



# THE OPERATIONAL LAW QUARTERLY



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## Director's Cut

By: LTC Joe Fairfield, CLAMO Director

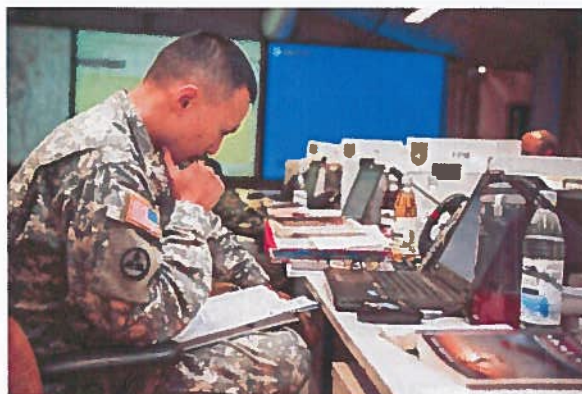
Welcome to the second edition of the Operational Law Quarterly newsletter. The response from the field has been overwhelming, both in submissions and requests to be added to our distribution list. As envisioned, this publication is fast becoming the premier forum for oplan practitioners to share and discuss best practices and lessons learned from across the joint and multinational force. It also provides a way for SJAs to highlight some of the great work being done by their highly talented JAs and paralegals. Please continue to share this publication with your colleagues as well as submitting timely and focused articles from the field.

In this edition, the main article addresses the challenges of hybrid conflict, which is timely in light of the recent terrorist attacks in Paris, Mali, and the downing of a Russian airliner over the Sinai. The article calls for "a comprehensive legal approach and broader legal interoperability" to address some of these challenges. The article also provides a good scene setter for the 3rd Major General John L. Fugh Symposium on Law and Military Operations, which CLAMO will host on May 18, 2016. The 2016 Fugh Symposium will explore in depth the legal issues associated with hybrid armed conflict.

Thank you again for your support and we look forward to your continued readership.

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CPT Nate Lew works in the JOC during NATO Exercise STRONG SWORD 2015.

**CORRECTION:** In the Division Road to War article in the August edition, we incorrectly referred to Long Range Acoustic Devices (LRADs) as less than lethal weapons. Per Navy sources, LRADs are primarily used as communication devices and have not received a legal weapons review.

## Editor's Note

We will be publishing a special edition of the Oplan Quarterly in December focusing on multinational and warfighter exercises. Keep those articles coming – we'd like to focus the February issue on deployment-related articles. Try to limit them to two to four pages double-spaced, with citations as necessary. Submissions may be edited for content and length. Contact [CLAMO](#) if you have any questions.

## Hybrid Warfare and Lawfare<sup>1</sup>

By: *Andres B. Munoz Mosquera and Sascha Dov Bachmann*<sup>2</sup>

### 1. Introduction

Hybrid Warfare as a method of war is not new. The change today appears to be that Hybrid Warfare "has the potential to transform the strategic calculations of potential belligerents [it has become] increasingly sophisticated and deadly."<sup>3</sup>

This short paper presents Hybrid Warfare and one of its methods, lawfare. For this, we provide a current, comprehensive definition of hybrid warfare and examine different areas where law has been/is being used as a method of war. This paper focuses on the following areas where lawfare can be applied: the *Jus ad bellum*, the *Jus in bello* and finally in International Relations where the Law of Treaties can be exploited.

### 2. Hybrid Warfare

Hybrid War has been discussed by (mostly US) military writers since the beginning of the 21st century and its recognition as a theory in formal military doctrinal thinking is still not guaranteed. Hybrid Warfare may use elements from four existing methods and categories of full spectrum warfare, namely conventional warfare, irregular warfare (such as Terrorism and Counter-Insurgency), (the related) asymmetric warfare (unconventional warfare such partisan warfare) and compound warfare (where irregular forces are used simultaneously against an opponent while being employed by state actors to augment their otherwise conventional warfare approach). Current US Military writing acknowledges the existence of Hybrid Warfare

without clarifying whether it is a new category or sub-category.

Drawing from his assessment of Israel - Hezbollah's war of 2006, Frank Hoffman as one of the predominant advocates of Hybrid Warfare, argues that "[h]ybrid threats incorporate a full range of different modes of warfare including conventional capabilities, irregular tactics and formations, terrorist acts including indiscriminate violence and coercion, and criminal disorder. Hybrid Wars can be conducted by both states and a variety of non-state actors [with or without state sponsorship]."<sup>4</sup>

Hybrid Warfare appears to be mainly a warfare variant resulting from using an economy of force war, in which state or non-state actors interact with a minor traditional military investment. These actors can employ means based on those approaches with the following intentions causing the end of hostilities before political goals are reached; consolidating stagnant situations – turning them into intractable or 'simple incidents'; eroding and delegitimizing the internal and external prestige, reputation, and support of a superior military force, state or states' apparatus, and/or international organizations; creating confusion in general by questioning agreed political, religious or territorial *status quo*; and building new dependencies and structures on essential-resources to support consolidated or imposed political, religious or territorial changes. Among the means or methods used in Hybrid Warfare to reach the intentions described above, we can find 'lawfare.'

<sup>1</sup> The topic of this article was originally presented at the University of Exeter - Strategy and Security Institute Workshop during the "The Legal Framework of Hybrid Warfare and Influence Operations" seminar, 16-17 September 2015. DISCLAIMER: The views and opinions of the authors expressed herein are solely their own and do not reflect those of the universities or organizations they work for or are affiliated with. All references made to NATO documents are open source and can be found on the Internet.

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who has also served in various capacities as lieutenant colonel (army reserve). Professor Bachmann took part as NATO's Rule of Law Subject Matter Expert (SME) in NATO's Hybrid Threat Experiment of 2011 and in related workshops at NATO and the national level.

<sup>3</sup> A. Deep 'Hybrid War: Old Concept, New Techniques', *Small Wars Journal*, 2 March 2015.

<sup>4</sup> Frank G. Hoffman, *Conflict in the 21st Century: The Rise of Hybrid Wars* (Arlington, VA: Potomac Institute for Policy Studies, December 2007), 8, available, [http://www.potomac institute.org/publications/Potomac\\_HybridWar\\_0108.pdf](http://www.potomac institute.org/publications/Potomac_HybridWar_0108.pdf). Also Hoffman, "Hybrid threats: Reconceptualising the evolving character of modern conflict" *Strategic Forum* 240, 2009. 1; also Hoffman, FG. "Hybrid warfare and challenges". *Joint Forces Quarterly* 52. 1Q. 2009. 1–2.

### 3. Lawfare, a component of Hybrid Warfare

Lawfare is using law as a weapon with a goal of manipulating the law by changing legal paradigms. Lawfare appears to be first defined by Dunlap back in 2001; he refined his previous definition in 2007 to state that lawfare "is the strategy of using - or misusing - law as a substitute for traditional military means to achieve an operational objective."<sup>5</sup>

In the case of the current situation in Russia and Ukraine, lawfare has its roots in an undefined situation, i.e., the lack of definition of the conflict - international armed conflict, non-international armed conflict, or civil unrest. This ambiguous situation creates patent confusion as to the source or paradigm of applicable law and any eventual action to identify and assign legal responsibilities and demand accountability. The same occurs in the case of the 2008 and 2014 wars between Israel and Hamas after the 2005 voluntary Israeli disengagement from the Gaza Strip. Consequently, we can argue the following with respect to the limits imposed by international law in regular conflicts: i) in the former and in the context of *jus ad bellum*, where Russia denies being an active agent in the conflict, law is evaded and misused; and ii) in the latter and in the context of *jus in bello*, where Hamas uses human shields and protected places, law is ignored or simply dismissed.<sup>6</sup> On this note, we can say that 'modern' Hybrid Warfare does not only present challenges to international peace and security, but also undermines current legal frameworks by questioning the public international law rules of the game. Below we will present some examples.

During the implementation of the United Nations' mandates in Afghanistan, NATO launched a media campaign stating that NATO forces will not fire on positions if civilians are nearby. The Taliban, for their military advantage and benefit, regularly placed civilians near their positions,<sup>7</sup> which was extremely disadvantageous for NATO – as a law-abiding international organization

which aims at excluding or at least limiting civilian, non-combatant fatalities. Another example of the use of lawfare is the case of Hamas during the 2008 and 2014 Gaza wars. The European Union strongly condemned Hamas calls on the civilian population of Gaza to offer themselves as human shields.<sup>8</sup> During those two wars Hamas' tactic of launching rocket attacks from densely populated areas into Israeli territory was the norm and continuous practice. This amounted to intentionally disregarding International Humanitarian Law and Human Rights Law. In fact, this has to be qualified as a contemptuous use of lawfare, which was also extremely disturbing and confirmed a trend already highlighted by the International Court of Justice in the *Nicaragua case*<sup>9</sup> with respect to a lack of reciprocity in non-regular conflicts.

The result of the above events is a rhetorical use of international law and judicial processes, which may turn International Humanitarian Law and Human Rights Law into inapplicable law, and create the idea that abiding by the law may also become inconsistent with perceived interests of the warring parties.

Another example can be found in Russia's strategy in Ukraine: in 1994 the so-called Budapest Memorandum<sup>10</sup> was signed by Ukraine, United States, Russia and United Kingdom. In that memorandum, the parties agreed to "respect the independence and sovereignty and the existing borders of Ukraine" and "refrain from the threat or use of force against the territorial integrity or political independence of Ukraine." However, after Russia's annexation of Crimea in 2014 (and subsequent 'occupation' of Eastern Ukraine), the Russian Ministry of Foreign Affairs argued in March 2015 that "[i]n the memorandum, we also undertook to refrain from the threat or use of force against Ukraine's territorial integrity or political independence. And this provision has been fully observed. Not a single shot was fired on its territory ... The loss of Ukraine's territorial

<sup>5</sup> C. Dunlap 'Lawfare Today: A Perspective', *YALE Journal of International Affairs* (Winter 2008), p. 146.

<sup>6</sup> S. Reeves, R. Barnsby 'The New Griffin of War. Hybrid International Armed Conflicts', *Harvard International Review*, (winter 2013), p. 18. See also Bachmann, S. Bachmann & H. Gunneriusson 'Hybrid Wars: The 21<sup>st</sup> Century's New Threats to Global Peace and Security', *Scientia Militaria, South African Journal of Military Studies*, Vol 43, No. 1, 2015, , pp. 90-93.

<sup>7</sup> Dunlap, *supra* note 12.

<sup>8</sup> European Union. 'EU Council conclusions on the Middle East Peace Process', <eu-un.europa.eu/articles/en/article\_15300\_en.htm>, 5 August 2015.

<sup>9</sup> International Court of Justice, *Nicaragua v. United States*, Merits para. 218.

<sup>10</sup> United Nations Document A/49/765, S/1994/1399, 19 December 1994, <www.cfr.org/nonproliferation-arms-control-and-disarmament/budapest-memorandums-security-assurances-1994/p32484>, 12 August 2015.

integrity has resulted from complicated internal processes, which Russia and its obligations under the Budapest Memorandum have nothing to do with."<sup>11</sup>

This is an attempt to deliberately disinform regarding the scope of existing treaty obligations, thus creating deliberately confusion of the public opinion in the West. Such malicious use of lawfare to "negate" the validity of treaties and to void the inherent principle of international law's *pacta sunt servanda*, qualifies as concept of treaty abuse, as a special case of the concept of *abus de droit*.<sup>12</sup> This concept of 'abuse of right' relates to situations, where states or international organizations [or other subjects of international law], as parties to an international agreement, interpret and apply its provisions depending on the particular circumstances in order to benefit from such a deviation. In this context, the parties not applying the agreement can claim circumstantially that the other party exercises the agreement's provisions abusively.

President Putin's further declaration that Russia had intervened, under international law, "to defend the rights of Russian-speakers living abroad" highlights Russia's consequent use of lawfare to aid its overall goals. We highlighted two instances of Russia's abuse of law and argue that any Russian claim to have the right to intervene in Ukraine under international law must prove "the urgent humanitarian catastrophe it seeks to avert and why there is no

alternative to its action ... [i]t should not act by stealth and revert to the "big lie", denying that its forces are engaged, denying that its missile units shot down Malaysian airliner MH17, and pretending to be the peacemaker."<sup>13</sup>

The above shows that the deliberate interpretation of international agreements in a circumstantial manner amounts to lack of good faith, amounting to being an *abus de droit* and potentially giving rise to state responsibility,<sup>14</sup> in the case of Russia (or other states) aiding and abetting non-state actors.

## 6. Conclusion

The main conclusion of this paper is that the inherent complexity and ambiguity of Hybrid Warfare creates not only new security but also legal challenges for those adhering to international law within the frameworks established under and governed by the principles of the rule of law. Law-abiding actors will be confronted with short-lead time for political decision-making and military planning based on incomplete intelligence and open-source information, an incommensurate broadness of the battlespace – both tangible and virtual, and the 'dictates' of compliance with the rule of law and public morality: to follow democratic procedures and be subject to court review and public opinion scrutiny. This requires a comprehensive legal approach and broader legal interoperability, which includes the use of affirmative lawfare.

<sup>11</sup> The Ministry of Foreign Affairs of the Russian Federation, Foreign Ministry Spokesman Alexander Lukashovich answers a media question about the situation around the Budapest Memorandum, 12 March 2015, <archive.mid.ru/brp\_4.nsf/0/CC1C845CAA26D5A043257E07004BF6EB>, 12 August 2015.

<sup>12</sup> M. Byers 'Abuse of Rights: An Old Principle, A New Age', (2002) *McGill Law Journal*, Vol 47, pp. 397-404.

<sup>13</sup> See eg E. Buckley, I. Pascu 'NATO's Article 5 and Russian Hybrid Warfare' (17 March 2015),

<[www.atlanticcouncil.org/blogs/natosource/nato-s-article-5-and-russian-hybrid-warfare](http://www.atlanticcouncil.org/blogs/natosource/nato-s-article-5-and-russian-hybrid-warfare)>, 17 August 2015.

<sup>14</sup> '1075th Meeting', Yearbook of the International Law Commission 1970, vol. 1 (New York: United Nations, 1971) 181 at para. 40. See also the Articles on Responsibility of States for Internationally Wrongful Acts 2001, <[legal.un.org/avl/ha/rsiwa/rsiwa.html](http://legal.un.org/avl/ha/rsiwa/rsiwa.html)>, and the Articles on the Responsibility of International Organizations New York, 9 December 2011, <[legal.un.org/avl/ha/ario/ario.html](http://legal.un.org/avl/ha/ario/ario.html)>, 19 August 2015.