghanistan, produce an immediate outcry and debates about the lawfulness of the military operation, the motives of the state forces, and the potential for criminal liability."[114] Non-state actors can exploit civilian deaths against the state on a strategic level to undermine popular and international support for the state's military campaign. In addition to opportunistically exploiting civilian casualty situations, opponents that are "unconstrained by humanitarian ethics now take the strategy to the next level, that of orchestrating situations that deliberately endanger noncombatants. Civilians thus become a pawn at the strategic level as well, because they are used not only for tactical advantage (e.g., shelter) in specific situations, but for broader strategic and political advantage."[115]

States derive strength from legitimacy, so it is also a potential vulnerability. Announcing that one has a just cause for war and claiming moral superiority puts one at risk of forfeiting legitimacy by losing the moral high ground. Lawfare "can be effectively canvassed to corrode the indispensable home-front support for a given war."[116] The legitimacy of the conflict is vulnerable to public opinion, and when that legitimacy is based on following the humanitarian aspects of international law then any perceived moral failure undermines that legitimacy.

Second, strong states have proved adept at exploiting the gaps in the international legal order as well as, perhaps better than, weak powers and non-state actors. NATO and the West successfully intervened in Kosovo and secured its independence. Russia has manipulated international law to justify absorbing part of a neighboring country. China is using lawfare to try to force changes in the customary international Law of the Sea. States have proved able to successfully use legal measures to help secure their strategic objectives.

There are some who argue that the US has yet to fully tap into its potential lawfare capabilities. The US does not possess a comprehensive approach to lawfare strategy as China or Israel have developed. Kittrie describes how parts of the US government have nevertheless successfully used legal techniques to achieve strategic results, such as the US Treasury and its use of international financial laws against Iran.[117] Also, some of the most effective US lawfare has been the work of private sector attorneys rather than the US government. Kittrie

113. The Palestinian Authority's accession to the International Criminal Court in April 2015 exemplifies how international tribunals and organizations can allow weak actors to punch well above their weight in the international arena. *See* KITTRIE, *supra* note 30, at 208.

114. BLANK, *supra* note 51, at 304.

115. *Id*.

116. Dinstein, *supra* note 62, at 485.

117. KITTRIE, *supra* note 30, at 111.

provides several examples of litigation using the Anti-Terrorism Act of 1990. A significant case was *Boim v. Holy Land Foundation*, in which attorneys working on behalf of the family of a US victim of terrorism secured a judgment against Islamic fundraising organizations, drying up a significant source of financial support to Hamas.[118]

Given the vast experience of the US legal community, "the United States has the potential to be the dominant lawfare superpower."[119] However, the US has refrained from incorporating law into its national strategy, with the exception of a mention in the 2005 National Defense Strategy that Kittrie notes unfortunately seemed to dismiss lawfare as a strategy of the weak that was of little use to the US.[120] The US government has yet to fully tap into the national reservoir of legal talent to maximize its advantages in legal skills and abilities, advantages already being demonstrated by US private sector attorneys.[121]

US private sector expertise can inform potential military uses of lawfare. Kittrie describes how Special Operations Command Pacific reached out to the University of Pennsylvania's Law School for research on foreign criminal laws that could be used to detain and prosecute foreign fighters supporting the Islamic State.[122] In Kittrie's assessment, if the US properly leverages its extensive legal expertise to support a national lawfare strategy, the "US advantage in sophisticated legal weapons has the potential to be even greater than its advantage in sophisticated lethal weapons."[123]

Finally, there are some looming unintended consequences implied when it comes to using international law to promote humanitarian values. Well-intentioned but potentially dangerous precedents are probably more hazardous to major powers within the current system, because major powers in general have based their security on the structures and rules created under the current world order. Humanitarian ideals are – for good reasons – being more universally applied but can also still be exploited for the legitimacy they can grant to military operations. This is not a new development. As Michael Walzer once observed, "the idea of humanitarian intervention has been in the textbooks of international law for a long time, but it appeared in the real world, so to speak, as a rationale for imperial expansion."[124] Humanitarian legal principles could become mere boilerplate justifications for interventions undertaken for less than ideal reasons.

For weaker powers, the shift in priorities from sovereignty to IHL can be a double-edged sword. On the one hand, humanitarian law principles can restrict

118. *Id.* at 54-60.
119. *Id.* at 343.
120. *Id.* at 30.
121. *Id*. at 38.
122. *Id*. at 107.
123. *Id.* at 32.
124. MICHAEL WALZER, *Preface to the Third Edition*, *in* JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS xi (3d ed. 2000).

the use of military methods used against weaker powers and provide political leverage against larger powers. On the other hand, the corresponding decrease in emphasis on sovereignty leaves weaker powers more vulnerable to intervention by a larger power professing to act out of noble-sounding ideals.

There are some critics who caution that "the case for humanitarian intervention is essentially misdirected. A history of black intentions clothed in white has tainted most possible applications of the doctrine."[125] The danger is that the cynical use of IHL has an unintended consequence of undermining faith and trust in the international legal system. Ultimately, "the abuse of the legal system, of human rights laws, and of humanitarian laws by lawfare undermines the overarching goal of world peace by eroding the integrity of the legal system and by weakening the global establishment and enforcement of the rule of law."[126] Some warn that if international law is undermined through the excessive use of lawfare it "will erode the integrity of the national and international legal systems and result in the unfortunate and increased use of warfare to resolve disputes."[127]

Another unintended consequence may be the effect of introducing alternative sources of military power onto the modern battlefield. After a hiatus of over 400 years, sophisticated private organizations – akin to the medieval Italian *condottieri* – capable of standing up trained and equipped fighting forces have reappeared to replace or augment professional state-sponsored soldiers on the international scene.[128] As the state's grip on sovereignty has eased, these other actors have re-emerged to stake claims on powers previously reserved to the state. These developments suggest to some a return to similar conditions that existed during the period after the Thirty Years' War, a period when the international order was undergoing a comparable shift in the legal operating environment.[129]

States probably are still hamstrung by some intellectual blinders inherited from the Westphalian era. For example, non-state actors tend to disregard international boundaries and borders. This tendency is evidenced by proponents of humanitarianism who consider narrow international interests morally inferior to their universal values, as well as extreme organizations such as the Islamic State and its ambitions for a universal caliphate.[130] This raises questions as to

125. H. Scott Fairley, *State Actors, Humanitarian Intervention, and International Law: Reopening Pandora's Box,* 10-1 GA. J. INT'L AND COMP. L. 29, 63 (1980).

126. Susan W. Tiefenbrun, *Semiotic Definition of "Lawfare,"* 43 CASE W. RES. J. INT'L L. 29 (2010).

127. *Id*. at 60.

128. MCFATE, *supra* note 105, at 52.

129. McFate concludes that the return of private military forces to the international arena "heralds a wider trend in international relations: the emergence of neomedievalism." *Id.* at 5. Victory is also defined differently in neomedieval warfare, because risking expensive assets in battle discourages combat emphasizing overwhelming force. *See id.* at 90-100.

130. "Human rights movements frequently view sovereignty as morally unacceptable because it places national interests above universal values." GRIMM, *supra* note 9, at 123.

whether states too should reconsider the implications of borders and sovereignty when facing opponents with a transnational and borderless world view.

It is the leading theorist of war from the previous era who probably gives us the best reason for questioning the assumptions of his day. Clausewitz observed that the "first, the supreme, the most far-reaching act of judgment that the statesman and commander have to make is to establish by that test the kind of war on which they are embarking, neither mistaking it for, nor trying to turn it into, something which is alien to its nature."[131] The kinds of wars that will be fought in the era of an expanding humanitarian legal regime probably will be – if not actually more humane – then certainly different from the kinds of wars that came before it.

> "[T]he US advantage in sophisticated legal weapons has the potential to be even greater than its advantage in sophisticated lethal weapons."
>
> – Orde F. Kittrie, *"Lawfare: Law as a Weapon of War,"* 32.

CONCLUSION: STRATEGY IN A MORE HUMANITARIAN AGE

International law has come to play an expanded role in the use of force. This expanded role has elevated evolving humanitarian law concepts over the long-standing preference for sovereignty, and has contributed to the state losing its uncontested control over the direction of war. The "state therefore has an interest in re-appropriating the control and direction of war." As Hew Strachan notes, "that is the purpose of strategy."[132] Arguments about international law are part of diplomacy, and "diplomatic arguments are a means to an end. They are part of a strategy."[133] For this reason, in the tight relationship between law and politics, law has a Clausewitzian link to war. Competitors such as Russia, who view international law as a weapon, show that "to simply ignore legal argument is to cede a strategy, to concede multiple positions."[134] To leave legal arguments unchallenged not only cedes strategy, it cedes a guiding hand in the shaping of the strategic operating environment, and perhaps the nature of contemporary strategy itself. As one study of Russian legal maneuvers on Ukraine concludes, "to shape the legal environment unchecked is to concede that lawfare can adversely shape the battlefield without hindrance from those whose interests are undermined."[135]

There are several implications for strategy in this changing operating environment. To start, justifications for the use of force are poised to place new obligations on states to intervene for humanitarian reasons. Second, some strategic principles developed during the previous age probably need to be

131. CLAUSEWITZ, *supra* note 4, at 88.
132. Strachan, *supra* note 1, at 42.
133. Borgen, *supra* note 93, at 263.
134. *Id*. at 278.
135. Michael A. Newton, *Illustrating Illegitimate Lawfare*, 43 CASE W. RES. J. OF INT'L L. 61, 261 (2010).

re-examined in light of the new legal operating environment. Finally, the evolving international order raises questions of what it means to win in the current system.

First, the evolving nature of international law is imposing new obligations on the state. Responsibility to Protect (R2P) is a relatively new international concept that emerged out of the UN in the aftermath of the wars of the 1990s and the world's failure to prevent genocidal acts such as the massacres in Bosnia and Rwanda. The Canadian government on behalf of the UN in 2000 took up the question of the responsibility for humanitarian intervention and established the International Commission on Intervention and State Sovereignty (ICISS) to study the matter. In 2001, the ICISS suggested the term "Responsibility to Protect," in part to avoid the stigma associated with intervention and to stress the new principle's humanitarian basis.[136] Since then, R2P has enlisted many advocates to include US officials such as US Ambassador to the UN Samantha Powers, who argued in favor of humanitarian intervention to prevent genocide in her 2002 book, *A Problem From Hell*.[137]

R2P asserts that states have a responsibility to protect their populations from genocide, war crimes, crimes against humanity, and ethnic cleansing. R2P holds that "should a state fail to meet this responsibility, the United Nations General Assembly has recommended that the Security Council should step in to provide protection, including by military measures if necessary."[138] The R2P doctrine "overturns established international law that was designed to maintain national jurisdiction free from external intervention."[139] This means that not only will there probably be more humanitarian operations in the future, but that strategic success will be more difficult to define. It is harder to prove that a military operation has been successful if the objective has been to prevent something, a humanitarian crisis, from happening.

There is a growing expectation that states and alliances will formally incorporate humanitarian law principles into their strategic planning. This has already been explicitly called for by the UN under R2P. The UN declared that to uphold R2P in practice, member states should declare "atrocity crime prevention and response a national priority, undertake a national risk assessment and articulate an actionable whole-of-government strategy for both domestic and international policy."[140] States are not only expected to intervene when necessary in the affairs of other states for humanitarian reasons, they are now also expected to incorporate these humanitarian concerns into the development of their national strategy.

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136. INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 11 (2001).

137. SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE 503-516 (2002).

138. Doyle, *supra* note 7, at 7.

139. *Id*. at 113.

140. U.N. Secretary-General, *A Vital and Enduring Commitment: Implementing the Responsibility to Protect,* ¶ 74, U.N. Doc. A/69/981-S/2015/500 (July 13, 2015).

Second, some assumptions and ideas about strategy probably have to be re-examined in light of a legal environment increasingly rooted in humanitarian principles. For example, strategy historian Beatrice Heuser has opined that the Clausewitzian dictum on compelling an opponent to do our will may not be as suitable for an era when there is less emphasis on crushing an opponent and more emphasis on the post-conflict transition to peace. She questions whether "we would do well to discard the notion derived from Clausewitz that the aims of strategy should be to 'impose our will' unilaterally upon the enemy. Even if force is used, what ultimately is needed is the enemy's willingness to be persuaded to accept a new situation."[141] German Army General Klaus Naumann also noted in the aftermath of NATO's Kosovo campaign that "democratic societies that are sensitive to human rights and the rule of law will no longer tolerate the pervasive use of overwhelming military power."[142]

Finally, international humanitarian law is beginning to address more post-conflict issues. Heuser notes that one of the historical trends in strategy is thinking about strategy in relation to the peace one wants to achieve characterized by the post-1945 shift back to concerns of humanitarian awareness.[143] This raises questions about the ending of conflicts, and what it means to win. For example, "the responsibility to protect implies the responsibility not just to prevent and react, but to follow through and rebuild."[144] Interventions, justified under humanitarian law, will naturally grow to increasingly emphasize "the traditional just war criteria of *jus ad bellum* (just cause) and *jus in bello* (just means), plus the new but relevant complement of *jus post bellum* (just occupation and outcome)."[145]

New post-conflict obligations raise questions as to what it now means to win in an era when sovereignty is not considered inviolable. The international legal emphasis on humanitarian norms means that in the future there will probably be more humanitarian obligations imposed on military forces. This implies more coalition operations because humanitarian operations require certain levels of mutual agreement and support. Under the still evolving post-Westphalian system, it is probably even less useful to measure success in terms of territory taken or capitals seized. International boundaries and lines on a map mean little to opponents who do not accept the state as a legitimate construct and think in terms of a universal transnational struggle.

The changes in the legal operating environment outlined above compel strategists to consider the growing implications of international law and lawfare. China political analyst Dean Cheng suggests several strategic considerations for

141. BEATRICE HEUSER, THE EVOLUTION OF STRATEGY: THINKING WAR FROM ANTIQUITY TO THE PRESENT 505 (2010).

142. Klaus Naumann, *NATO, Kosovo, and Military Intervention*, 8 GLOBAL GOVERNANCE 1, 16 (2002).

143. Heuser, *supra* note 141, at 502.

144. ICISS, *supra* note 136, at 39.

145. Doyle, *supra* note 7, at 7.

the US regarding lawfare. For example, Cheng advises that the US should try to mesh "legal warfare countermeasures into U.S. operational planning and training."[146] Specifically, at "the strategic level, the growing Chinese interest in legal warfare highlights the need to examine new international commitments carefully."[147] Cheng further warns that "the U.S. must alter its current legal warfare strategy; no longer can America regard lawfare from a purely defensive standpoint. Indeed, offensive legal warfare – whether practiced by the [People's Republic of China] or by militarily overmatched insurgents – can neutralize America's military might while damaging its allies and strategic partners."[148]

Professor Kittrie also argues for a more creative and innovative integration of lawfare into US strategy, noting that the 2015 National Security Strategy identifies a number of new security challenges that are decentralized, transcend state borders, involve non-state actors, and "cannot be neutralized using only deterrence or the United States' traditional kinetic toolbox."[149] However, neither the US nor any other state is likely to allow its vital interests to be litigated away. As lawfare continues to expand, the US probably will be compelled to give more attention to the strategic implications of international law because lawfare is not a phenomenon that is likely to go away, and the US government's "lack of a broader and more sophisticated strategy for defensive lawfare and its continued lack of any strategy and structure for offensive lawfare are clearly and unnecessarily self-defeating."[150]

The supplanting of sovereignty by humanitarianism as a central principle of international law has increased the legal justifications for the use of force beyond self-defense, encouraged the growing use of lawfare, loosened the state's monopoly on the use of force, decreased the strategic relevance of international boundaries, reduced the utility of overwhelming force as a means of achieving victory, and obscured the gap between war and peace. In the current stage of international legal development, the state must compete with non-state actors that appropriate some of the state's sovereign authorities but are sometimes less inhibited by humanitarian concerns. Given the shifting nature of a still evolving international legal system, strategists should probably also be mindful of Clausewitz's warning: "the fact that slaughter is a horrifying spectacle must make us take war more seriously, but not provide an excuse for gradually blunting our swords in the name of humanity. Sooner or later someone will come along and hack off our arms."[151]

146. Cheng, *supra* note 81, at 10.
147. *Id.* at 9.
148. *Id.* at 11.
149. Kittrie, *supra* note 27, at 96.
150. *Id.* at 30.
151. CLAUSEWITZ, *supra* note 4, at 260.

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