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## THE ORIGINS OF “LAWFARE” AND THE EXPLOITATION OF PUBLIC INTERNATIONAL LAW\*

*This paper offers a transdisciplinary analysis of the abuse of public international law for geopolitical objectives, providing an analysis of the term **lawfare**, the only previously accepted term to describe this behavior. It concludes that the definition **lawfare** is inadequate for professional scholarly or policy-focused discourse and offers the notion of **Malign Legal Operations (MALOPs)** as a more appropriate term to encapsulate these actions. Furthermore, this paper emphasizes that the debate over the value-neutrality of the notion **lawfare** is complex, and the term is insufficiently defined to support its supposed neutrality, leading to opportunities for further exploitation by revisionist states and entities. Supporters of value-neutrality argue that distinguishing a “malign” variant of lawfare offers malicious practitioners more opportunities to make false claims against legitimate actors. However, the text counters that classification of malign behavior is based on objective and observable manipulations of legal systems rather than mere disagreement. Furthermore, the paper argues that **lawfare** is a doctrinally inappropriate term due to its contradictory nature, as it combines “law” and “warfare” despite serving as an alternative to military conflict. Using a single term to describe both legitimate and malicious legal actions is damaging to discourse and detracts from efforts to combat the misuse of legal systems. The research’s primary objectives include establishing the lack of a universally accepted definition for **lawfare**, demonstrating the unanswered question of value-neutrality, and highlighting the non-doctrinal nature of the term itself. It concludes that **lawfare** is no longer an appropriate term to describe these phenomena, advocating for the adoption of **Malign Legal Operations** to better represent the manipulation of legal domains for political ends.*

**Keywords:** lawfare, Malign Legal Operations, public international law, aggression, treaty abuse, international relations, legal exploitation.

### Introduction

Revisionist recognized and unrecognized legal entities actively employ strategies that abuse and misapply public international law to achieve geopolitical objectives and undermine the international rule of law. There is presently no scientific term, academic theory, or doctrine to codify the manipulation of legal domains in pursuit of political objectives. Until now, the only viable term or concept to partially describe these ideas is *lawfare*, which its creator never intended to serve as official terminology and is a doctrinally inappropriate term. This research offers *Malign Legal Operations* as a wholesome and doctrinally appropriate term to describe these legal manipulations. Malign Legal Operations (MALOPs) exploit legal domains by employing disinformation to shape legitimacy, justify violations, escape legal obligations, contain adversaries, or to advantageously revise the rule of law.

The term *lawfare* is a portmanteau of the words *law* and *warfare* that is used, *inter alia*, to describe the instrumental use of legal mechanisms both by

state and non-state actors to achieve political or military objectives. In November 2001, General Charles Dunlap (then-Colonel) published a paper through Harvard University’s Humanitarian Challenges in Military Intervention Conference titled *Law and Military Interventions: Preserving Humanitarian Values in 21<sup>st</sup> Century Conflicts*. General Dunlap noted that the phrase *lawfare* can be traced as far back as 1975, when lawyers Neville Yeomans and John Carlson published a paper identifying an increasing trend whereby legal systems are used as a “refinement of combat”<sup>1</sup> to settle disputes by word, or *lawfare*, rather than by sword. In framing his research problem, General Dunlap asked whether the law, particularly international law, is becoming more of a problem in modern war than a solution. He cited lawyers Rivkin and Casey, who declared that a novel and fundamentally undemocratic simulacrum of

<sup>1</sup> John Carlson and Neville Yeomans, “Whither Goeth the Law – Humanity or Barbarity,” *The Way Out – Radical Alternatives in Australia*, 1975, <http://www.lacweb.org.au/whi.htm>.

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

international law is appearing and threatens to upend the post-Cold War international system.<sup>2</sup> International law, they asserted, is becoming one of the “most potent weapons ever deployed”<sup>3</sup> and “just as war is too important to be left to the generals, international law cannot be left solely to the lawyers.”<sup>4</sup> To address his research question, General Dunlap proposed four broad themes or assertions, the fourth of which was particularly noteworthy. “[T]here is disturbing evidence that the rule of law is being hijacked into just another way of fighting (lawfare), to the detriment of humanitarian values as well as the law itself.”<sup>5</sup> In what became the first defined instance of the term, Dunlap offered that *lawfare* is “the use of law as a weapon of war. . . the newest feature of 21<sup>st</sup> century combat. . . a method of warfare where law is used as a means of realizing a military objective.”<sup>6</sup> General Dunlap gave new life to the term *lawfare* as a self-described educational “bumper sticker” to inform military commanders of the benefits, and dangers, of cleverly applied legal mechanisms during a time of war.<sup>7</sup>

Mr. Mark Voyager noted while researching *lawfare* as a Senior Lecturer at the Baltic Defense College that General Dunlap eventually broadened his definition of lawfare in 2017 to include “using law as a form of asymmetrical warfare.”<sup>8</sup> While Dunlap’s earlier work included mention of asymmetry, his 2017 publication on the matter was a clear attempt to simplify and clarify the concept. Indeed, Dunlap ultimately broadened the term sixteen years after first introducing it. “Over time, the definition has evolved, but today it is best understood as the use of law as a means of accomplishing what might otherwise require the application of traditional military force.”<sup>9</sup> He made comparisons to Sun Tzu’s suggestion of subduing an adversary without ever fighting at all as the “supreme excellence” of war. He also adamantly reiterated, as is consistent throughout

his nearly two decades of lawfare discourse, the notion that lawfare is ideologically neutral and may be used for *good* or *evil*.

### The Many Definitions of So-Called *Lawfare*

There is also a wide body of alternative views and definitions of *lawfare*. For example, the Lawfare Project is a nonprofit organization started by human rights attorney Brooke Goldstein in 2010. The purpose of this organization is to defend the rights of the Jewish community worldwide. The organization is based in the United States and boasts a global network of legal professionals that pursues three main lines of effort: promoting civil rights; advancing human rights; and fighting lawfare.<sup>10</sup> In April of 2010, Ms. Goldstein gave a speech at Fordham Law School that specifically addressed the concept of *lawfare*. She highlighted the legal community’s critical task of arriving at “a working and acceptable definition of lawfare so that we are all on the same page.”<sup>11</sup> Goldstein offered the following definition, which she argued was a “relatively good amalgamation of the various definitions”<sup>12</sup> and expanded upon what she characterized as a “vague” definition originally offered by General Dunlap. To Ms. Goldstein, lawfare is “the wrongful manipulation of the law and legal systems to achieve strategic military or political ends.”<sup>13</sup> The differences are subtle, however, Goldstein asserted that an activity must be *wrongful* to qualify as *lawfare* while Dunlap proposed a purely value-neutral definition. She also included the pursuit of political objectives in her definition rather than a specific focus on military applications and the LOAC.

As a result of this delineation, Goldstein’s definition created a grey area. Observers must now distinguish “constructive, legitimate legal battle[s]” from “counter-productive *lawfare*.”<sup>14</sup> To highlight her point, Goldstein used examples of defamation lawsuits to deter journalists from exposing terrorist organizations, hate speech lawsuits used to silence those who discuss the threat of “radical Islam and terrorism,” and the exploitation of LOAC and war crimes accusations. Throughout her writings, however, there is a very distinct theme. *Lawfare*, as considered by Goldstein, is a tool of radical Islam.

<sup>2</sup> David B. Rivkin and Jr. Lee A. Casey, “The Rocky Shoals of International Law,” *The National Interest*, December 1, 2000, <https://nationalinterest.org/article/the-rocky-shoals-of-international-law-523>.

<sup>3</sup> Rivkin and Casey.

<sup>4</sup> Rivkin and Casey.

<sup>5</sup> Charles J. Dunlap Jr., “Law and Military Interventions: Preserving Humanitarian Values in 21<sup>st</sup> Century Conflicts,” *Kennedy School of Government, Harvard University*, 2001, <http://people.duke.edu/~pfeaver/dunlap.pdf>.

<sup>6</sup> Dunlap Jr.

<sup>7</sup> Charles J. Dunlap, “Does Lawfare Need an Apologia?,” *Case Western Reserve Journal of International Law* 43, no. 1 (2010), <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1146&context=jil>.

<sup>8</sup> Mark Voyager, *NATO at 70 and the Baltic States: Strengthening the Euro-Atlantic Alliance in an Age of Non-Linear Threats*, Estonia (Tartu: Baltic Defense College, 2019), [http://www.baltdefcol.org/files/publications/NATO\\_AT\\_70\\_AND\\_THE\\_BALTIC\\_STATES.pdf](http://www.baltdefcol.org/files/publications/NATO_AT_70_AND_THE_BALTIC_STATES.pdf).

<sup>9</sup> Charles J. Dunlap Jr., “Lawfare 101: A Primer,” *Military Review* 8 (May-June 2017), <https://sites.duke.edu/lawfire/>.

<sup>10</sup> The Lawfare Project, “What We Do,” accessed February 2, 2021, <https://www.thelawfareproject.org/whatwedo>.

<sup>11</sup> Brooke Goldstein, “Speech Delivered by Brooke Goldstein at Fordham Law School on Lawfare & Combating the Goldstone Report,” The Lawfare Project, April 27, 2010, <https://www.thelawfareproject.org/analysis/2010/4/27/ispeech-delivered-by-brooke-goldstein-at-fordham-law-school-on-lawfare-combating-the-goldstone-report#the-lawfare-project?rq=what%20is%20lawfare%3F>.

<sup>12</sup> Goldstein.

<sup>13</sup> Goldstein.

<sup>14</sup> Goldstein.

Critics of Goldstein's definition of *lawfare* suggested that it was a co-opting of the term, noting that the purely Islam-focused approach showed a neo-conservative agenda. "When references are made to the 'hijacking' of the term, the Lawfare Project is usually the chief culprit."<sup>15</sup> Still, leading experts in the field of *lawfare* continue to cite her work in major research.<sup>16</sup>

The Lawfare Blog is another authority on the subject of *lawfare* and was also established in 2010. The founders, Ben Wittes, Robert Chesney, and Jack Goldsmith, dedicated the website to the "nebulous zone in which actions taken or contemplated to protect the nation interact with the nation's laws and legal institutions."<sup>17</sup> They adopted Dunlap's definition of the term, however, they expanded upon it to suit their editorial focus on "Hard National Security Choices." "The name *Lawfare* refers both to the use of law as a weapon of conflict and, perhaps more importantly, to the depressing reality that America remains at war with itself over the law governing its warfare with others."<sup>18</sup> The result was a blog that covered a range of national security related topics. Many of these articles have little to no legal analysis or relevance to the topic of *lawfare*. As a result, the discourse surrounding the term has been further diluted over the past decade.

Professor Susan Tiefenbrun, another researcher in the field of legal exploitation, offered a semiotic analysis of the word *lawfare*. She determined that the term is a "clever but potentially destructive play on words: both law and war enjoy power, and it is precisely this shared power that makes the use of *lawfare* such a dangerous weapon in modern asymmetrical warfare."<sup>19</sup> She assessed that *lawfare* was a clever pun, neologism, and play on words. Professor Michael Newton of Vanderbilt University contributed additional *lawfare* analysis. He investigated what Dunlap previously characterized as the abusive, malevolent, and malicious uses of

the law. In other words, Newton sought specifically to address the *misuse* aspect of Dunlap's definition of *lawfare*. He asserted that "the illegitimate exploitation of the law in turn permits the legal structure to be portrayed as a means of indeterminate subjectivity that is nothing more than another weapon in the moral domain of conflict at the behest of the side with the best cameras, biggest microphones, and most compliant media accomplices."<sup>20</sup>

Dr. Christi Scott Bartman provides an alternative definition of *lawfare* in the context of public international law. She characterizes it as "the manipulation or exploitation of the international legal system to supplement military and political objectives legally, politically, and equally as important, through the use of propaganda."<sup>21</sup> Unlike previous definitions, Bartman's perspective narrows its focus to the international legal system, broadens its criteria to encompass political objectives alongside military ones, and introduces propaganda as a key component.

Bartman's exploration of this concept centers on the Soviet Union's strategic manipulation of international law during the 20<sup>th</sup> century. She argues that the Soviets, and subsequently the Russian Federation, used treaties as a means of state manipulation to justify the use of force. They operated on two fronts, one through international legal bodies and the other through unlawful or quasi-legal means, supplementing their military agendas. Bartman highlights historical instances where the Soviet Union abused non-aggression pacts and good-neighborliness agreements with neighboring countries such as Finland, Latvia, and Poland in the 1930s. She underscores the importance of the Convention for the Definition of Aggression signed in London in 1933, which explicitly defined aggression and prohibited political, military, economic, or other excuses to justify it. It formally defined aggression with familiar terms and phrases such as *declaration of war*, *invasion*, *naval blockade*, and *support to armed bands* while stipulating that no political, military, economic, or other excuses may justify aggression. The USSR and other nations signed this convention, but Bartman reveals how the Soviets used propaganda to create false justifications for violating these agreements. This behavior was

<sup>15</sup> Michael P. Scharf and Elizabeth Andersen, "Is Lawfare Worth Defining – Report of the Cleveland Experts Meeting – September 11, 2010," *Case Western Reserve Journal of International Law* 43, no. 1 (2010): 43, <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1141&context=jil>.

<sup>16</sup> Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (New York: Oxford University Press, 2016).

<sup>17</sup> Benjamin Wittes, "Welcome to Lawfare," Lawfare: Hard National Security Choices Blog, September 1, 2010, <https://www.lawfareblog.com/welcome-lawfare>.

<sup>18</sup> "About Lawfare: A Brief History of the Term and the Site," Lawfare: Hard National Security Choices Blog, accessed February 4, 2021, <https://www.lawfareblog.com/about-lawfare-brief-history-term-and-site>.

<sup>19</sup> Susan W. Tiefenbrun, "Semiotic Definition of Lawfare," *Case Western Reserve Journal of International Law* 43, no. 1 (2010), <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1142&context=jil>.

<sup>20</sup> Michael A. Newton, "Illustrating Illegitimate Lawfare," *Case Western Reserve Journal of International Law* 43, no. 1 (2010), <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1155&context=jil>.

<sup>21</sup> Christi Scott Bartman, "Lawfare and the Definition of Aggression: What the Soviet Union and Russian Federation Can Teach Us," *Case Western Reserve Journal of International Law* 43, no. 1 (2010): 423–45, <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1163&context=jil>.

consistent with the Brezhnev Doctrine, a Soviet policy of intervention to maintain socialism and Soviet influence in Eastern Europe. This duplicitous approach to international law allowed the Soviet Union to remain at the forefront of the definition of aggression and therefore at the height of influence on the subject; “the more involved it became, the more influence it had on both the process and the outcome.”<sup>22</sup>

Bartman provides examples of how the Soviet-led definition of aggression was used to justify interventions, including the Winter War of 1939-40 in Finland, the 1956 Hungarian Revolution, and the 1979 invasion of Afghanistan. These faux justifications allowed the Soviet Union to wield significant influence over the definition of aggression, remaining at the forefront of the international stage. She also introduces the concept of the Chinese doctrine of *unrestricted warfare*, which emphasizes establishing international legal mechanisms in one’s interest. Bartman notes that the Soviet Union perfected this method long before China introduced its own doctrine of legal manipulation in the 21<sup>st</sup> century. In the case of the Russian Federation, she observes a transition from “brute domination” to “institutionalized techniques of regulation” based on treaties and international law. Instead of using socialist internationalism as a pretext for aggression, the Russian Federation often cites the protection of Russian citizens and diaspora to justify its actions, reminiscent of the Soviet playbook that invoked the protection of “brother Slavs” to justify the invasion of Poland in 1939.

The final conceptualization of *lawfare* to be discussed comes from Professor Orde Kittrie, who subscribes to General Charles Dunlap’s definition of lawfare but expands on it, identifying two primary forms of lawfare. The first is battlefield tactics, which seek to gain an advantage from an adversary’s commitment to international law. Kittrie emphasizes that such tactics can be both tactical and strategic. An example he cites is non-state actors in Muslim countries firing at their enemies from protected religious sites or from the protection of human shields, which not only provide protection but also create damaging narratives and public relations victories in the event of a retaliatory strike. The second form is the use or misuse of legal forums. This form of so-called *lawfare* involves leveraging legal mechanisms to achieve operational objectives traditionally accomplished through military means. Kittrie provides examples of groups like FARC,

Hezbollah, and Hamas using legal mechanisms to impose costs and risks on their adversaries, such as accusing military commanders of human rights violations. Another example is Hezbollah employing a policy of suing Israeli leaders wherever possible and with such frequency that the Israeli military would be left “beleaguered and perplexed.”<sup>23</sup>

Kittrie then applies this conceptual framework to the case of Iran’s pursuit of nuclear weapons. He discusses various methods used to coerce Iran into compliance with international law, including state and local actions, legal pressure on foreign banks and energy companies, and litigation strategies. He concludes by highlighting the potential of a U.S. lawfare strategy and the need for further research in this area. In his later work, Kittrie refines the definition of *lawfare*. The first caveat was that an incident of lawfare must be the instrumental application of the law as a replacement for what would otherwise be a physical attack on a target. The second caveat is that the lawfare practitioner must intend to “weaken or destroy an adversary against which the *lawfare* is being deployed.”<sup>24</sup> He distinguishes between “Instrumental Lawfare” (using legal tools for effects similar to conventional military action) and “Compliance-Leverage Disparity Lawfare” (gaining an advantage from the influence of law, such as the law of armed conflict).

However, one main concern is the requirement to accurately assess the practitioner’s intent. Without explicit admissions of intent, it can be challenging to determine whether an act would have resorted to kinetic military action if a specific lawfare tactic were not available. The text provides examples, such as China’s manipulation of the Non-Proliferation Treaty, the U.S. financial lawfare against Iran, and the use of cyberweapons, highlighting potential inconsistencies in Kittrie’s definition of lawfare and the vagueness surrounding the term. One example of this narrowed definition offered by Kittrie is the MV *Alaed*, a Russian vessel dispatched to deliver attack helicopters to Syria in an effort to bolster the Assad regime during the country’s civil war. Rather than using force, which would have ended in an international incident, the United Kingdom (U.K.) elected to contact the ship’s insurance provider, London’s Standard Club. They convinced the company to withdraw coverage due to the ship’s breach of sanctions and an active arms embargo. Ultimately, the MV *Alaed* was left with no

<sup>22</sup> Christi Scott Bartman, *Lawfare: Use of the Definition of Aggressive War by the Soviet and Russian Federation Governments* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2010).

<sup>23</sup> Orde F. Kittrie, “Lawfare and U.S. National Security,” *Case Western Reserve Journal of International Law* 43, no. 1 (2010), <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1162&context=jil>.

<sup>24</sup> Kittrie, *Lawfare: Law as a Weapon of War*, 8.

choice but to turn back towards Russia. However, it is highly unlikely that the U.K. would have risked the incredible escalation of striking the ship had it been unable to convince London's Standard Club to de-insure the vessel. This gray area contributes to the uncertainty, doubt, and overall vagueness of the term *lawfare*. Additionally, the various types of lawfare serve only to dilute discourse and create further confusion as to the true utility of the term.

### The Value Neutrality Debate

In a 2018 journal article about *lawfare* within military discourse, Freya Irani noted significant disagreements surrounding the definition of the term, particularly with respect to its use by liberal states in comparison to states that employ the law in an inherently negative way. He noted that Kittrie's *compliance leverage disparity lawfare* is viewed by some, including Kittrie, as just one form of *lawfare*. Other authors, however, view it as the one and only acceptable meaning of *lawfare*. "These latter writers have a narrower understanding of lawfare. For them, all lawfare is 'designed to gain advantage from the greater influence that law and its processes exerts over an adversary': as such, all lawfare is practiced against (more law-abiding) liberal states. For such authors, the instrumental use of law by Western states (which Kittrie would define as 'instrumental lawfare') should not be defined as lawfare at all."<sup>25</sup>

As discussed, Dunlap belongs to the group that sees *lawfare* as a mere instrument to be used for good or evil. An example of lawfare being used as Dunlap opined, *in accordance with the higher virtues of the rule of law*, is the United States purchasing the commercial rights to detailed satellite imagery of Afghanistan in 2001 so that it could not be used by the Taliban or Al-Qaida in military operations. Rather than invoking *shutter control* procedures, which allows the U.S. government to restrict commercial uses of satellites to protect national security, the government elected to resolve the issue by contract. It purchased exclusive rights to all imagery of Afghanistan taken by Space Imaging, the operator of the Ikonos satellite.<sup>26</sup> This kept the valuable imagery out of the hands of the Taliban and Al Qaeda. Dunlap is careful throughout his literature to clarify that *lawfare* is not intrinsically evil, but rather it can – and should – be used as a substitute for force when appropriate. "Lawfare is

much like a tool or weapon that can be used properly in accordance with the higher virtues of the rule of law – or not. It all depends on who is wielding it, how they do it, and why."<sup>27</sup> In this sense, he suggests, lawfare is not only right, but proper.<sup>28</sup>

Those in agreement with Dunlap believed that viewing the term as neutral allowed activities that employed the law properly, or as intended, to be considered *lawfare* as well. The result, they opined, was a rush to the courtroom rather than the battlefield. Furthermore, viewing the term only in the context of "misuse" of the law could negatively impact public opinion of international law itself. *Lawfare*, they feared, would "instill fear of international law in the American public. . . [lawfare would] 'become a code word for all things bad and mushy about international law'."<sup>29</sup> Some participants even favored removing the word "misuse" from the definition, narrowing its scope to only the positive use of the law in-lieu of military means. "[M]isuse implies the objective or the motive of the person using it, saying that you can't use law if you are a bad guy. . . . bad guys can legitimately use law just like good guys can. . . . So I wouldn't use the word misuse at all."<sup>30</sup> Still others clarified that "misuse" should be included in the definition, but only for contentious issues or underdeveloped areas of the law.

Those who opposed a value-neutral understanding of *lawfare* in favor of a purely negative connotation of the term to describe the "misuse" of the law put forth numerous arguments. Those in this camp questioned whether these value-positive applications of the law should be considered *lawfare* or if it is simply the clever application of the law. Dr. Bartman was also in this camp and suggested the defining principle of lawfare is that it is inherently manipulative or exploitative. "Simply utilizing the international legal system to enforce valid laws would also not be considered lawfare. . . . The state that claims the United States violated international law under a given valid circumstance would be making a legal claim, therefore not manipulating the system, but simply seeking redress for a legal wrong." It was purely the misuse, not the use, that Bartman thought deserved a unique term and more dedicated study. "This is not the legal application

<sup>25</sup> Freya Irani, "'Lawfare', US Military Discourse, and the Colonial Constitution of Law and War," *European Journal of International Security* 3, no. 1 (2018): 113–33, <https://doi.org/10.1017/eis.2017.12>.

<sup>26</sup> Duncan Campbell, "US Buys up All Satellite War Images," *The Guardian*, October 17, 2001, <https://www.theguardian.com/world/2001/oct/17/physicalsciences.afghanistan>.

<sup>27</sup> Charles J. Dunlap Jr., "Lawfare Today: A Perspective," *Yale Journal of International Affairs*, Winter Issue (2008): 146–54, <http://yalejournal.org/wp-content/uploads/2011/01/083111dunlap.pdf>.

<sup>28</sup> Brad Fisher, "The Kremlin's Malign Legal Operations on the Black Sea: Analyzing the Exploitation of Public International Law Against Ukraine," *Kyiv-Mohyla Law and Politics Journal* 5 (2019): 193–223.

<sup>29</sup> Scharf and Andersen, "Is Lawfare Worth Defining – Report of the Cleveland Experts Meeting – September 11, 2010."

<sup>30</sup> Scharf and Andersen.

of international law, this is the preemption of international law.”<sup>31</sup>

Professor Newton circumvented this debate by narrowing his focus to *illegitimate lawfare*, insinuating that there must be such a thing as *legitimate lawfare* and that they should be divided so as to never be confused with one another. “[T]he term ‘lawfare’ should never be automatically conflated with the legitimate use of legal forums to vindicate and validate binding legal norms when they are in danger of being overwhelmed or replaced for the sake of expediency of political convenience.”<sup>32</sup> This explanation referenced the use of the word *lawfare* to discredit completely legitimate legal claims, which others in the conference referred to as a *hijacking* of the term. Other participants avoided the “use versus misuse” debate by using alternative terms such as *legal subterfuge* or *lawfare* to highlight the deliberate misuse of the law. Professor Newton said this best in his observation of *lawfare’s* inexactitude. “The concept of ‘lawfare’ remains captive to terminological imprecision that threatens to erode its utility as a guiding principle... the term ‘lawfare’ should never be automatically conflated with the legitimate use of legal forums to vindicate and validate binding legal norms when they are in danger of being overwhelmed or replaced for the sake of expediency or political convenience.”<sup>33</sup>

Ultimately, the debate over *lawfare’s* value neutrality is complicated. What can be said with certainty is that the term is insufficiently defined to support Dunlap’s claim of value neutrality, and keeping it this way creates more questions than answers. Using the same word to describe both the legitimate application and malign manipulation of the law provides an advantage to malign practitioners, primarily in the form of logical fallacies and linguistic traps. However, supporters of value-neutrality in *lawfare* can and do make the same claim, stating that a distinct “malign” variant of *lawfare* offers malicious practitioners even more opportunity to make false claims against legitimate actors.

### Conclusion

While the term *lawfare* is well served as a colloquial “bumper sticker” or political term to describe this phenomenon, even the term itself is a misattribution of the definition of *warfare*. Carl von Clausewitz was a nineteenth century Prussian general and military theorist who is often cited by *lawfare* researchers. He asserted that one

must limit the term *war* to an act of force and nothing else. “There is only one means in war: combat.”<sup>34</sup> Clausewitz established that “war is thus an act of force to compel our enemy to do our will.” As such, the term *lawfare* is a contranym. It is a portmanteau of the words *law* and *warfare* that essentially describes the employment of legal mechanisms as a substitute for warfare. Stated more clearly, the portmanteau *lawfare* includes a word that contradicts the very meaning of the term. As such, this portmanteau of *law* and *warfare* is a contranym and therefore a doctrinally inappropriate term for use in any normatively significant way outside of General Dunlap’s original “bumper sticker” intent.

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

This paper established that there is no single accepted meaning for the term *lawfare*, proved that even the question of value-neutrality remains unanswered, and established that a truly value-neutral term is counterproductive and easily misappropriated by malign actors. Finally, it showed that even the word *lawfare* is a non-doctrinal contranym. While Dunlap’s “bumper sticker” was critical to enabling vitally important discourse surrounding this topic over the past two decades, *lawfare* is no longer an appropriate term to describe these dangerous phenomena that threaten to upend the rules-based international order.

<sup>31</sup> Scharf and Andersen.

<sup>32</sup> Newton, “Illustrating Illegitimate Lawfare.”

<sup>33</sup> Newton.

<sup>34</sup> Carl von Clausewitz, *On War*, eds. Michael Howard and Peter Paret (Princeton, New Jersey: Princeton University Press, 1976).

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## ПОХОДЖЕННЯ ПОНЯТТЯ «ПРАВОВІЙНА» («LAWFARE») ТА ЗЛОВЖИВАННЯ МІЖНАРОДНИМ ПУБЛІЧНИМ ПРАВОМ

У дослідженні проведено міждисциплінарний аналіз зловживання міжнародним публічним правом для геополітичних цілей через застосування поняття «правовійна» (англ. *lawfare*). Зроблено висновок, що використання для позначення таких дій терміна «правовійна» (*lawfare*) у науковому або політичному дискурсі не є адекватним сучасним реаліям, натомість запропоновано термін «підривні юридичні операції» (англ. *Malign Legal Operations, MALOPs*) як більш відповідний. Крім того, наголошено, що дискусія про оцінку нейтральності поняття «правовійна» (*lawfare*) є складною і недостатньо визначеною, щоб стверджувати про його можливу нейтральність, що відкриває шлях для подальшого використання цього поняття ревізійністськими державами та суб'єктами міжнародного права.

Прихильники оцінки нейтральності поняття «правовійна» (*lawfare*) переконані, що наявність його «зловмисного» варіанта надає зловмисникам більше можливостей для неправдивих заяв проти законних і правомірних дій. Проте автор доводить, що класифікація зловмисної поведінки базується на об'єктивних і очевидних практиках маніпуляції юридичними інструментами, а не лише на неузгодженості. Крім того, автор обґрунтовує, що використання поняття «правовійна» (*lawfare*) є доктринально неприпустимим через його внутрішню суперечність, оскільки воно поєднує поняття «право» і «війна», попри те що є альтернативою воєнному конфлікту. Слово «правовійна» (*lawfare*) має водночас два протилежні значення. Використання одного терміна для позначення як легітимних,

так і зловмисних юридичних дій шкодить дискурсу і нівелює зусилля, спрямовані на боротьбу із зловживанням міжнародним правом.

Основні завдання дослідження: довести несформованість загальноприйнятого змісту поняття «правовійна» (*lawfare*); продемонструвати нерозв’язаність проблеми оцінної нейтральності та наголосити на недоктринальному характері самого терміна.

Автор дослідження доходить висновку, що термін «правовійна» (*lawfare*) уже не відповідає тим явищам, для позначення яких його вживають, і підтримує використання терміна «підривні юридичні операції» задля кращого відображення зловживання міжнародним правом для політичних та безпекових цілей.

**Ключові слова:** підривні юридичні операції, правовійна, міжнародне публічне право, агресія, зловживання договорами, міжнародні відносини, юридична експлуатація.

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