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Towards a War of Norms ?
From Lawfare to Legal Operations

Amélie FÉREY

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Focus stratégique

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Résumé

Défini comme une utilisation du droit visant à établir, pérenniser ou renverser un rapport de force dans le but de contraindre un adversaire, le *lawfare* renvoie à une réalité ancienne et inhérente au droit international. Résultant de compromis entre États, ce dernier exprime des rapports de force politico-stratégiques qui prennent quatre formes principales :

- l'aménagement des contraintes juridiques par la réinterprétation de normes existantes ;
- l'émission de nouvelles normes au moyen d'un lobbying juridique mis au service d'une stratégie de puissance ;
- la mobilisation des effets du droit pour contraindre un acteur par une judiciarisation stratégique ;
- l'utilisation du droit comme arme réputationnelle.

Alors que le terme est controversé car il correspond à un détournement de la règle de droit, il connaît aujourd'hui une institutionnalisation. Bien que les États ne revendiquent pas les pratiques de *lawfare* comme étant directement de leur fait, le recours croissant à des vecteurs juridiques pour obtenir des finalités politico-stratégiques est un fait notable des bouleversements à l'œuvre dans le système international. Les États ont ainsi toujours utilisé le droit à des fins stratégiques. Cependant, la multiplication de cours de justice, la médiatisation croissante des conflits et la confusion entre légalité et légitimité tendent à favoriser l'instrumentalisation du droit.

La Russie mobilise le droit dans le cadre de la lutte informationnelle comme élément de discours pour construire sa légitimité et soutenir sa politique étrangère. Ce discours légaliste est mis au service de pratiques hybrides pour maintenir l'ambiguïté stratégique aussi bien que pour légitimer sa politique d'expansion territoriale et ses interventions militaires.

Aux États-Unis, la réflexion sur le *lawfare* s'inscrit dans un discours critique sur l'émergence de la justice pénale internationale visant à défendre la souveraineté de l'État. S'il n'existe pas de politique cohérente et unifiée de *lawfare*, ce dernier est davantage le fruit d'actions venant d'une multiplicité d'acteurs (*Department of Justice* [DoJ], *Departement of Treasure* [DoT], *Department of Defense* [DoD], *Office of Foreign Assets Control* [OFAC]…) Cette absence d'unité n'enlève cependant rien au *lawfare* américain, marqué par des efforts dans l'application extraterritoriale du droit américain, contournant ainsi les mécanismes de régulation internationaux, et centré sur une forte capacité d'influence juridique permettant à ce pays d'obtenir des normes satisfaisant leurs intérêts.

Israël donne l'exemple d'un *lawfare* centré sur la question militaire. Cet État occupe une place particulière dans l'émergence d'une réflexion globale de l'intégration du droit dans les stratégies militaires étatiques. Les stratégies juridiques israéliennes reposent sur plusieurs piliers : le *Military Advocate General*, les institutions judiciaires et notamment la Cour suprême, les comités *ad hoc* et le principe de complémentarité, et les acteurs privés.

Enfin, la France se positionne dans ce domaine en veillant à l'articulation entre valeurs et intérêts dans l'utilisation stratégique du droit. La réflexion a été amorcée dès 2021 par une note de la Direction des affaires juridiques (DAJ), puis par un groupe de travail du Secrétariat général de la défense et de la sécurité nationale (SGDSN). Au sein de l'Organisation du Traité de l'Atlantique nord (OTAN), l'Office of Legal Affairs a construit une expérience opérationnelle du *lawfare* sur laquelle la France pourrait s'appuyer. Trois axes de travail sont identifiés :

- **la préparation aux opérations juridiques :** sensibiliser la communauté de défense, intégrer des opérations juridiques aux exercices, renforcer les synergies interministérielles ;
- **le renseignement juridique :** effectuer un travail de veille pour anticiper les menaces et identifier les opportunités, construire un réseau d'acteurs-relais ;
- **le développement d'une boîte à outils :** identifier les attaques juridiques, produire des contre-argumentaires, diffuser plus largement les positions juridiques de la France au niveau STRATCOM, travailler à des positions juridiques communes avec nos alliés.

Le recours au *lawfare* se dessine comme une tendance lourde des relations internationales, qui se renforcera à court et moyen terme. L'adaptation de la France est d'autant plus nécessaire que la compétition stratégique renouvelée provoque des tensions dans les relations interétatiques.

Executive summary

Defined as the use of law to establish, perpetuate, or change power relations in order to counter an adversary, lawfare practices reflect a reality that is inherent in international law. Resulting from compromises between states, international law expresses political-strategic power relations that lawfare seeks to manipulate in four main ways:

- adjusting legal constraints by reinterpreting existing norms
- establishing new norms through legal lobbying as a power strategy
- mobilizing legal effects to coerce an actor through strategic litigation
- using law as a reputational weapon

Although lawfare is controversial when understood as a misuse of the rule of law, it is now being institutionalized. While states do not claim direct responsibility for acts of lawfare, the increasing use of legal vectors to achieve political-strategic ends is a notable feature of the disruptions at work in the international system. States have always used the law for strategic purposes, but recent developments—the proliferation of courts of justice, the increasing media coverage of conflicts, and the growing confusion between legality and legitimacy—tend to favor a greater instrumentalization of the law.

Russia mobilizes the law, in the context of information warfare, as an element of a narrative that builds its legitimacy and supports its foreign policy. This legalistic discourse is used in hybrid practices to maintain strategic ambiguity and legitimize Russia's territorial expansion policy and military interventions.

In the United States, lawfare is understood in the framework of a critical discourse on the emergence of international criminal justice that aims to defend national sovereignty. Although there is no coherent and unified lawfare strategy, actions in this domain are taken by several actors (the Department of Justice, the Department of the Treasury, the Department of Defense, the Office of Foreign Assets Control, etc.). This absence of unity does not detract from American lawfare, however, which is characterized by efforts to apply American law extraterritorially, bypassing international regulatory mechanisms, and which relies on the country's considerable capacity to exert legal influence, sufficient to establish norms that serve its interests.

Israel's use of lawfare centers on military issues; the state makes a unique contribution to the emergence of global thinking about the integration of law into state military strategies. Israeli legal strategies work through four channels: the Military Advocate General, the judicial

institutions—in particular the Supreme Court—, ad hoc committees (exploiting the principle of complementarity), and private actors.

Finally, France is positioning itself in this field by finding a balance between values and interests in the strategic use of law. This process began in 2021 with research conducted within the Defense Department and the creation of a working group in the General Secretariat for Defense and National Security. Within NATO, the Office of Legal Affairs has built up operational experience in lawfare that France could draw on. Three lines of work have been identified:

- **Preparation for legal operations:** raising the defense community's awareness, integrating legal operations into training exercises, strengthening interdepartmental synergies.
- **Legal intelligence:** monitoring to anticipate threats and identify opportunities, building a network of intermediaries.
- **Toolbox development:** identifying legal attacks, producing counter-narratives, disseminating France's legal positions more widely at the NATO Strategic Communication Centre of Excellence (StratCom) level, working on establishing common legal positions with France's allies.

The use of lawfare is emerging as a major trend in international relations and is set to increase in the short and medium term. This renewed strategic competition is creating tensions between states, making it imperative for France to adapt to this new paradigm.

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Introduction

In his Strategic Vision presented in October 2021, the French Chief of Defense Staff, Thierry Burkhard, noted a deterioration in the international context, marked by a questioning of "multilateralism and international law". France, as an international balancing power, nevertheless remains attached to "an international order governed by law", which "albeit shaken [...] shall remain the reference for [its] actions".[1] The issue, however, is how to ensure international norms are respected,[2] when redefining or even subverting them is an inherent part of strategic competition and is carried out by France's partners as much as by its adversaries.

The emergence of the concept of lawfare, defined as the use of law to conduct warfare, has prompted a reassessment of the durability of the international order based on the rule of law. Like cyberspace regulation, informational threats, and instruments for applying economic and financial pressure, lawfare is a non-kinetic action that does not follow the traditional course of an armed attack. Taken unawares, states do not know how to respond to these non-kinetic actions because they occur in new and rapidly changing normative environments. Theoretical responsibility for responding to these actions is complicated by the fact that they fall outside traditional strategic categories, as they do not belong specifically to the military domain. Lawfare draws on a range of legal corpuses, from international public law to private law, and at a range of levels: national, regional (European law), and international. Finally, the American origin of this concept raises questions about the relevance for France of importing ideas from a different strategic community.

In this context, the very notion of lawfare is contested. Can the law really be manipulated to strategic ends? Is lawfare potentially a useful tool to help the French armed forces understand a hybrid theater of operations or conflict?

Strategic use of the law currently takes four main forms: reinterpreting existing norms; establishing new norms; mobilizing legal effects to constrain a party; and making accusations of unlawful acts to cause reputational damage. Strategic use of the law in Russia, the United States, and Israel demonstrates how states exploit legal norms to serve their foreign policies and strengthen their position on the international stage. By taking targeted measures focused on three lines of work, France can position itself in this new arena for conflict while remaining loyal to the values of the international order based on the rule of law.

1. *Strategic Vision of the Chief of Defense Staff*, Ministère des Armées, October 2021.
2. Norms are understood here in the widest sense and include legal, technical, and moral norms.

The four faces of lawfare

Lawfare, defined as the use of the law to establish, perpetuate, or change a balance of power to force an adversary to act in a particular way, gives name to a practice that has long existed in international law. The latter, resulting from compromises between states, expresses political-strategic power relationships. Given the many ways in which international law can be exploited, creating a typology of current practices will help us to understand the distinctions between them and the roles they can play in resetting international power relationships.

Adjusting legal constraints

First, lawfare can take the form of reinterpreting a principle of law in favor of one or more actors in strategic competition. This could be a principle codified in a treaty or included in national laws, or simply a standard of behavior. The law of armed conflict has multiple sources—treaties, customs, and doctrines—and its interpretation is not overseen by an authority recognized by all actors on the international scene. This body of law has therefore given rise to divergent, even contradictory, opinions, over time.

As the objective of the law of armed conflict is to determine the behavior of actors in a conflict, tension arises between that law and military objectives. There is, therefore, a strong temptation for states and their armed forces to propose adjustments to the law that reduce guaranteed protections in order to obtain greater freedom of action. This corpus of law thus becomes a key battleground for lawfare. As an example, post-9/11, on October 26, 2001, the US Congress adopted the Patriot Act, which allowed restrictions on detentions to be relaxed by ad hoc application of the status of "illegal combatant" to members of Al Qaeda and their associates who did not fit the category of lawful combatant as defined by the Additional Protocol (I) to the Geneva Conventions.[3]

States such as Russia, China, and Turkey[4] are also currently involved in adjusting legal constraints, and they take stances on major principles of international law that are sometimes described as "revisionist". In the domain of public international law, the lively debates on the interpretation of the United Nations Convention on the Law of the Sea (UNCLOS) of 1982, known

3. Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), of June 8, 1977, art. 43, para. 2.

4. In 2019, Turkey signed a bilateral agreement with the Libyan Government of National Accord delimiting the respective maritime boundaries of both states, to the detriment of Greek maritime space. This contested reinterpretation of the principles of maritime law is part of a strategy to weaken Greek sovereignty.

as the Montego Bay Convention, provide an interesting case study of this type of lawfare between states. Two points are particularly debated, the first being the criteria for delimiting the exclusive economic zones (EEZ) for island territories, and the second, freedom of navigation, originating in customary international law and protected by the Convention.[5]

These tensions are most acute in the South China Sea, a strategic area shared by eight countries,[6] through which one-third of global maritime trade transits and in which China is strengthening its military presence. Like the Mediterranean, the South China Sea is a semi-enclosed maritime space linked to the ocean by straits. This geographical characteristic leads to EEZs being adjacent to each other. The Award issued by the tribunal constituted under the Permanent Court of Arbitration in The Hague on the status of the Spratly Islands, claimed by both the Philippines and China, is a good illustration of the challenges that arise from diverging interpretations of key principles.[7]

To counter China's territorial ambitions, which are based on "historic" claims of sovereignty over the whole of this area, the Philippines took their dispute to the Permanent Court of Arbitration. The tribunal was charged (among other tasks) with making a determination on the validity of China's nine-dash line under the Montego Bay Convention, on China's program of land reclamation in the Spratly Islands under environmental law, and on China's attempt to have certain low-tide elevations characterized as islands. As a reminder, the nine-dash line is a Chinese doctrine created in the era of Chiang Kai-shek, claiming sovereignty over almost the whole of the South China Sea.

By proving wrong against China on these various points in its Award of July 12, 2016, the Arbitral Tribunal reaffirmed its support for a conservative interpretation of the Convention.[8] This decision, the legitimacy of which was not accepted by China, had no effect, so the international community limited itself to carrying out freedom-of-navigation missions in the area. The strategy used here by China was that of the fait accompli reinforced by a national legal arsenal: since 2021, the Chinese People's Armed Police Force Coast Guard Corps has been legally authorized to use force against foreign vessels in waters under Chinese jurisdiction.[9]

5. This latter principle is itself the product of a strategic use of the law, as it arises from the book *Mare Liberum*, by Hugo Grotius, commissioned by the Dutch East India Company. The arguments made in favor of freedom of navigation in *Mare Liberum* were intended to counter Portugal's maritime blockade of access to the Indian subcontinent. See A. Estève, "Le 'lawfare' ou les usages stratégiques du droit" in: B. Pélopidas and F. Ramel (eds.), *L'Enjeu mondial. Guerres et conflits armés au XXIe siècle*, Paris: Presses de Sciences Po, 2018, pp. 201–211.

6. Brunei, Indonesia, Malaysia, the People's Republic of China, the Philippines, Singapore, Taiwan, and Vietnam.

7. The Paracel Islands are disputed by the People's Republic of China, Taiwan, and Vietnam, but not by the Philippines. It is thought possible that Vietnam may initiate similar legal proceedings.

8. Permanent Court of Arbitration Case No. 2013-19 of July 12, 2016, award in the matter of the South China Sea Arbitration.

9. N. Guibert, "La Chine arme ses garde-côtes, suscitant l'inquiétude de ses voisins", *Le Monde*, February 4, 2021.

Establishing new norms

A second category of lawfare consists of establishing new norms through legal lobbying so as to gain the upper hand. This strategic use of the law is favored by the many civil and military applications of contemporary technological advances, particularly in the cyber and outer-space domains. The contracting parties to Additional Protocol I to the Geneva Conventions have an obligation to ensure the compatibility of such applications with existing legal principles under Article 36, which states that parties must examine the legality of new weapons. The practical implementation of international humanitarian law (IHL) depends on national interpretations, as is so often the case in international law. States therefore have to assert their own interpretations of legal doctrines and customary law—expressed in declarations and interpretative manuals and guides—and try to win other states over to their point of view. This feeds a legal diplomacy that is characterized by the expression of power relationships and relies on the fait accompli to legitimize a particular interpretation.

The current controversy over the regulation of cyberspace demonstrates the strategies deployed by states to circumvent the collective mechanisms for international discussion. The United States produced an interpretative guide to the law of armed conflicts in cyberspace, known as the Tallinn Manual, the aim of which was to counter the shared position of Russia and China that IHL did not apply to this new field of conflict. China, meanwhile, uses its influence within international organizations such as the International Telecommunication Union to promote an internet architecture that suits its own interests.[10]

The same strategy—countries issuing their own legal norms, without seeking the approval of international or supranational bodies—is being used in the domain of space. While the corpus of law on this topic remains relatively slim,[11] the United States has worked to develop an alternative body of law by adopting no fewer than seven Space Policy Directives between 2017 and 2020.[12] China contests the legitimacy of these, accusing the United States of imposing an exclusively national customary law, in a context where advances in space regulation are blocked. China is highly active in the Committee on the Peaceful Uses of Outer Space and ratified the majority of treaties relating to space between 1983 and 1988, with the exception of the Moon Agreement, which the United States and Russia also did not sign.

The Sino-Russian initiative to promote the PAROS treaty (Prevention of an Arms Race in Outer Space), which is based on the work of the ad hoc

10. S. Bussard, "La Chine exacerbe la bataille pour le contrôle d'internet", *Le Temps*, April 7, 2020.
11. It mainly comprises five United Nations treaties plus resolutions of the United Nations General Assembly, which are non-binding. See C. Steer and M. Hersch (eds.), *War and Peace in Outer Space: Law, Policy, and Ethics,* Oxford: Oxford University Press, 2021.
12. E. Véron, "Les îles militarisées en mer de Chine du Sud: la partie émergée de la puissance de frappe de Pékin", *The Conversation*, June 14, 2018.

committee mandated by the United Nations between 1985 and 1994, shows how international regulatory bodies can be exploited in strategic competition. This initiative ultimately assumes the obsolescence of the current legal framework (the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space) and would not prevent certain practices, such as anti-satellite fire, which is favored by China and Russia. The United States vetoed PAROS in 2008 and 2014, denouncing the text as a bad-faith attempt to gain time to fill a technology gap in this area, with no real intent to rein in a weaponization of space.

Strategic litigation

A third category of lawfare actions involves mobilizing legal effects to constrain an adversary, sometimes called strategic litigation. Both national and international courts can be used to limit a party's freedom of action. This type of litigation allows citizens to contest the policies of the state in the courts, for example questioning the criminal responsibility of members of the armed forces, the state's responsibilities toward soldiers and their families, or decisions to export armaments. The strategy of resorting to the courts is effective mainly in liberal democracies that subscribe to the principles of IHL; states with political models in which justice is not independent are less likely to be obliged to account for their actions in national courts. This strategy can be applied outside of armed conflicts—it can also serve states' strategic interests in times of peace and in the civilian world.

The general tendency to substitute international human rights law (IHRL) for IHL when evaluating the use of force by states is also part of this strategy of using litigation to further restrict the exercise of sovereignty, particularly for states that are party to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Since the scope of universal jurisdiction was reduced,[13] the International Criminal Court (ICC) has become a favored arena for criminal prosecutions, because—unlike the United Nations International Court of Justice (ICJ)—it has binding application mechanisms.

The Palestinian Authority's use of the various legal mechanisms at its disposal to oblige Israel to respect international law provides an example of the strategic effects of moving an armed conflict into the courts. In March 2021, the ICC prosecutor, Fatou Bensouda, officially opened an investigation into the crimes committed on Palestinian territory under three main headings: the use of force during the 2014 Operation Protective Edge, the repression of the "Great March of Return" demonstrations in Gaza in 2018, and the colonization of Palestinian territories on the West Bank. Bensouda subsequently became the target of American sanctions, a consequence

13. The mechanisms of universal jurisdiction permit a court belonging to a third-country to prosecute outside its own territory in serious cases of violation of international law.

intended to intimidate the ICC and force it to declare that it did not have jurisdiction in these areas. Sanctions have then been removed by Biden administration.

Another practice that belongs in this category is issuing sanctions with extraterritorial effects in order to weaken an adversary's resolve. The debates over the extraterritorial application of American law that allows the Department of Justice to prosecute a legal or physical person belonging to a third-country and sanction actions not carried out on American soil prompt reflection on the reality of American lawfare. The imprisonment in the United States of Frédéric Pierucci, a French executive at Alstom, for offenses under the Foreign Corrupt Practices Act is seen as a paradigm for the use of a normative environment to reinforce national power. In 2013, as a senior manager in the boiler division of Alstom, Pierruci was arrested during a business trip to New York for paying bribes to win a contract in Indonesia. He was released (pending sentencing) in 2014 in the context of the sale of the Alstom group's energy business to General Electric.[14]

In a similar vein, the legal offensive by the United States against the Chinese firm Huawei, to exclude it from US telecommunications networks, made use of the American sanctions against Iran. Huawei was prosecuted in the district court for the Eastern District of New York for having circumvented American sanctions against Iran through its subsidiary, Skycom. As a result, Huawei's chief financial officer, Meng Wanzhou, was arrested at the request of the American authorities in December 2018, while transiting through Canada on her way to Mexico, and placed under house arrest until her return to China in 2021.

It is not only the United States that uses sanctions as a unilateral lever to pursue its strategic objectives—other international actors do the same. Several European think tanks and academics, as well as members of the European Parliament (like Raphaël Glucksmann), have been the subject of sanctions by the People's Republic of China, forbidden to enter Chinese territory after publishing position statements on China's repression of the Uyghurs in Xinjiang.

Finally, this court-centered type of lawfare can also take the form of gagging procedures initiated by intermediaries on behalf of foreign powers aiming to intimidate researchers who make critical remarks about the country in question. Thus, the Russian television station RT France filed a complaint in the French courts after the Center for Analysis, Planning, and Strategy (part of the French Ministry for Foreign Affairs), together with the French Institute for Strategic Research (IRSEM), published a report on the manipulation of information, targeting among others RT. This court action

14. F. Pierucci and M. Aron, "The American Trap: My Battle to Expose America's Secret Economic War Against the Rest of the World", trans. D. Gulan, London: Hodder & Stoughton, 2019.

could be interpreted as a response to French criticism of Russia.[15] Even if the courts reject an application for a gagging order, the cost, media coverage, and time required to fight the case can effectively limit the means of action of the person or institution targeted and hence weaken their resolve.

Reputational lawfare

The fourth and final category of lawfare concerns mobilizing legal arguments to adversely affect the reputation of a practice and the parties involved in it. The law's power to confer and destroy legitimacy makes it an outstanding tool of influence. Legal arguments are therefore also communication tools. Accusing a state of not respecting international legality, even in the absence of evidence, may for example damage the legitimacy of a military operation in progress or cast doubt on a foreign policy stance.

NATO started giving serious consideration to the possible exploitation and manipulation of the law after a complaint was filed in Germany against General Breedlove, who was then Supreme Allied Commander Europe of NATO, during the Russian military operations in Crimea in 2014. The complaint, which related to the glorification of war crimes and was made by a Bulgarian citizen with links to Russia, was seen as a hybrid mode of action intended to destabilize NATO.[16]

As an example of a failure to recognize the importance of the law as a communication tool, the French army's institutional communications in the wake of the controversy around the air strike near the village of Bounti in Mali in January 2021 could suggest that military objectives were determined on the basis of the age and sex of the individuals targeted,[17] although this is contrary to French operational practices. These communications therefore implied some connection with the American operational practice of "signature strikes", whose compatibility with IHL is questionable. In "signature strikes", targets that have not been identified precisely—for example, they may have been identified only by their age and geographical proximity to persons displaying "signature" characteristics of terrorists—may nevertheless be considered legitimate. This practice was heavily criticized, to the point that the Obama administration claimed to have abandoned it in 2013.

These four faces of lawfare show how legal norms can be mobilized as an instrument of power, with the distinctive feature of involving extra-military spheres of activity and legal corpuses, such as business law, the compliance sector, and reputational pressures.

15. A. Dassonville, "Devant la justice, RT joue la carte de la diversion : 'Quels sont les médias qu'on peut autoriser en France ou pas ?'", *Le Monde*, March 18, 2022.
16. J.-E. Perrin, "La conduite des opérations juridiques au sein de l'Otan", *Revue Défense Nationale*, Vol. 815, No. 10, 2018, pp. 79–87.
17. "Opération Barkhane, Frappe contre un rassemblement de membres d'un groupe armé terroriste dans la région de Douentza", press release, Chief of Defense Staff, January 7, 2021, available at: www.asafrance.fr.

Strategic recourse to the law in support of national security

Although states do not generally admit direct responsibility for acts of lawfare (with the notable exception of Ukraine), increasing recourse to the law to achieve political and strategic ends is a notable feature of the disruptions at work in the international system. States have thus always used the law for strategic ends. However, recent developments encourage them to exploit it further, such as the proliferation of courts of justice, growing media coverage of conflicts, and the confusion between legality and legitimacy.

Russia: mobilizing the law in hybrid warfare

The Russian Federation deploys legalistic discourse informed by a sound understanding of international law and refers to international norms to criticize the actions of its competitors and justify its foreign policy. The Russian legal narrative is therefore well-informed and emphasizes the supposed hypocrisy of liberal democracies, in particular the United States, which insists on the supremacy of the law in its foreign policy while practicing an allegedly selective interpretation of legal norms.[18] This discourse, which does not attempt legal coherence, serves to justify repeated breaches of norms, which are represented as unfair, in order to weaken international order.[19] Mobilizing the law in this way thus falls within the domain of information weaponry.

This legalistic discourse is accompanied by a professed desire to reform an international order that is based on an (in Russia's view) unjust interpretation of legal rules. The latter are represented not as expressing universal values of justice but as a vector for the interests of the United States and its allies. Vladimir Putin's speech to the Duma in 2014, after the invasion of Crimea, follows this logic: "[W]hat do we hear from our colleagues in Western Europe and North America? They say we are violating norms of international law… it's a good thing that they at least remember that there

18. See S. V. Lavrov, "On Law, Rights and Rules", *Russia in Global Affairs*, Vol. 19, No. 3, 2021, pp. 228–240; S. Van Severen, "Lavrov's Lament: A Russian Take On the Rules-based Global Order", *EJILTalk* (blog), *European Journal of International Law,* July 16, 2021, available at: www.ejiltalk.org.

19. J. Ancelin, "La Fédération de Russie pratique-t-elle le *lawfare*? Quelques observations illustrées du conflit opposant la Fédération de Russie et l'Ukraine à propos de la situation en Crimée", in: *Annuaire français de relations internationales*, Paris: Éditions Panthéon-Assas, 2021, pp. 511–522.

exists such a thing as international law—better late than never".[20] Russia's strategic use of the law thus takes the form of an alternative legal discourse aimed at overhauling the current international order. It plays out in several different areas.

Legal preparation of the battlefield

Russia began by developing a legal rationale for its policy of territorial expansion into Georgia, Crimea, and the Donbas, and more generally in relation to the current operation in Ukraine. As part of this strategy, Russia took action—both prior to military action and then in parallel with it—to establish legal grounds for the use of force. The goal was to create a basis or a legal narrative that would confer an aura of legitimacy, thus helping justify the use of force under national or international law. In the case of the invasion of Ukraine, the legal preparation for the operation consisted of highlighting the breaking of the Minsk agreements and the failure of the negotiations between Russia and Ukraine following the addition of clauses deemed unfair by Russia and hence not examined.

Next, Russia recognized the independence of the Luhansk People's Republic and the Donetsk People's Republic and used this development to justify its "special military operation". Russia's letter to the United Nations Security Council on February 24, 2022 announced a Russian military intervention in the region under Article 51 of the United Nations Charter, on the grounds of legitimate self-defense, which constitutes an exception to the prohibition on the use of force contained in Article 2(4). Russia's legal interpretation therefore relies on a principle of selective self-determination.

Moreover, Russia justified its interventionism via a broad conception of the "responsibility to protect" (R2P), exercised in response to alleged genocide, which draws on the Western precedents set by the NATO military intervention in Kosovo in 1999 (Kosovo was declared independent in 2008) and the Western military intervention in Libya in 2011. The R2P norm, ratified in 2005 at the United Nations World Summit,[21] was primarily a response to states' difficulties in dealing with ethnic cleansing in Rwanda and Kosovo. However, the Russian Federation's broad interpretation of it drew on a principle of protecting Russian populations abroad formulated by the Russian president, Dmitry Medvedev, in an interview given to Russian TV stations on August 31, 2008, following the conflict between Russia and Georgia.[22] While the issue in 2008 was one of protecting populations with Russian nationality living outside the country, equating to roughly eighteen million Russians living in former Soviet territories, the category of "fellow

20. V. Putin, "Address by the President of the Russian Federation", March 18, 2014, English language version available at: http://en.kremlin.ru.
21. Available at: www.un.org.
22. Interview with Dmitry Medvedev, "Interview given by Dimitry Medvedev to television channels Channel One, Rossia, NTV", August 31, 2008, available at: http://en.kremlin.ru.

countryman living abroad" was subsequently enlarged to include the protection of ethnic minorities in Crimea in 2014, and Russian-speakers in the east of Ukraine in 2022. The Federal Law of May 24, 1999, on state policy concerning Russian citizens abroad, amended in 2010, is the cornerstone of an ambiguous approach to the diaspora that refers not just to ethnic nationality ("Russki") but also encompasses citizens of the Russian Federation living abroad, Soviet citizens and their descendants, as well as emigrants from the Russian empire and their descendants. This broad definition allows the various peoples inhabiting the post-Soviet space to be linked to the Russian Federation, where necessary through passportization (giving Russian nationality to the non-native populations of the former Soviet republics).[23] This broadening tendency reaches its epitome in the concept of "*Russkiy Mir*" (the Russian world), which refers to a supranational community of nearly thirty million individuals living outside Russia's borders but maintaining ethnic, legal, and cultural links with it. At the institutional level, this concept was expressed through the creation in 2008 of an agency for compatriots abroad within the Russian Ministry of Foreign Affairs and a dedicated Russkiy Mir Foundation.

Manipulating international norms

Russia applies particular international rules tactically, using international conventions and treaties to extend its freedom of action as far as possible. For example, Russia exploited provision 41 of the Vienna Document of the Organization for Security and Co-operation in Europe to allow it to circumvent having to provide prior notification of military activities, thus enabling it to conceal troop movements prior to the invasion of Ukraine.[24] The Russian Federation also avoided the obligation to invite international observers by reporting a number of troops below the threshold of thirteen thousand fixed by the Vienna Document[25] and by relying on provision 58, which allows states to forgo observers for military activities carried out without advance notice to the troops and lasting no more than seventy-two hours.[26] This approach is characteristic of Russia's pursuit of a strategic ambiguity that masks its intentions and keeps its adversaries in a state of strategic paralysis.

23. E. Knott, "Quasi-Citizenship as a Category of Practice: Analyzing Engagement with Russia's Compatriot Policy in Crimea", *Citizenship Studies*, Vol. 21, No. 1, 2017, pp. 116–135.
24. "Notifiable military activities carried out without advance notice to the troops involved are exceptions to the requirement for prior notification to be made 42 days in advance." Provision 41 of the Vienna document effectively allows states to carry out military activities without advance notification, available at: www.osce.org.
25. The number communicated to the Organization for Security and Co-operation in Europe was 12,700. Russia split the military activity into smaller, separate activities so it could carry out larger troop movements.
26. M. Voyger, "Russian Lawfare—Russia's Weaponisation of International And Domestic Law: Implications for the Region and Policy Recommendations", *Journal on Baltic Security*, Vol. 4, No. 2, 2018, pp. 35–45.

This exploitation of international norms for its own benefit also allows Russia to secure its interests in the Arctic, which it identified as a critical objective in 2014. Having ratified the United Nations Convention on the Law of the Sea (the Montego Bay Convention) in 1997, Russia then took advantage of Article 76 paragraph 3 regarding continental shelves[27] to extend its EEZ from 200 to 350 nautical miles, so as to exploit the hydrocarbons found in that zone. To achieve this, Russia made the (disputable) claim that the Lomonosov Ridge, which spans 1,800 kilometers of the Arctic Ocean, is an extension of the Russian continental shelf. A United Nations Commission is currently evaluating the geological validity of this claim. In addition to pushing this legal narrative, Russia uses the strategy of fait accompli, deploying military resources to assert its sovereignty in this strategic part of the world, now open to navigation because of the effects of climate change.

Yet another critical arena in which Russia is making strategic use of the law is the use of legal influence to set new norms in strategic sectors, principally the cyber domain and space. Russia is strengthening its position within international bodies and structures of influence in order to promote norms that are favorable to it, as mentioned earlier.

Offensive and defensive litigation

Finally, Russia also exploits national and international legal mechanisms, as demonstrated by Russian courts convicting senior Ukrainian officials in absentia and the Russian use of gagging orders in third-country jurisdictions. But litigation can also be used to counter Russian actions. The Ukrainian government set up an internet site listing legal actions taken against the Russian Federation.[28] The list is long and includes a case filed with the ICJ regarding violation of the International Convention on the Elimination of All Forms of Racial Discrimination, in connection with Russia's treatment of the Tatar and Ukrainian populations in Crimea and Russian support for terrorism. Nine applications have been brought before the European Court of Human Rights as a result of the downing of Malaysia Airlines flight MH17 by a Russian missile in 2014, in addition to the individual cases brought by families. Ukraine has also instituted proceedings with the International Tribunal for the Law of the Sea, the ICJ, and the Permanent Court of Arbitration regarding the Kerch Strait. Additionally, on March 3, 2022, the ICC opened an investigation regarding allegations of war crimes in Ukraine.

In response to these legal actions, the Russian Federation has been developing defensive strategies based on the use of proxies, as these allow it

27. "The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof." (Article 76 paragraph 3)
28. Available at: https://lawfare.gov.ua.

greater freedom of action by circumventing international courts. Private military firms like Wagner provide a rich case study of such strategies.

Russia has also developed a counter-lawfare strategy, principally to protect itself from the effects of the American and European sanctions imposed in 2014. The implementation of Russia's policy of import substitution to limit its dependence on the United States and European Union (EU) first materialized in the agri-food sector. The Kremlin responded to the sanctions with an embargo on Western and European exports of agricultural products to Russia, affecting up to a third of food imports into Russia. The same policy was then applied to the military-industrial complex, following the announcement by several Western countries that they were ending exports of components required to manufacture Russian weapons systems. It was subsequently extended to all sectors deemed strategic, such as aviation and information technologies, for example by replacing Western operating systems in administrative IT systems. The new volley of sanctions imposed after the invasion of Ukraine in 2022, and in particular the exclusion of the Russian Federation from the SWIFT banking communication system, were used by the West to put pressure on Russia in renewed condemnation of its aggression. It will be necessary to evaluate the medium and longer-term impact of this Western use of lawfare in conflict on Russia's determination to fight.

The United States: Extraterritorial lawfare and legal influence

The concept of lawfare originated in the United States and remains largely based on an American vision of international law. It appears in the American strategic landscape in the context of a discourse that is critical of the development of international law and concerned about possible limitations to states' sovereignty. In this sense, lawfare is understood pejoratively, as practices carried out by the competitors of the United States who circumvent the law to obtain a strategic advantage.

International criminal law versus national sovereignty

Leading the charge to recast the law as a national security issue were conservative American intellectuals whose goal was freedom from legal constraints on matters of national security. They were uneasy about the threats to national sovereignty posed by international law, and in particular by the ICC, created in 1998.[29] This new institution, created on the initiative of several non-governmental organizations (NGOs), was initially supported

29. D. B. Rivkin, Jr. and L. A. Casey, "The Rocky Shoals of International Law", *The National Interest*, No. 62, 2000, pp. 35–45.

by the United States, which later refused to ratify the Rome Statute. In an article in *The National Interest*, published in 2000, David B. Rivkin, Jr. and Lee A. Casey (then officials in the US Department of Justice) denounced the desire of certain NGOs to transform international law into an "international regulatory code". These NGOs were, in Rivkin and Casey's view, launching an "assault on the Westphalian order" with the goal of administering the relationship between citizens and governments in domains such as environmental protection, children's rights, and the use of force. This would eventually imply eliminating the unilateral use of force, requiring that wars cause no civilian casualties, and the possibility of political and military decision-makers being subject to criminal prosecution by international courts. For the authors, such a vision of the world represented a direct threat to the interests of the United States, where the predominant role of the law in politics was both "our genius and our Achilles Heel". They proposed a three-pronged solution, laying the groundwork for a theory of the law as a weapon:

- A public diplomacy that provides systematic legal justification of American stances;
- a defense of the principle of sovereignty, in particular through consistent opposition to the principle of universal jurisdiction, in favor of the national criminal justice system;
- strategic analysis of the impact on the United States of new legal norms.

Although they did not use the term "lawfare", they did make clear the intellectual approximation between war and the law. They conclude: "Moreover, international law imperatives will have to be integrated into American statecraft. For just as war is too important to be left to the generals, international law cannot be left solely to the lawyers."[30]

The law as a national security issue

US General Charles Dunlap's presentation at the Carr Center for Human Rights Policy in 2001 was a golden opportunity to develop this discourse. Dunlap coined the term "lawfare" in 2001 to refer to "the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective".[31] His speech was intended as a response to critics pondering the question of whether "lawfare [is] turning warfare into unfair"[32] by placing legal constraints on Western armies that would disadvantage them when faced with enemies who did not respect the restrictions imposed by international law. First developed in the context of the military intervention in

30. *Ibid.*, p. 36.
31. C. J. Dunlap, "Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts", *Humanitarian Challenges in Military Intervention Conference*, November 29, 2001.
32. Dunlap, p. 1

Kosovo, this analysis was particularly apt in the post-9/11 context, inferring an asymmetrical confrontation with an adversary less bound by IHL.

This theorization of the law as a threat may nevertheless appear paradoxical because the United States makes such extensive use of legal tools as instruments of power, in both the economic and military spheres. In Afghanistan and Iraq, the United States relied on the courts of justice to weaken the organizations that threatened it on the battlefield: American legal tools got Taliban financial assets frozen before and during their offensive in Afghanistan.

But the United States' use of the law as an instrument of power had already been noted and envied by other nations prior to these conflicts. This was the perspective taken in 1999 by Qiao Liang and Wang Xiangsui, two officers in China's People's Liberation Army, who advocated expanding war into other sectors of society in their book, *Unrestricted Warfare*.[33] They suggested a typology of twenty-four types of warfare with non-kinetic elements, including the use of the law in "legal warfare". Their analysis echoes the speech made by Jiang Zemin, former president of the People's Republic of China, who in 1996 told Chinese experts in international law that China should "be adept at using international law as a 'weapon'".[34]

These ideas gained traction and found a political echo inside the Bush administration. The 2005 *National Defense Strategy* repeated this negative vision of international law, placing it on the same level as terrorism: "Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international forums, judicial processes, and terrorism".[35] The Republican elite in the United States thus took note of the strategic importance of the "mouthpieces of the law" (using the expression of Montesquieu), those institutions that can impose their own interpretation on international law and thus promote a political agenda. Rivkin and Casey used the term "lawfare" in two articles from 2006 and 2007 to refer to the political exploitation of blunders made by American troops, such as the Haditha massacre in Iraq. In this context, the authors described Al Qaeda as "an experienced lawfare practitioner"[36] whose actions were intended to erode the United States' determination to fight by delegitimizing the army in public opinion and by clogging the courts with a proliferation of pointless cases with the aim of paralyzing the justice system. As in 2000, the two authors advocated improving the legal training of American troops and insisted on the need for the US government to "tirelessly" explain its own interpretation of the law.

33. Q. Liang and W. Xiangsui, *Unrestricted Warfare*, Beijing: People's Liberation Army Arts, 1999.
34. C. Monteiro Da Silva, "Falü zhan : la 'guerre du droit', une version chinoise du lawfare?", *Raisons politiques,* 2022/1, No. 85, pp. 89–99.
35. "National Defense Strategy", Department of Defense, United States of America, 2005, available at: www.hsdl.org.
36. David B Rivkin, Jr. and Lee A. Casey, "Lawfare", *Wall Street Journal*, February 23, 2007.

Their call seems to have found receptive ears, judging by the initiatives taken by conservative intellectuals to organize a collective response to the legal "attacks" against the government and armed forces of the United States. In 2010, Jack Goldsmith, a law professor at Harvard, started the "Lawfare" blog with Robert Chesney and Benjamin Wittes. The blog, affiliated to the Brookings Institution, enjoys a large readership because of the active participation of conservative legal scholars from Harvard Law School. It monitors legal action and posts articles and analysis, as well as a producing a podcast.[37]

The American lawfare strategy

Today, there are several authors calling for an American lawfare strategy to be developed.[38] Although lawfare is generally presented as being carried out by competitors, the United States has developed complex legal strategies capable of serving American interests effectively on the international scene. These strategies are well-served by certain particularities of the American system: a legal culture that encourages soft law; justice based on negotiation and compromise; and the extraterritoriality of American law, with the Department of Justice leading the charge. These characteristics enable the United States to act in all four categories of lawfare presented in the typology here.

The United States can use its own law to promote new norms in the domain of technology, if necessary relying on public-private partnership. This encourages dialogue with the Big Five. In 2017, Microsoft suggested a "Digital Geneva Convention" to combat cyberattacks and proposed the tech sector play the role of a Red Cross of cyberspace to protect essential infrastructure.[39] US influence on legal doctrine also accrues through the firepower of the English language and the existence of influential legal journals in the United States, served by prestigious law faculties that train legal experts from around the world. The United States is also represented within technical regulatory authorities, which means it can weigh in on norms for new technologies such as Artificial Intelligence.

What is more, the United States has not hesitated to mobilize all these features—conception of the law and legal culture, institutions, legal diplomacy—to promote a reinterpretation of existing norms in line with its interests. The domain of the law of armed conflict is a particularly good example in this regard. In an article published in 2011, John Morrissey analyzed not just categories of enhanced interrogation and the ad hoc legal framework of the so-called war on terrorism, but also a more subtle form of

37. Available at: www.lawfareblog.com.
38. J. Williams, "Legitimizing and Operationalizing US Lawfare: The Successful Pursuit of Decisive Legal Combat in the South China Sea", *Journal of Indo-Pacific Affairs*, Vol. 4, No. 2, 2021, pp. 298–304.
39. B. Smith, "The Need for a Digital Geneva Convention" (speech, RSA conference, San Francisco), February 14, 2017, available at: https://blogs.microsoft.com.

legal warfare carried out by the Judge Advocate General's Corps (JAG Corps), which is responsible for enabling the deployment of American troops everywhere around the world by ensuring their immunity from legal process, in relation to the ICC in particular. By ensuring that American forces have access to a wide range of territories, the JAG Corps has acted as the armed wing of a reinterpretation of IHL.

Since the 1980s, American bases abroad under the aegis of combatant commands have enabled the country to adapt to requirements for limited intervention, by enabling American troops to be deployed rapidly. The operation of these bases relies on bilateral agreements between the United States and the countries concerned, in particular in relation to arranging military exercises. In this regard, the status of forces agreements (SOFAs) defining the legal status of US military forces deployed on the territory of host nations are critical. In the words of military attorney and US Air Force Lieutenant Colonel Jeffrey Walker: "Without a SOFA, you're just a group of heavily armed tourists".[40] Thus while in official American discourse the term "lawfare" is used to denounce legal strategies against the United States, in reality lawfare is used proactively in military strategy: generating legal discourses to legalize the presence of American forces abroad.

The United States also mobilizes courts of justice to take strategic legal action. Cutting off the funding of terrorist networks is a prime example of this. Similarly, the extraterritorial firepower of American sanctions owes much to US courts of justice and the Department of Justice, which allow these sanctions to be applied. Thus it was American judges who allowed an extraterritorial application of the law on a grand scale from 1998 onward by broadening the concept of "nexus" (i.e., a connection between a legal matter and American territory). Using the US dollar, employing an American citizen, an email transiting through a server hosted in the United States: today, these all constitute nexuses that can be used as the legal basis for prosecutions, thus ensuring that American courts have jurisdiction in a large number of cases. Equally, embargoes decided by the Office of Foreign Assets Control and applied to individuals, countries, or materials, through ad hoc regulations, the International Traffic in Arms Regulations, or the Export Administration Regulations all lay essential groundwork.[41] The use made of these weapons in connection with Iran and Ukraine demonstrates their importance.

Even though the United States does not explicitly claim to have a lawfare policy and uses this term to make critical remarks about international law, analysis of its legal practice shows how it exploits legal instruments to serve its geopolitical interests.

40. J. Morrissey, "Liberal Lawfare and Biopolitics: US Juridical Warfare in the War on Terror", *Geopolitics*, Vol. 16, No. 2, 2011, pp. 280–305.
41. M. Leblanc-Wohrer, "*Comply or die*? Les entreprises face à l'exigence de conformité venue des États-Unis", *Potomac Papers*, No. 34, Ifri, March 2018.

Israeli legal strategies

Israel occupies a special position in the development of global thinking about integrating the law into state military strategies.[42] The Israeli State provides rich materials for detailed study because it adopted this approach within its armed forces very early on. The linchpins of the Israeli strategy are the legal department of the Israeli army, legal institutions, particularly the Supreme Court, and ad hoc committees used when prosecutions for war crimes arise.

The legal department of the Israeli army

The legal department (*HaPraklitut HaTzva'it)* of the Israel Defense Forces (IDF), known as the Military Advocate General (MAG) Corps in English, comprises military legal experts whose job is to justify the legality of the use of force.[43] This organization is at the heart of a major doctrinal evolution that has occurred since the second intifada: the IDF has increasingly viewed international law not as an external constraint but as an element of the Israeli national interest. Interpreting the law of armed conflict and promoting alternative norms, where necessary, has come to be seen as a way of advancing Israel's interests in wartime as in peacetime. The MAG is responsible for exploiting the gray areas of international law in order to allow the IDF free rein. Ahaz Ben Ari, legal adviser to the defense ministry and the former head of the IDF's international law department, expressed the situation clearly at a 2007 conference in Tel Aviv: "Our job is to let the army operate".[44]

This new importance granted to the law translates into an increased workforce. The international law department is one of the IDF units that has grown the most, relatively speaking. In 2009, it had twenty members; in 2019, it had thirty, plus another thirty reserve officers, allowing it to double its size if required. It then became known colloquially as "the lawfare team".

At the institutional level, the MAG also provides legal assistance to members of the IDF. Soldiers fear the international courts, and this fear is increased at the outset by their lack of legal knowledge. The MAG thinks of itself as a bridge between the legal and military environments, and its officers strive to master both the legal imperatives specific to military deployment and the specific needs of the armed forces. The MAG's involvement in military decision-making demonstrates a desire to protect soldiers from prosecution for war crimes. Its officers take part in decision-making at the level of operation planning and in the operational command of the IDF by

42. For a deeper examination of Israeli warfare, see: A. Férey, "Pour une approche descriptive du *lawfare* dans le conflit israélo-palestinien", *Raisons Politiques*, No. 85, February 2022.
43. See the MAG presentation on the IDF website, available at: www.idf.il.
44. Quoted by A. Cohen, "Legal Operational Advice in the Israeli Defense Forces: The International Law Department and the Changing Nature of International Humanitarian Law", *Connecticut Journal of International Law*, Vol. 26, No. 2, 2011, pp. 382-383.

checking the legality of decisions in advance. By making military command responsible for ensuring that international legality is respected, soldiers are supposed to be protected against criminal prosecution because orders are checked for legality before being issued, thus reducing the moral solipsism of soldiers who may be placed in a difficult position if asked to assess for themselves the legality of the orders received. By the same logic, if acts of violence occur, the IDF can also clear itself of responsibility by showing that the soldiers who committed them were not following orders. In practice, these two missions of respecting international legality and protecting soldiers against criminal prosecution may contradict each other and leave the legal advisers attempting an uncomfortable balancing act. While the armed forces want their decisions to be approved as much as possible, they also have to protect their credibility with the public and with organizations that defend human rights.

Legal protection for soldiers is also provided by the use of military courts. In accordance with the principle of complementarity, the ICC may exercise its jurisdiction only if a legal action is not already underway in the country concerned. Soldiers who have already been prosecuted for a war crime in their own country cannot be tried again by the ICC. Unlike the process in France, where soldiers are tried before civilian courts, in Israel, soldiers are judged by members of the military in special courts that may be more understanding than those in the civilian world.

The role of the Supreme Court

The Supreme Court also plays a key role, albeit an indirect one, in Israeli lawfare strategy concerning the Palestinians. This entity, combining the roles of High Court and Supreme Court, is particularly important for Israel, which has no constitution. Its judges are simultaneously the guarantors of democracy and entrusted with a leading political role: interpreting and updating the state's basic laws. Until the mid-1990s, the Supreme Court rarely intervened in the IDF's affairs. That changed however when Aharon Barak became President of the Supreme Court in 1995. Barak, who was close to the American liberal elites, theorized about "legal interventionism" in his book *The Judge in a Democracy* and recommended that the courts should fulfill their political role by evaluating decisions made by the executive.[45] Involving the court in this way helped place the officers of the MAG in a crucial position as they prepared the legal arguments to explain decisions to the courts.

Here we must put the importance of the Supreme Court as a balancing force into perspective. Judges are not in a position of systematic conflict with the MAG. On the contrary, they often work hand-in-hand with the military. Rather than a culture of confrontation, there is one of cooperation, partly as a result of institutional and interpersonal links. During the preparatory work

45. A. Barak, *The Judge in a Democracy*, Princeton: Princeton University Press, 2006.

for judgments, MAG legal experts provide an initial opinion that the court generally approves. When differences of opinion occur, the judges provide a second opinion, sometimes called "Plan B", in collaboration with the MAG teams.[46]

Ad hoc committees and the principle of complementarity

As the final component of the defensive mechanism intended to reduce its legal vulnerability, Israel has established a series of committees of inquiry responsible for evaluating allegations of war crimes. These committees are at the junction between the Ministry of Justice and the Supreme Court, which sometimes orders their creation. In the 2006 decision authorizing targeted killings under certain conditions, the Supreme Court recommended that an investigative committee be set up to examine disputed cases.[47] An institutional arrangement of this kind operates as a "legal shield" against potential prosecution in both international criminal institutions (the ICC) and national ones (universal jurisdiction), which are thus not competent to issue a legal opinion on these cases under the principle of complementarity. The committees' hearings are based on the model of a debriefing in an internal military investigation: the testimony and evidence are inadmissible in any court of justice that might take over in criminal proceedings.

These committees' tendency to respect obligations under international law has been uneven. One obstacle is that they are structurally close to the state, which has the authority to define their working methods. Moreover, studies on the impact of the independent committees show that the regulators have a tendency to identify with the regulated. They are reportedly inclined to side with the logic of the actors regarding strict respect of norms, particularly in security matters. In these latter cases, the presence of former members of the military on the committee is sometimes necessary, because of their detailed knowledge of the terrain, but has the disadvantage of reducing the amount of criticism in the committee's conclusions. Factors that help explain why the opinions of former members of the military may be more permissive than those of a judge include continuing institutional links, the idea that loyalty is important within the military, and the rules of engagement as applied in practice often being more flexible than those authorized by IHL.

In a report on the role of national commissions of inquiry in impunity for extrajudicial executions, published in 2008 for the United Nations Human Rights Council, the special rapporteur Philip Alston expressed his

46. A. Cohen, "Legal Operational Advice in the Israeli Defense Forces: The International Law Department and the Changing Nature of International Humanitarian Law", *Connecticut Journal of International Law*, Vol. 26, No. 2, 2011, pp. 382–383.
47. Decision of the Israeli Supreme Court on targeted killings, 2006.

concerns regarding states' propensity to favor committees over other existing types of mechanism.[48] His view was that "such inquiries are frequently used primarily as a way of avoiding meaningful accountability". In his opinion, international law imposes an obligation to hold an independent inquiry to punish perpetrators in the case of war crimes and to ensure compensation is provided to victims. He notes that, logically, national civil justice systems should take responsibility for this: unlike committees, national civil justice systems can impose punishments. Israel's practice is the opposite of this conception, and Israel deploys an extensive legal strategy to demonstrate the validity of the principle of complementarity and the probity of these committees.

Private actors

While the MAG, the Supreme Court, and the ad hoc committees are part of a defense against Palestinian lawfare, Israel also possesses offensive mechanisms that use judicial processes to assert certain political principles. Dedicated NGOs act as facilitators between the state and citizens who are prepared to launch criminal proceedings against individuals or organizations if it serves the political and military objectives of the State of Israel, which can provide them with sensitive information to ensure their success in court.

For examples of offensive action, we can consider the work of The Lawfare Project, an American NGO. Created in 2010, it carries out impact litigation to defend Israeli interests. Its efforts to ban the labeling of consumer products made in Israeli settlements illustrate how average citizens can be used to engage national and international legal levers. This labeling had been mandated by legislative decree in France to make it easier for consumers to boycott products from the West Bank, the Golan, and East Jerusalem, territories that are illegally occupied in the view of international law and French foreign policy. Brooke Goldstein, founder of The Lawfare Project, was warned about the decree by the Cabinet Briard, one of the sixty-four French law firms admitted to practice before the French Council of State and the Court of Cassation, a monopolistic situation that increases the influence of these firms. Both the François-Henri Briard, partner at Cabinet Briard, and Goldstein are members of the Federalist Society for Law and Public Policy Studies, a powerful association for conservative lawyers and legal scholars in the United States. To be able to start proceedings, one has to have standing (locus standi). The Lawfare Project therefore contacted the Israeli Psâgot Winery, located in the occupied territories and marketing its wines in Europe, and suggested that it bring civil proceedings, with the assurance that The Lawfare Project would cover the legal fees of Cabinet Briard. This winery, located in a religious settlement, is a popular destination

48. P. Alston, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, UNHRC, 2008.

for politicians on the Israeli right-wing. In November 2020, Mike Pompeo visited Psâgot, making it the destination for the first visit to an Israeli settlement by a representative of the United States. The Lawfare Project's aim was to obtain a judgment from the European Court of Justice that would apply in all twenty-seven member states. This type of lawfare, initiated by private individuals, served the government of the Israeli prime minister Benjamin Netanyahu, which was campaigning for full recognition of Israeli sovereignty in the annexed territories of Golan and the occupied territories of Jerusalem and the West Bank.

These features indicate the importance of the law in Israeli military strategy, even though that strategy is not explicitly described as lawfare. With the support of the media, private initiatives, and international cooperation, Israel has created "legal shields" and used various levers to its advantage.

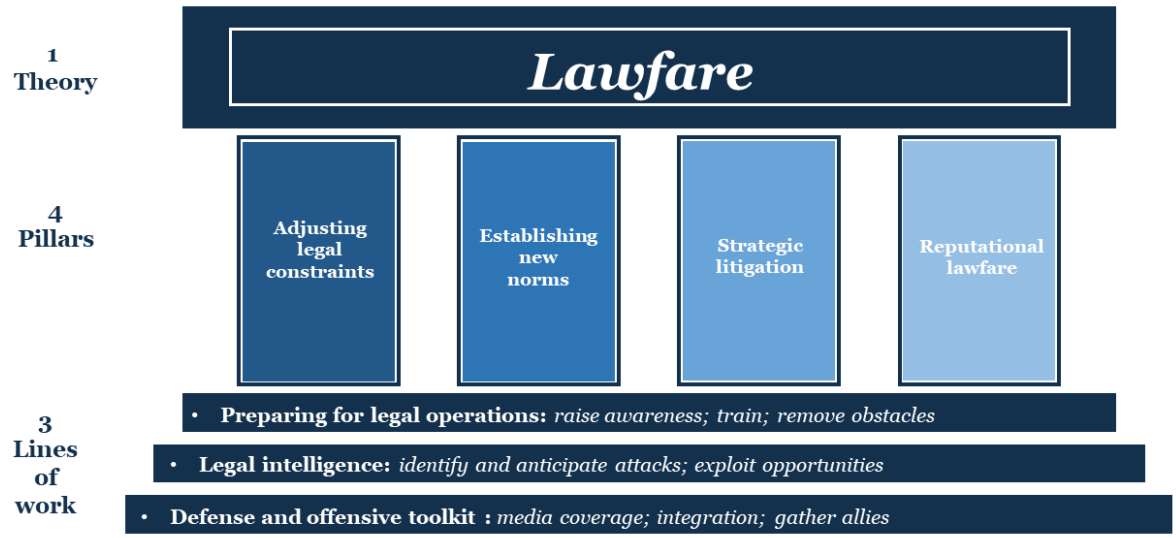
From lawfare to legal operations

Lawfare is a symptom of the disruption of the international system. Given that the French conception of the law is as a tool for calming relationships between states and facilitating the peaceful resolution of differences, the de facto use of the law alongside or instead of military force raises certain questions. Failing to give lawfare proper consideration leads to denying the existence of something that is observably real, at a time when it is imperative to consider how possible responses to lawfare could be organized.

A number of institutions have recently taken up this issue, proving that it is possible to draw on some of lawfare's practices without risking a departure from commitment to the law. In France, the General Secretariat for Defense and National Security (SGDSN) designated the use of the law as a weapon as a core strategic challenge for 2019-2020 and set up a working group on this topic.[49] The group's interdepartmental structure gives it effective coverage of the various domains affected by the weaponization of norms, from the economy and finance to the defense community and the Ministry of Justice. Since 2021, the Ministry of Armed Forces' Legal Affairs Department (DAJ) has also developed innovative thinking about the law as an instrument of power. The 2021 LEGAD (military legal adviser) conference organized a round table on this issue, a first for the DAJ.

49. Along with cybernetics, combating the manipulation of information, and economic security. *Rapport d'activité 2019-2020*, Secrétariat général de la défense et de la sécurité nationale (SGDSN), November 2021, p. 16.

Toward a French theory of lawfare



The NATO term "legal operations" emphasizes specific, isolated cases of normative conflict and lacks the polemic charge of the term "lawfare". Within NATO, it is the Allied Command Operations (ACO) that has most thoroughly taken the concept on board, and the ACO's Office of Legal Affairs (OLA) has created a number of tools. The OLA, created in 1951, was restructured in 2018. To its three original branches (international, operational, and legal management) were added a cross-cutting and interdisciplinary Legal Operations Team and a Legal Advisers Worktop Functional Area System team. The latter populate a database with the various legal texts of NATO member states and run a network offering conferences and shared analyses. Three lines of work arise from these NATO initiatives.

Preparation for legal operations

Given the difficulties in coming to terms with this form of conflict, one line of work is to raise awareness and alert the French defense community to the reality of hostile actions carried out via legal arguments, for example by including legal operations in training exercises. This legal preparation and training also aims to avoid silo working and encourage cross-cutting actions, by establishing links with representatives of the Ministries of Foreign Affairs, Justice, and Economy and Finance. This goal of creating synergies also applies in the domain of defense.

Including the legal dimension in operational preparation requires upfront efforts to understand this type of conflict. Case studies and reports prepared by OLA for the NATO ACO intelligence community and ACO leadership present specific legal operations that certain nations or armed groups may

carry out.[50] They are prepared by the legal operations team and then aligned with NATO legal policies by the operational branch before being widely disseminated, and are accompanied by analyses, evaluations, and recommendations to the commanders and staff. The reports are intended to arouse interest and alert NATO member nations to the below-the-threshold actions taken by hostile countries in order to weaken them.

Finally, including legal operations in the preparation of forces requires that the legal advisers assigned to the armed forces be perceived as a useful source of suggestions and initiatives, a point of view which is still resisted in some quarters.

Toward legal intelligence

The second line of work focuses on legal intelligence, broadening the scope of monitoring work to include lawfare both in peacetime and during open conflict over international law (treaties, United Nations legal thinking) or national laws and regulations. This mapping is required because of the need to anticipate potential threats, identify opportunities to promote legal interpretations by building coalitions, and become aware of vulnerabilities. The objective is to make the institutions and actors concerned aware of the increase in hostile activities in the legal domain. The OLA publishes a monthly Legal Vigilance Bulletin that compiles extracts taken from an informal, non-exhaustive examination of open sources. These texts are not analyzed in depth but may nevertheless be of interest to legal operations, intelligence, strategic communications, and research communities (think tanks and universities) that take an interest in normative conflict. Since September 2021, the French Ministry of Armed Forces' DAJ has also proactively published a legal monitoring journal on current IHL and IHRL issues that is distributed to almost 400 representatives and military legal advisers. Responding to an obligation under IHL, these legal advisers are responsible for disseminating the law within the armed forces, providing operational legal advice to the military command, and ensuring that international conventions are respected by French forces during operations.

Various allied armies run this kind of collaboration on legal matters between intelligence services and armed forces, going so far as to mobilize intermediaries. As a case study, the joint action by the Israeli MAG and private actors in 2011 to ensure that the naval blockade of the Gaza Strip was respected demonstrates how the law can be a substitute for military action. This event occurred after a 2010 incident in which Israeli forces in the waters off Gaza intercepted and boarded a flotilla that had sailed from Turkey, leading to the death of ten people. This incident was catastrophic for Israel's image and led to an internal commission and a highly critical report by UNHRC.

50. J.-E. Perrin, "La conduite des opérations juridiques au sein de l'Otan", *Revue Défense Nationale*, Vol. 815, No. 10, 2018, pp. 79–87.

A year later, fourteen boats attempted the same type of action to protest the Israeli naval blockade of Gaza. Shurat HaDin,[51] an organization that uses the law to defend Israel's interests, employed a range of levers to ensure the blockade was respected. First, it wrote to insurance companies to get the flotilla's insurance withdrawn on the basis that Hamas was classified as a terrorist organization by the United States and the EU. It also approached Inmarsat, a provider of communications systems, in a similar fashion, but received no response. It then contacted an American citizen living in the Israeli town of Sderot, Michelle Fendel, about launching a legal action in her name. Inmarsat immediately stopped providing the flotilla with communication services and the legal case was dropped. Shurat HaDin also started a legal action in a federal court in the name of Dr. Alan Bauer, an American citizen injured in a Hamas attack, focusing on the fact that the flotilla was financed by organizations that were illegal in the United States, including the Free Gaza Movement. However, the federal court rejected the application. After these actions, Shurat HaDin informed the Greek minister for civil protection that the boats did not have insurance or communications. Consequently, the fourteen boats were prevented from leaving the port by Greek law enforcement agencies. Thus, because of the legal action taken by Shurat HaDin, the Israeli military objective of preventing the flotilla from breaking the Gaza blockade was fulfilled without bloodshed, at very little cost, and without imperiling either personnel or the reputation of the Israeli government. This case also shows that even without a formal sentence being imposed by a court, legal and reputational pressure on private actors may produce good outcomes.

Developing an appropriate legal arsenal

Given the above, it seems worth developing a range of instruments that defense communities—primarily J5-level operations planning—can draw on and that allow them to exploit the potential of legal operations.

To defend against legal operations, it is first necessary to detect a hostile use of the law. Moreover, before employing any of the available legal tools to extend or support a strategy of competition, their potential must be evaluated, using measurable criteria. With this in mind, in 2018, the ACO legal operations division developed the Matrix for Identification of Legal Operations. This handy tool helps commanders and staff to identify and evaluate the potential of a specific legal operation using three criteria:

51. The objective of the Shurat HaDin Law Center, founded by Nitsana Darshan-Leitner, is to use lawfare to defend what it considers to be Israeli interests, sometimes at the request of the Israeli government and sometimes not. It has ten lawyers and an annual budget of $2.5 million. Through its legal work, Shurat HaDin has obtained more than $1 billion in compensation, frozen $600 million worth of assets considered to belong to terrorist groups, and collected more than $150 million on behalf of its clients. See: https://israellawcenter.org.

- The intention to cause harm, which may be implicit or explicit. Evaluation of this intention is based on statements, information obtained through intelligence, and the adversary's previous conduct.
- The instrument represented by the legal vehicle used.
- The potential impact. According to this impact, the most appropriate actor within NATO to respond to the threat (operations, military, political adviser, intelligence, or strategic communications) is identified.

Other instruments may be added to these indicators, such as Diplomatic, Intelligence, Military, Economic, Financial, Information, and Legal (DIMEFIL), which can be used militarily or politically to evaluate and respond to a hostile legal operation. NATO currently offers this tool to member states, so that national staffs can make use of it.

When a weaponization of the law is identified, a defensive response can be selected. This could be producing counter-arguments and identifying appropriate intermediaries to disseminate them, or producing legally justified criticisms of enemy actions so as to play the role of persistent objector. Strengthening the perception of the law as a communication tool also requires greater and more systematic media coverage of the French armed forces' interpretation of the law during live operations, for example via communiqués and press conferences, which requires advance preparation of legal arguments. To achieve this, greater coordination is needed between legal thinking and media action at the STRATCOM (NATO's Strategic Communications Centre of Excellence) level, in particular to avoid accusations of international law violations before the facts have been ascertained. A link is thus established between lawfare and the information war.

To bear fruit, this type of strategy needs institutional and financial support. For French armed forces to adapt to the growing importance of the legal component in building their authority to intervene they need greater numbers of legal staff, greater participation of legal advisers in operations, better legal training of troops, and lobbying of allied armies to extend their legal influence and promote their interpretations of IHL.

Defensive lawfare can also take the form of legal countermeasures. Efforts in this area have focused on the economic domain more than the military one. The 2018 amendment to the 1996 EU blocking statute against the extraterritorial application of third-country laws, the development of a culture of selecting and evaluating strategic investments, and the International Procurement Instrument limiting non-EU companies' access to the EU public procurement market are all examples of measures intended to protect the European space against adverse legal offensives.

Offensive lawfare, meanwhile, would include actively promoting French interpretations of the law, going to court to neutralize an enemy, and negotiating treaties to French advantage by strengthening France's normative influence. The latter is achieved by taking strategic advantage of key posts held by French officials both in international organizations like the United Nations and in technical standardization bodies. These normative influence practices are already established and documented in the context of drafting treaties or resolutions. To be effective, France needs to encourage better integration of operational staff with the academic community, and develop an influence strategy so that it can, if necessary, rely on professional networks, those of private actors in particular (such as lawyers' professional associations, think tanks, or lobbies).

Conclusion

Lawfare, then, is using the law to change a power relationship. It takes four main forms: reinterpreting existing norms; establishing new norms; strategic litigation; and, at the informational level, mobilizing the law to impact reputations. Lawfare therefore works at the crossroads of legal and reputational effects.

Recourse to lawfare is emerging as a major trend in international relations and is set to gain significance in the short- and medium term. Several states are particularly active in this area. The Russian invasion of Ukraine provides an example of legal preparation of the battlefield, which could have been used to predict the imminence of the attack. The United States mainly uses the term "lawfare" pejoratively to neutralize the binding quality of international law, while simultaneously using its own normative power as a lever to defend its national interests. Israel combines military planning with its tools for weaponizing the law in order to maximize impact.

France has only recently realized the importance of lawfare, as demonstrated by its appearance in the Ministry of the Armed Forces' 2021 Strategic Review (*Actualisation stratégique*). More work is needed to implement a progressive institutionalization of the concept, prepare for legal operations, create interdepartmental synergies, and plan for legal intelligence.

As renewed strategic competition increases tensions between states, it is all the most important for France to adapt to the new paradigm. The strategic use of norms that regulate states' behavior internationally poses a dilemma to liberal democracies, which are forced to reconcile their ambition to embody the values of the rule of law with the fact that the legal system that guarantees those values provides an ideal platform for power struggles. However, making strategic use of norms does not necessarily mean undermining their authority and entering a purely instrumental relationship with the legal order. The relationship between the values defended and the interests pursued must permit objective debate so that, from the outset, standards are not automatically perceived as a constraint but as an instrument for preserving and even increasing freedom of action. We need to open up thinking on this subject so as to encourage democratic debate on the morality and legitimacy of lawfare.

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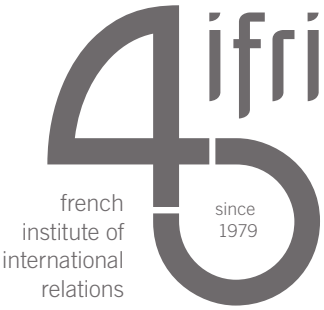

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