

# Lawfare in Hybrid Wars: The 21<sup>st</sup> Century Warfare

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## Abstract

In the context of 'Hybrid Warfare' as 21<sup>st</sup> Century's threat to peace and security, this paper intends to address the role of Lawfare. The use of law as a weapon, Lawfare,<sup>1</sup>

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DISCLAIMER: This text was drafted in a personal capacity. The views and opinions of the authors expressed herein should therefore not be interpreted as stating or reflecting those of their respective employers, universities, or associations and organizations of which they are members. All references made to NATO documents are open source and can be found on the Internet.

1 This term was coined by Colonel Dunlap in 2001. See C. Dunlap, 'Law and Military Interventions: Preserving Humanitarian Values in 21<sup>st</sup> Conflicts', Humanitarian Challenges in Military Intervention Conference, November 2001, Harvard University; C. Dunlap, 'Lawfare today: A Perspective' (2008) 3 *Yale J. Int'l Affairs* 146, at 146.

can have a tangible impact on democratic States when their adversaries use it in an exploitative way. Lawfare can be used in the context of Hybrid War.<sup>2</sup> Examples of Hybrid Warfare as witnessed in the Russian/Ukrainian conflict of 2014/2015 and the ongoing conflict with *Daesh* are particularly sensitive to Lawfare due to an apparent asymmetric adherence to the international rule of law among involved actors. The different legal and ethical approach of democratic States in warfare and their non-democratic opponents in Hybrid War scenarios has the potential to impact negatively on the eventual prompt success of Western military actions. The authors argue that against this backdrop it is essential for law-abiding nations to adapt an approach which uses counter-Lawfare means in support of its own legitimate objectives and to prevent opponents from using it law as a weapon for their own strategic purposes.

### Keywords

hybrid war – lawfare – Russia – Ukraine – rule of law – Daesh – 21<sup>st</sup> century conflict

### Introduction

Hybrid Warfare as a method of war is not new. Hybrid Warfare as a method of warfare has its roots in methods of war fighting of past conflicts; while not necessarily new as a category of conflict, it has the potential to change the future conceptualization of conflict.

In military historiography,<sup>3</sup> it is easy to find examples of conflicts in which different actors, States and non-State entities alike, aim to reach their political and/or military goals by using a mix of conventional and non-conventional, or irregular, methods, as well as kinetic and non-kinetic means, in very different operational environments.

The variance 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>4</sup> Some of the non-kinetic aspects

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2 The term Hybrid War/Warfare will be used interchangeably within this article.

3 Consider the examples of the Spanish guerrillas during the Roman conquest, or the War of Independence against Napoleonic armies, George Washington's militias of free men against British forces during the wars for US independence, and the use of both, Palestinian-Jewish and – Muslim irregular forces, used by British regular forces against revolts in Palestine during the mandate.

4 A. Deep ‘Hybrid War: Old Concept, New Techniques’, *Small Wars Journal* (2 March 2015).

of Hybrid Warfare share methods with ‘influence operations’ by aiming to misinform world opinion (like Russia in Crimea and now Syria) or become a powerful ‘force multiplier’ (like Jihadists and *Daesh* in the Middle East). These methods have a long history of successful employment. As Sun Tzu once said: “[t]o subdue the enemy without fighting is the supreme excellence”.<sup>5</sup>

This short paper briefly presents the concepts of Hybrid Warfare and Lawfare, the use of law as a weapon, and tries to foster discussion and thought on how to use Lawfare affirmatively in support of own objectives and to prevent opponents from successfully using law maliciously for their own purposes and objectives. For this, we attempt to provide a current, comprehensive definition of Hybrid Warfare and examine some recent developments in this emerging area of study, including some reflection on The North Atlantic Treaty Organization NATO’s open source perspective on ‘Hybrid Threats’. Then, we will take a look at different areas where law has been or is being used as a method of war. Lawfare encompasses both affirmative activities reinforcing the rule of law (often in a defensive context) and its malicious use and exploitation (in an offensive context) by an opponent to achieve strategic objectives. Lawfare can be used successfully in the following three legal fields: the *Jus ad bellum*, the *Jus in bello*, and finally the law of treaties in international relations. In detail, we will examine several present and past examples where Lawfare has been employed maliciously in order to erode and delegitimize the opponent by ignoring or even abusing law with the intent to create confusion in internal and external public opinion or to counter any affirmative use of Lawfare to the adversary’s tactical or operational advantage. The paper concludes with the observation that Lawfare has become an integral element of any Hybrid Warfare strategy and that its affirmative use has to become an element of Western military thinking and planning.

## 1 Hybrid Warfare

We understand that definitions pose a challenge for commentators since they are elusive and tend to leave out key points of the element they are trying to define. However, in general, a shared understanding of the term is necessary for any further discussion. Military writers, predominantly from the US, have discussed Hybrid War since the beginning of the 21<sup>st</sup> century and its recognition as a theory in formal military doctrinal thinking still not guaranteed. In order to find a binding definition it is important to look at the use of the term

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5 T. Sun, *The Art of War*, The Book of Lord Shang, Wordsworth Editions Limited (1998), at 25.

Hybrid War by commentators and practitioners. Hybrid Warfare may very well constitute a new type of warfare, warranting its recognition as a separate form of warfare, or category of full spectrum operations. Hybrid Warfare may use elements from four existing methods and categories of warfare, namely irregular warfare (such as Terrorism and Counter-Insurgency), asymmetric warfare (unconventional warfare such as 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 or by non-State actors who use the Hybrid Warfare approach to gain an advantage over a conventional warfare opponent. Twentieth Century conflict has seen examples of all four forms of warfare and has led to the doctrinal recognition of these forms of warfare in the US Army Field Manual on Operations,<sup>6</sup> where so called full spectrum operations account for these different forms of war fighting. The attacks of 9/11, with the following campaigns in both Iraq and Afghanistan, Hezbollah's hybrid war with Israel in 2006, Russia's Crimean and Ukrainian campaigns in 2015 and the emergence of Islamic State ISIL/Daesh in Iraq, Syria, and Afghanistan have seen the emergence of a new form of warfare; a new category which in essence resemble multi-modal conflicts which combine and exploit various elements of existing forms of warfare. It is now up to the military doctrinal commentators to make a strong case for including Hybrid Warfare in the existing strategic doctrines of full spectrum operations and not just subsuming it as some subcategory of either compound warfare, irregular and asymmetric warfare. Current US Military writing acknowledges the existence of Hybrid Warfare without clarifying whether as a new category or sub-category. Reflecting on the available writings and commentaries on the subject, Hybrid War describes a conflict "in which states or non-state actors exploit all modes of war simultaneously by using advanced conventional weapons, irregular tactics, terrorism, and disruptive technologies or criminality to destabilize an existing order",<sup>7</sup> and which blurs "distinct categories of warfare across the spectrum, from active combat to civilian support".<sup>8</sup>

6 Field Manual No. 3-0: Operations, Headquarters, Department of the Army, Washington, DC, (Final Approved Draft), this publication supersedes FM 3-0, February 5, 2008, p. 3-1.

7 R. Wilkie, 'Hybrid Warfare – Something Old, Not Something New', *Air & Space Power Journal* 2009, <https://www.airpower.au.af.mil/airchronicles/apj/apj09/win09/wilkie.html> (last accessed 1 June 2016).

8 See e.g., U.S. Government Accountability Office, *Hybrid Warfare*, GAO-10-1036R, (2010) cited in National Research Council of the National Academies, *Improving the Decision Making Abilities of Small Unit Leaders*, (2012).

Drawing from his assessment of Israel-Hezbollah's war of 2006, Frank Hoffman, a leading US thinker on Hybrid Threats and Warfare, summarized the elements of this form of warfare in his seminal work on Hybrid Warfare as follows:

Hybrid 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]. These multi-modal activities can be conducted by separate units, or even by the same unit, but are generally operationally and tactically directed and coordinated within the main battlespace to achieve synergistic effects in the physical and psychological dimensions of conflict.<sup>9</sup>

While Hoffman's work on Hybrid Warfare is leading, as it set the military-historiographical scene for recognizing such form of warfare as either 'new' or evolving 'old' warfare, it also makes it clear that there is not yet a binding definition on the notion in place; instead the 'hybrid' element indicates the existence of multiple elements and factors which are somehow merged into a method of warfare.<sup>10</sup> With Hoffman's subsequent definition of 'Hybrid' as constituting a modus of war fighting, where the opponent "simultaneously and adaptively employs a fused mix of conventional weapons, irregular tactics, terrorism and criminal behavior in the battle space to obtain their political objectives",<sup>11</sup> and Brown's definition<sup>12</sup> as a basis, we can try to update the definition of Hybrid Warfare.

9 F.G. Hoffman, 'Conflict in the 21st Century: The Rise of Hybrid Wars, Potomac Institute for Policy Studies' (2007), at 8, [https://www.potomac institute.org/publications/Potomac\\_HybridWar\\_0108.pdf](https://www.potomac institute.org/publications/Potomac_HybridWar_0108.pdf), (last accessed 29 February 2016). See also F.G. Hoffman, 'Hybrid threats: Reconceptualising the evolving character of modern conflict', 240 *Strategic Forum* (2009) at 1; F.G. Hoffman, 'Hybrid warfare and challenges', 52 *Joint Forces Quarterly* (2009), at 1–2.

10 See e.g., P.R. Mansoor, 'Hybrid Warfare in History', in W. Murray and P.R. Mansoor (eds.), *Hybrid Warfare: Fighting Complex Opponents from the Ancient World to the Present* (2012).

11 F.G. Hoffman, 'Hybrid vs. compound war: The Janus choice of modern war: Defining today's multifaceted conflict', *Armed Forces Journal* (2009), at 3.

12 "This aspect of the hybrid war is information warfare combined with irregular warfare to achieve strategic impacts. When a civilian casualty occurs it adversely affects the indigenous popular support to the legitimate government, the United States and its allies as well as international support for the wars through the mainstream media, the – CNN effect." L. Brown "Twenty-First Century Warfare Will be Hybrid", USAWC Strategy Research Project, United States Army: U.S. Army War College, Class of 2011, (2011) at 20.

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 will use indirect and multi-disciplinary approaches (civil and military, legal and illegal, kinetic and non-kinetic, high-tech and 'rock-art' means, etc.). These actors can employ means based on those approaches with the following intentions:

1. causing the end of hostilities before political goals are reached;
2. consolidating stagnant situations – turning them into intractable or 'simple incidents';
3. eroding and delegitimizing the internal and external prestige, reputation, and support of a superior military force, State or States' apparatus, and/or international organizations;
4. creating confusion in general by questioning agreed political, religious or territorial *status quo*; and
5. building new dependencies and structures on essential-resources to support consolidated or imposed political, religious or territorial changes.

The most recent definition of Hybrid Warfare can be found in a February 2016 memorandum by the United Kingdom's Ministry of Defence to the Defence Committee, which highlights some of the just made elements of Hybrid Warfare:

Hybrid warfare can be characterised as a comprehensive strategy based on a broad, complex, adaptive and often highly integrated combination of conventional and unconventional means. It uses overt and covert activities, which can include military, paramilitary, irregular and civilian actors, targeted to achieve (geo) political and strategic objectives. Hybrid warfare is directed at an adversary's vulnerabilities, focussed on complicating decision making and conducted across the full spectrum (which can encompass diplomatic, political, information, military, economic, financial, intelligence and legal activity) whilst creating ambiguity and deniability. Hybrid strategies can be applied by both state and non-state actors.<sup>13</sup>

13 Ministry of Defence – Written Evidence submitted to Defence Committee, UK Parliament, 1 March 2016 para. 15, <https://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-committee/russia-implications-for-uk-defence-and-security/written/28854.pdf> (last accessed 31 May 2016).

In respect to Russia's use of Hybrid Warfare, Anthony Paphiti and Sascha Dov Bachmann find in their written submission to the Defence Committee that "The employment of hybrid methods has been evident from Russia's activities in Crimea and the Donbas region of Ukraine, with its deployment of 'little green men', namely, soldiers wearing unmarked uniforms that make direct state attribution difficult".<sup>14</sup> Citing Michael Kofman and Matthew Rojansky, Russia's 2010 Military Doctrine of modern warfare can be described as entailing:

[...] the integrated utilization of military force and forces and resources of a non-military character, [and] the prior implementation of measures of information warfare in order to achieve political objectives without the utilization of military force and, subsequently, in the interest of shaping a favourable response from the world community to the utilization of military force.<sup>15</sup>

Among the means and methods used by an adversary in a Hybrid Warfare context to reach the intentions above, we can find 'Lawfare'. Lawfare is using law as a weapon with a goal of manipulating the law by changing legal paradigms. As stated at the outset, this can be done either maliciously or affirmatively. While Lawfare appears to be first defined by Dunlap back in 2001, he refined his definition in 2007, stating that Lawfare "is the strategy of using – or misusing – law as a substitute for traditional military means to achieve an operational objective."<sup>16</sup>

Before addressing Lawfare in detail, including the fine points of some malicious employment thereof, it is relevant for this paper to address in general terms how the 28 NATO States collectively understand hybrid warfare. This is a difficult task as NATO does not (yet) have an official definition of Hybrid Warfare, nor of Lawfare, and the latter is rarely mentioned in daily business.

14 Written evidence submitted by Brigadier (Rtd) Anthony Paphiti, former ALS officer and Dr Sascha Dov Bachmann, Associate Professor in International Law, 1 March 2016, <https://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-committee/russia-implications-for-uk-defence-and-security/written/28402.pdf> (last accessed 31 May 2016)).

15 M. Kofman and M. Rojansky, 'A Closer look at Russia's "Hybrid War", *Kennan Cable*, No. 7, (2015), <https://www.wilsoncenter.org/sites/default/files/7-KENNAN%20CABLE-ROJANSKY%20KOFMAN.pdf> (last accessed 30 May 2016), citing 'The Military Doctrine of the Russian Federation' of 5 February 2010, [https://carnegieendowment.org/files/2010russia\\_military\\_doctrine.pdf](https://carnegieendowment.org/files/2010russia_military_doctrine.pdf), cited at Paphiti & Bachmann, (n. 17).

16 C. Dunlap 'Lawfare Today: A Perspective', *Yale Journal of International Affairs* (2008), at 146.

## 2 NATO's Approach to Hybrid Warfare

In 2014, NATO used the term 'Hybrid warfare' to describe Russian actions during the illegal occupation of Crimea and its subsequent military activities in Eastern Ukraine.<sup>17</sup> However, it is not the term used by NATO's Supreme Headquarters in its 2010 Capstone Concept on the subject.<sup>18</sup> Rather, that document uses the term 'hybrid threats'.<sup>19</sup> This capstone concept envisions the challenges that hybrid threats pose and explains NATO's need "to adapt its strategy, structure and capabilities accordingly [...] to deliver an effective response".<sup>20</sup> In this concept, NATO defines hybrid threats as "those posed by adversaries, with the ability to simultaneously employ conventional and non-conventional means adaptively in pursuit of e their objective".<sup>21</sup>

In 2011, NATO issued a 'longsighted' report, which predicted that States may be attracted by non-conventional wars, as hybrid threats "can be largely non-attributable, and therefore applied in situations where more overt action is ruled out for any number of reasons".<sup>22</sup> Hybrid Threats were defined as multimodal, low intensity, kinetic as well as non-kinetic threats to international peace and security.<sup>23</sup> Hybrid Threats include asymmetric conflict scenarios, global terrorism, piracy, transnational organized crime, demographic challenges, resources security, retrenchment from globalization, and the proliferation of weapons of mass destruction.<sup>24</sup> In 2011, NATO's Allied Command Transformation (ACT), supported by the U.S. Joint Forces Command Joint Irregular Warfare Centre and the U.S. National Defense University (NDU), conducted

17 NATO *Wales Summit Declaration*, par 13 Sept 2015, at [https://www.nato.int/cps/fr/natohq/official\\_texts\\_112964.htm?selectedLocale=en](https://www.nato.int/cps/fr/natohq/official_texts_112964.htm?selectedLocale=en).

18 NATO – Supreme Allied Commander Transformation Headquarters, 'Military Contribution to Countering Hybrid Threats Capstone Concept', August 2015, [www.act.nato.int/the-counteracting-hybrid-threats-concept-development-experiment](http://www.act.nato.int/the-counteracting-hybrid-threats-concept-development-experiment), 1 (last accessed 1 June 2016).

19 *Ibid.*

20 *Ibid.*

21 S. Bachmann & H. Gunneriusson 'Hybrid Wars: The 21<sup>st</sup> Century's New Threats to Global Peace and Security', 43 *Scientia Militaria, South African Journal of Military Studies* 1 (2015), at 79.

22 *Ibid.*, referring to S. Bachmann and J. Sanden, 'Countering Hybrid Eco-threats to Global Security Under International Law: The Need for an Comprehensive Legal Approach', 33 (3) *Liverpool Law Review* (2013), at 16.

23 S. Bachmann and J. Sanden, 'Countering Hybrid Eco-threats to Global Security Under International Law: The Need for an Comprehensive Legal Approach', 33 (3) *Liverpool Law Review* (2013), at 261–289.

24 *Supra* note 23.



specialized research into ‘Assessing Emerging Security Challenges in the Globalized Environment (Countering Hybrid Threats) Experiment’.<sup>25</sup> Its findings were in essence that hybrid threats faced by NATO and its non-military partners required a comprehensive approach allowing a wide spectrum of kinetic and non-kinetic responses, by both military and non-military actors. Essential to NATO’s planning was the hypothesis that such a comprehensive response will have to be in partnership with other stakeholders, such as international and regional organizations, as well as representatives of business and commerce.<sup>26</sup>

NATO’s 2011 Concept of Hybrid Threats (CHT) and its visionary approach in regards to States, such as Russia, and their willingness to use the Hybrid Warfare concept for aggressive purposes could not be developed further, as in June 2012 the NATO decided to discontinue work on CHT on the organizational level in favor of member States (with their associated NATO Centres of Excellence) to continue.

Moving forward to autumn 2014, NATO reflected on the Russian aggression in Ukraine (including the occupation of Crimea) when declaring its resolution to prepare for Russia’s use of Hybrid Warfare and Threats. NATO’s Wales Summit Declaration of September 2014 provides us with a definition for ‘Hybrid Warfare’ and its components:

We will ensure that NATO is able to effectively address the specific challenges posed by hybrid warfare threats, where a wide range of overt and covert military, paramilitary, and civilian measures are employed in a highly integrated design. It is essential that the Alliance possesses the necessary tools and procedures required to deter and respond effectively to hybrid warfare threats, and the capabilities to reinforce national forces.<sup>27</sup>

This declaration, as well as subsequent publications and announcements by NATO seem to indicate that NATO has accepted the reality of facing

25 NATO, ‘Countering the Hybrid Threat’, <https://www.act.nato.int/nato-countering-the-hybrid-threat> (last accessed 1 June 2016).

26 See ‘Updated List of Tasks for the Implementation of the Comprehensive Approach Action Plan and the Lisbon Summit Decisions on the Comprehensive Approach’, 4 March 2011, pp. 1–10 (para. 1), cited in S. Bachmann & H. Gunneriusson, ‘Russia’s Hybrid Warfare in the East: Using the Information Sphere As Integral to Hybrid Warfare’, *Georgetown Journal of International Affairs* (2015), at 198–212; and S. Bachmann, ‘Hybrid Threats, cyber warfare and NATO’s comprehensive approach for countering 21<sup>st</sup> century threats – mapping the new frontier of global risk and security management’, 88 *Amicus Curiae* (2011).

27 *Supra* note 9.

Hybrid Warfare Threats.<sup>28</sup> Whether this amounts to “adapting to the hybrid challenge”<sup>29</sup> remains to be seen, as NATO does not have a Hybrid Warfare concept in place yet and it seems unlikely that the discontinued CHT can act as a substitute without further significant amendments, which requires not only the political will but also a reorganization of the integrated military structure in order to implement it.

It can be noted that NATO’s attitude contrasts with Russia, which on the contrary already has a Hybrid Warfare doctrine (non-linear war or Gerasimov Doctrine)<sup>30</sup> in place, which it successfully applied to its campaigns in 2014/2015. The fact that Russia is keen on using non-linear war demonstrates that this type of warfare not only include non-State actors but also states. Today, we have blatant examples of States, like non-State entities do, that find this type of warfare very appealing for it reduces the need for using classical military resources – no need to use only kinetic means. Further, and perhaps more significantly, *prima facie* it preserves some amount of legitimacy, or at least reduces the erosion of apparent legitimacy, due to the non-attributable aspects inherent in hybrid warfare when using non-lethal Hybrid Warfare methods such as Law fare.

On 1 December 2015, NATO Secretary General Jens Stoltenberg and European Union High Representative for Foreign Affairs, Federica Mogherini, announced the cooperation on aspects of a new Hybrid Warfare program and a new NATO Hybrid Warfare Strategy. Currently, challenges by Russia and Daesh, among others, to alter the Euro-Atlantic security order and Middle Eastern stability are executed using elements of Hybrid Warfare. Countering such threats made it necessary for NATO to adopt its new Hybrid Warfare strategy, which is to be developed and announced this year.

### 3 Law as a Weapon: Zeus versus Hades

Lawfare is, generally speaking, a method of war, like others, using non-kinetic means and intending to influence the adversary for the benefit of strategic

28 See e.g., J.A. Davis, ‘Continued Evolution of Hybrid Threats – The Russian Hybrid Threat Construct and the Need for Innovation’, [https://www.jwc.nato.int/images/stories/three\\_swords/CONTINUED\\_EVOLUTION\\_OF\\_HYBRID\\_THREATS.pdf](https://www.jwc.nato.int/images/stories/three_swords/CONTINUED_EVOLUTION_OF_HYBRID_THREATS.pdf) (last accessed 1 March 2016).

29 Cf. A. Jacobs and G. Lasconjarias, ‘NATO’s Hybrid Flanks – Handling Unconventional Warfare in the South and the East’, *NATO Research Division- Research Paper*, No.112 (2015).

30 P. Pomerantsev, ‘How Putin is Reinventing Warfare’, *Foreign Policy* (2014), [foreignpolicy.com/2014/05/05/how-putin-is-reinventing-warfare/](http://foreignpolicy.com/2014/05/05/how-putin-is-reinventing-warfare/) (last accessed 5 October 2015).

objectives. Lawfare has traditionally been seen to have a negative connotation, namely as the use of law by the opponent and not as means of own war fighting capacities, when used affirmatively to achieve own military and political objectives as we will show in this short submission. A parallelism may be used with the eternal fight between good and evil represented by that of Zeus and Hades. Lawfare, as the use of law as a weapon, highlights this: if used to distort the rule of law's leading principles and underpinnings, it would qualify as Hadesian, if used to reaffirm and strengthen the principles of law, it would be Zeusian.

At this stage it is important to note that Lawfare can be used in the context of Hybrid Warfare and/or 'influence operations'. Since influence operations mainly consist of "non-kinetic, communications-related, and informational activities that aim to affect cognitive, psychological, motivational, ideational, ideological, and moral characteristics of a target audience",<sup>31</sup> Lawfare fits as one of the methods that influence operations can employ. Although Lawfare needs to use communications-related and informational activities through media and Strategic Information Operations (InfoOps/StratCom to become a 'weapon', Lawfare is not subordinate to them. A good analogy to understand how Lawfare reaches the desired 'target' is to see it as the warhead of a missile, while media and InfoOps/StratCom would be powering the flight of that missile. After seeing some examples below, we may be in a better position to understand Lawfare. The authors are hesitant to provide an absolute definition of the concept of Lawfare, which at this point such would be extremely vague. A most recent commentator, Ordre Kittrie, characterizes Lawfare actions as:

- (1) the actor uses law to create the same or similar effects as those traditionally sought from conventional kinetic military actions – including impacting the key armed forces decision-making and capabilities of the target; and (2) one of the actor's motivations is to weaken or destroy an adversary against which the Lawfare is being deployed.<sup>32</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

31 E. Larson et al., *Foundations of Effective Influence Operations. A Framework for Enhancing Army Capabilities* (2009), at 3–4.

32 O. Kittrie, *Lawfare: Law as a Weapon of War* (2015), at 8.

responsibilities and demand accountability. The same occurs in the case of the 2008 and 2014 conflicts between Israel and Hamas, after the 2005 Israeli disengagement from the Gaza Strip. Drawing upon the idea of Sascha Dov Bachmann,<sup>33</sup> we can affirm the following with respect to the limits imposed by international law in conventional conflicts: (i) in the former example, 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 example, and in the context of *jus in bello*, where Hamas uses human shields and protected places, law is ignored or simply dismissed.<sup>34</sup>

However, Hybrid Warfare tools, such as Lawfare, are not only focused on *jus in bello*, but also on areas relating to the interpretation and implementation of international obligations, as we will see below, which fall in the realm of *jus ad bellum*. In conclusion, ‘modern’ Hybrid Warfare not only presents challenges to international peace and security, but also undermines current national and international legal frameworks by questioning the validity of existing public international law rules applicable in international relations in peace time and times of war.

The inherent criterion of ambiguity in Hybrid Warfare has to be considered when looking into the impact of this type of war on current international humanitarian law and human rights law, and on public international law in general. The difficulty for defining a hybrid conflict impedes also its characterization as an international armed conflict, a non-international armed conflict, or a simple civil unrest. This creates an uncertainty in the law-abiding party of a hybrid situation, which forces it to demonstrate that an abuse of international law is taking place. Given these legal uncertainties arising from the “fog of Lawfare”, it becomes apparent the potential role it actually plays in the context of Hybrid Warfare. Lawfare in this context thrives on legal ambiguity and exploits legal thresholds and fault lines. Applied by an adversary, both State and non-State actors, which untied to the need to comply with international law and the rule of law, Lawfare can exploit the disadvantages of legal restrictions in place for the compliant actor leading to the emergence of “asymmetric warfare by abusing laws”.<sup>35</sup>

33 (n. 21).

34 S. Reeves, R. Barnsby, ‘The New Griffin of War. Hybrid International Armed Conflicts’, 43(3) *Harvard International Review* (2013), at 18. See also Bachmann, *supra* note 6, at 90–93.

35 See <https://thelawfareproject.org/lawfare/what-is-lawfare-1/> (last accessed 1 June 2016) for the term and related discussions.

A commonly recognized methodology for defining the nature of conflict was established by the ICTY in *Tadić*: “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”<sup>36</sup> These criteria appear to be inadequate or insufficient to characterize conflicts dominated by Hybrid Warfare methods, as these are intended to disguise the actual facts. Therefore, the necessary attribution of direction or control in a conflict, which entirely depends on the appreciation and assessment of facts, becomes a ‘mission impossible’ in Hybrid Warfare environments where subterfuge dominates the stage. This situation diminishes the authority of international humanitarian law and human rights law (and public international law in general), and parties will then tend to “emphasize the idea of military necessity [,which] deteriorat[es] legal incentives to act humanely”.<sup>37</sup>

The malicious exploitation of international treaty law equates to the abuse of Lawfare as a weapon, means respectively of Hybrid Warfare. There are possibilities to use law as a weapon in a positive manner, affirmatively, i.e., in form of so called “bankrupting terrorism” lawsuits (*cf.* Shurat HaDin Israel Law Center) using this term to refer to US–Israeli terrorism litigation, referring to civil litigation before US Federal Court which is directed against “funding” activities (e.g. direct payments to terrorist groups) and other forms of aiding and abetting (such as the provision of material support) qualifying as “indirect liability” for acts of Islamist terrorism<sup>38</sup> and State sponsored terrorism, such as Russia’s liability for shooting down MH-17.<sup>39</sup> However, there remains a risk that when using Lawfare affirmatively, the adversary may end up ‘boomeranging’ it in a malicious manner. These examples show that the abuse or good use of Lawfare are often closely linked, as Lawfare covers any use of law for a specific military purpose.

#### 4 Lawfare in Armed Conflicts: When Law is Misused and Ignored

As we have seen above, an example of the Zeusian use of Lawfare is the case where NATO launched a media campaign in Afghanistan stating that

36 Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995), 70.

37 Reeves and Barnsby, *supra* note 35, at 18.

38 S. Bachmann, ‘Terrorism Litigation As Deterrence Under International Law – From Protecting Human Rights to Countering Hybrid Threats’, 87 *Amicus Curiae*, at 22–26.

39 See S. Bachmann, ‘Malaysia Airlines Flight MH17: the day Russia became a state sponsor of Terrorism’, 99 *Amicus Curiae* 2014.

NATO fighters will not fire on positions if civilians are nearby. The Taliban, in turn, used this campaign to develop tactics by boomeranging NATO's campaign in the form of malicious Lawfare. The Taliban, for their benefit and as military advantage, regularly placed civilians near their positions.<sup>40</sup> This was extremely disadvantageous for NATO and although its media campaign used Lawfare affirmatively, the Taliban recognized this and exploited it a Hadesian manner.<sup>41</sup>

Another example for the malicious use of Lawfare has been demonstrated by Hamas during the Gaza wars of 2008 and 2014. The European Union strongly condemned Hamas' calls on the civilian population of Gaza to 'offer' themselves as human shields.<sup>42</sup> During those two wars Hamas tactic of launching rocket attacks from densely populated areas into Israeli territory was part of its standard operating practice. This amounted to intentionally disregarding international humanitarian law and human rights law. In fact, these violations have to be qualified as a contumelious use of Lawfare. This fact is also disturbing from the standpoint of the principle of reciprocity in International Humanitarian Law. Actually, while disturbing, it also confirms the International Court of Justice's findings in the *Nicaragua case*, in relation to the lack of reciprocity in non-regular conflicts.<sup>43</sup>

This malicious employment of Lawfare by Hamas against an adversary following the rule of law, forced Israel to apply much more precise legal calculations regarding target selection and targeting. These deliberations had to take place in the fog of war and with the intention to distinguish, beyond any reasonable doubt, legitimate military targets. It appears that Israel, concerned for its image in the media and mindful of global opinion, may have 'overacted' in its operational proactive Lawfare efforts by increasing the protection of civilians in Gaza through precautions taken and warnings issued to unprecedented levels in modern warfare. This augmented to the point that some think Israel took

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40 Dunlap, *supra* note 12.

41 NATO, in order to avoid criticism of its air campaign, used a media campaign with hidden legal content that, in turned, was use by the Taliban as lawfare by placing civilians nearby their positions. 'NATO would not fire on positions if it knew there were civilians nearby [...] [if] there is the likelihood of even one civilian casualty, we will not strike'. C. Dunlap 'Airpower' in T. Rid, T. Keaney (ed.), *Understanding Counterinsurgency Warfare: Doctrine, Operations, and Challenges* (Oxon, Routledge, 2010), at 107.

42 European Union, 5 August 2015, 'EU Council conclusions on the Middle East Peace Process', eu-un.europa.eu/articles/en/article\_15300\_en.htm, <www.consilium.europa.eu/en/press/press-releases/2015/07/20-fac-mepp-conclusions> (last accessed 1 June 2016).

43 Judgment (Merits), *Nicaragua v. United States of America*, ICJ, 1985, para. 218.

“many more precautions than are required”.<sup>44</sup> According to international legal experts, in 2014 Israel forces remarkably prevented civilian casualties while fighting Hamas. Willy Stern, of Vanderbilt Law School, describes how Israel made thousands of telephone calls, leaflet drops, TV, and radio messages to Gaza residents trying to minimize ‘collateral’ casualties. Israeli action included “calls to influential citizens urging them to evacuate residents, and in doing so gave the terrorist enemy detailed information about its troop movements”.<sup>45</sup> Israel’s entire effort ‘targeted’ public opinion in order to remove an ‘endemic’ belief that Israel behaved inhumanely when conducting military operations in Gaza, which has immensely deteriorated its law-abiding image.<sup>46</sup>

The conclusion of some international experts is that the Zeusian way Israel uses Lawfare is creating a precedent that Hamas-like groups may use to their advantage as Taliban did with NATO in Afghanistan.<sup>47</sup> However, since the Israeli behavior aims to remove from public opinion the perception on how Israel conducts and reviews military operations, that advantage may be a short-term one. This manifests the abovementioned conflicting reality, i.e., Lawfare employed maliciously versus Lawfare employed affirmatively.

44 W. Heintschel von Heinegg quoted in ‘Int’l Legal Experts Slam IDF – For Over-Warning Gazans. Experts from US, Germany warn IDF ‘legal zeal’ sets dangerous precedent tying hands of democracies fighting terror’, <https://www.israelnationalnews.com/News/News.aspx/196506> (last accessed 03 February 2017).

45 *Ibid.*, Willy Stern: ‘It was abundantly clear that IDF commanders had gone beyond any mandates that international law requires to avoid civilian casualties’.

46 See e.g. Time, ‘UN Human Rights Council Launches Inquiry Into Gaza conflict’, 24 July 2014, <https://time.com/3027716/israel-gaza-hamas-netanyahu-un-human-rights-council/> (last accessed 1 June 2016).

47 *Ibid.* “Indeed, international legal experts quoted in the article argued that the IDF’s actions do go to inappropriate measures, and may end up harming the ability to fight terrorist organizations. W. Heintschel von Heinegg, “[the IDF] is setting an unreasonable precedent for other democratic countries of the world who may also be fighting in asymmetric wars against brutal non-state actors who abuse these laws.” Michael Schmitt, director of the Stockton Center for the Study for International Law at the US Naval War College, supported that idea that the IDF is creating a dangerous state of affairs that may harm the West in its fight against terrorism. Schmitt said, “[t]he IDF’s warnings certainly go beyond what the law requires, but they also sometimes go beyond what would be operational good sense elsewhere [...] People are going to start thinking that the United States and other Western democracies should follow the same examples in different types of conflict. That’s a real risk”. See also M. Schmitt and J. Merriam ‘A Legal and Operational Assessment of Israel’s Targeting Practices’, *Just Security*, 24 April 2015, <https://www.justsecurity.org/22392/legal-operational-assessment-israels-targeting-practices/> (last accessed 12 August 2015).

These two cases appear to suggest that when a party uses Lawfare as a “necessary element of mission accomplishment” in Hybrid Warfare situations,<sup>48</sup> the other party, who considers itself in disadvantage force-wise, will transform any adherence to the rule of law by its adversary into a ‘legal boomerang’. This boomerang would carry a piece of Hadesian Lawfare, which intends to paralyze the adversary or, at least, anesthetize the rule of law – government/administration structures of that law-abiding adversary. Along these lines, Lin argues:

[T]errorists are waging Lawfare and hijacking the rule of law as another way of fighting, to the detriment of humanitarian values as well as the law itself. Using human shields, abusing international law and post-conflict investigations to blur the line between legitimate counter-terror tactics and human rights violations, Lawfare – similar to terror tunnels – is also becoming an effective counter-measure against the superiority of western air power.<sup>49</sup>

Drawing the idea from Toni Pfanner,<sup>50</sup> in Hybrid Warfare we could argue that, as a consequence of those using weakly and rhetorically international law and judicial processes, International Humanitarian Law and Human Rights Law may become inapplicable, as it provides only partial answers. Moreover, this inapplicability may also be anchored in the idea that abiding by the law may also become inconsistent with perceived interests of the warring parties.

However, two points need to be remarked. First, this understanding would be equivalent to abandoning the legal battlespace to deniers of the rule of law. In this vein, Dunlap considers that “Lawfare is more than something adversaries seek to use against law-abiding societies; it is a resource that democratic militaries can – and should – employ affirmatively”.<sup>51</sup> Bilsborough considers that this employment must be done by “map[ping] the contours of international law (particularly the law of armed conflict) and structure their operations accordingly”.<sup>52</sup> There is room for a Zeusian use of Lawfare.

48 C. Dunlap, ‘Lawfare: A Decisive Element of 21<sup>st</sup> Century Conflicts?’, 54 *Joint Force Quarterly* (2009), at 35.

49 C. Lin, ‘Israel, China, and US/NATO – Counter-Terrorism as War Crimes?’, 287 *ISPSW Strategy Series: Focus on Defense and International Security* (2014), at 1.

50 T. Pfanner ‘Asymmetrical warfare from the perspective of humanitarian law and humanitarian action’, 87 (857) *International Review of the Red Cross* (2005) at 165.

51 Dunlap, *supra* note 21.

52 S. Bilsborough ‘Counterlawfare in Counterinsurgency’, *Small War Journals*, (2011), at 2.



In order to prepare military operations within the contours of international law, using Lawfare affirmatively, politicians and commanders alike need to train, before any actual conflict, difficult and complex legal scenarios with major and lasting impact, on internal and external public opinions. These scenarios will have: (i) short-lead response time to prepare a sound moral and legal case for forces intervention; (ii) high political consequences; (iii) likely future court review; and (iv) intervention of international organization<sup>53</sup> infiltrated by Hadesian Lawfare practitioners, as well as nongovernmental organizations (NGOs),<sup>54</sup> and multinationals.<sup>55</sup> Consequently, the shaping of the legal battlespace requires drafting contingency plans and conducting exercises based on those premises.

Secondly, we must never forget that public opinion is by nature coachable and therefore malleable. For this reason alone, we cannot afford to think naively and argue that Lawfare has to rely exclusively on its legal paradigms; the legality and legitimacy of (military) action are first and foremost subject to the scrutiny of public opinion. Consequently, any successful counter-Lawfare action, or Zeusian use of Lawfare, against 'boomerangs' must not be limited in scope, but comprehensive and holistic, as it will have to aim at establishing the right perceptions among the internal and external public opinions.

## 5 Lawfare in International Relations: When Law is Misused and Abused

After the breakup of the Soviet Union, Ukraine agreed to transfer the nuclear weapons to Russia and in return it asked for security assurances. In 1994, the so-called Budapest Memorandum<sup>56</sup> was signed by Ukraine, Russia, the United

53 "[T]he PA and its allies have turned numerous international organizations into lawfare battlegrounds. As a result, one international organization (UNESCO) has been weakened by having its budget slashed, and another (the UN Human Rights Council) has been largely diverted from accomplishing its original mandate", in Kittrie, *supra* note 33, at 339.

54 Palestinian Centre for Human Rights, [https://www.ngo-monitor.org/article/ngo\\_lawfare](https://www.ngo-monitor.org/article/ngo_lawfare), (last accessed 21 February 2016).

55 As targets, note the hacking of Sony before the screening of the movie 'The Interview', <https://www.lawfareblog.com/sony-hack>, (last accessed 20 February 2016). As a weapon, cf the case *Linde v. Arab Bank*, <https://www.osenlaw.com/case/arab-bank-case>, (last accessed 20 February 2016).

56 United Nations Document A/49/765, S/1994/1399, 19 December 1994, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N94/507/64/PDF/N9450764.pdf?OpenElement>, (last accessed 3 June 2016).

States, and the 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”.<sup>57</sup>

In March 2015, Russia argued that any allegation of Russia’s violation of its international obligations under the 1994 Budapest Memorandum would show that the text of the agreement had not been read by those alleging Russian involvement in the events in Crimea and Eastern Ukraine. The Russian Ministry of Foreign Affairs emphasizes that:

In 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 during which, or before, the people of Crimea and Sevastopol were making crucial decisions on the status of the peninsula. The overwhelming majority of the population of Crimea and Sevastopol, in a free expression of their will, exercised their right to self-determination, and Crimea returned to Russia. As for the ongoing attempts to accuse us of military interference in the events in southeastern Ukraine, the authors of these claims have not presented a shred of conclusive evidence yet.

Furthermore, neither in the Budapest Memorandum, nor in any other document, has Russia pledged to force a section of Ukraine to remain as part of the country against the will of the local population. The loss of Ukraine’s territorial integrity has resulted from complicated internal processes, which Russia and its obligations under the Budapest Memorandum have nothing to do with.<sup>58</sup>

Reading this official statement in conjunction with the official text of the 1994 Budapest Memorandum, we can easily identify a misinformation campaign. The significant element here is that the metaphorical ‘warhead’ of this Russian campaign is Lawfare. The statement mixes specific characteristics of Hybrid Warfare, namely denial – “Not a single shot was fired on its [Ukraine] territory

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57 *Ibid.*, at 2, para. 2.

58 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, [https://archive.mid.ru//brp\\_4.nsf/o/CC1C845CAA-26D5A043257E07004BF6EB](https://archive.mid.ru//brp_4.nsf/o/CC1C845CAA-26D5A043257E07004BF6EB) (last accessed 12 August 2015).

during which, or before, the people of Crimea and Sevastopol were making crucial decisions on the status of the peninsula” – with deliberate disinformation regarding the scope of existing treaty obligations, thus creating deliberately confusion of the public opinion. This outcome is the result of using Lawfare affirmatively, or maliciously, by Russia in a very effective way.

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 a concept of treaty abuse, as a special case of the concept of *abus de droit*.<sup>59</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.

An interesting case of Lawfare in international relations is that of Yasser Arafat’s off-the-record statements made on 10 May 1994 at a mosque while visiting Johannesburg, South Africa. A journalist from 702 Talk Radio, Bruce Whitfield, secretly recorded it. This took place few months before the signature of the Oslo Accords on 29 August 1994. Arafat alluded cryptically to the agreement comparing it to one of the Prophet Muhammad in similar circumstances:

This agreement I am not considering it more than the agreement which had been signed between our prophet Muhammad and Quraysh. And you remember, Caliph Omar had refused this agreement and considering the agreement of the very low class. But Muhammad had accepted it and we are accepting now this peace accord.<sup>60</sup>

Arafat’s allusion to the Hudaibiyya agreement (truce) was the object of several discussions and disagreements among commentators, which point to a sort of Lawfare. In 628 C.E a group of one thousand Muslims set off for a trip to Mecca in order to perform the *umrah* pilgrimage. The Muslims hoped that the Mecans would allow them to enter the city, but they did not. To avoid bloodshed, the two parties decided to avoid warfare and concluded an agreement or truce. On the one hand, some commentators thought Arafat sent a clandestine message about his true intentions and read the Quran in a biased manner:

59 M. Byers ‘Abuse of Rights: An Old Principle, A New Age’, 47 *McGill Law Journal* (2002). at 397–404.

60 See <https://www.textfiles.com/politics/arafat.txt>, (last accessed 23 August 2015).

In the twenty-two months after signing the treaty, Muhammad significantly built up his power base. He made new conquests and formed alliances ... with the Bani Khuza'a. As a result, by 630, he was considerably stronger vis-à-vis Quraysh than at the time of the signing. Quraysh did less well in terms of making new alliances, but it did ally with another strong tribe, the Bani Bakr [...] In December 629, some of the Bani Bakr, possibly with Quraysh help, took vengeance on a party of the Bani Khuza'a, killing several of the latter. On hearing this news, Muhammad instantly opted for the most drastic response – to attack Mecca [...] In response, Quraysh sent a delegation to Muhammad, petitioning him to maintain the treaty, and offering (as was the Arabian fashion) material compensation for the lives of the dead men. Muhammad, however, had no interest in a compromise and rejected all Quraysh entreaties.<sup>61</sup>

On the other hand, other publicists consider that Arafat's intention could not have a double-meaning as the interpretation of the Hudaibiyya agreement (truce) has to be done properly:

Quraysh and the tribe of Banu Bakr attacked the Banu Khuza'ah tribe, who were allies of the Muslims [...] Khuza'ah took refuge in the precincts of the Ka'bah, but their enemies pursued them even there, and killed a number of them. This incident directly violated the Treaty of Hudaibiyya, and Banu Khuza'ah [...] then, the Prophet did not act in haste. Instead, he sent a letter to Quraysh demanding payment of blood money for those killed, and a disbandment of their alliance with the Banu Bakr. Otherwise, the Prophet said, the treaty would be declared null and void [...] Abu Sufyan, traveled to Medina to reinstate the treaty [...] His tardy announcement, however, went unheeded by the Muslims and Abu Sufyan returned to Mecca. It was only after the Muslims had honored a treaty that was largely disadvantageous to them, and after they had refused to respond to Quraysh's breach of the contract and its subsequent nullification, that the Prophet prepared to retake Mecca.<sup>62</sup>

61 D. Pipes '[Al-Hudaybiya and] Lessons from the Prophet Muhammad's Diplomacy', *Middle East Quarterly* (1999), <https://www.danielpipes.org/316/al-hudaybiya-and-lessons-from-the-prophet-muhammads>, (last accessed 23 August 2015).

62 M. Abu Sway 'The Concept of Hudna (Truce) in Islamic Sources. The origin and implication of hudna', 13(3) *The Palestine-Israel Journal* (2006) <https://www.pij.org/details.php?id=860> (last accessed 23 August 2015).

As a conclusion, we can argue that no matter what version is true, either the Muslims or the Quarrysh misused the agreement for a strategic advantage. However, most importantly is to note that Arafat referring to this passage of the Quran during the Oslo Accord negotiations started a new episode of Lawfare based on past events and resting on the concept of *abus de droit* in its modality of treaty abuse.

The practice of treaty abuse constitutes an incorrect use of the actual agreement, notwithstanding of the violating party's 'justifications' to the contrary. Moreover, the incorrect use of an international agreement cannot be justified by the legal discretion given by international law makers to those applying it, as that discretion is not absolute. The limits of discretion are justified by the principle of good faith. In this regard, the International Court of Justice in the *Oil Platform* case established that:

[t]he Court recalls that, according to customary international law as expressed in Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.<sup>63</sup>

In international law the principle that good faith prevails is paramount, and it is described in international relations as "[...] idea[s] of community, tolerance, and trust, the basic prerequisites for the development of international law".<sup>64</sup> Hugh Thirlway argued that "[w]here an obligation, legal or conventional, is defined by specific words, good faith requires respect not only for the words but also for the spirit".<sup>65</sup>

Since an "international treaty-compliance police" has not been established under customary international law, good faith underpins all cross-border relations among States as the *sine qua non* of any *pacta sunt servanda*. In this regard, Virally reflects the following in results of the 7<sup>th</sup> session of the International Law Commission at Cambridge 1983 (Section 6): "*L'État ayant souscrit un engagement purement politique est soumis à l'obligation générale de bonne*

63 Judgment (Preliminary Objections), *Islamic Republic of Iran v. United States of America*, ICJ, 12 December 1996, at 812.

64 D. Bederman, *International Law in Antiquity* (2001), at 137.

65 H. Thirlway 'The Law and Procedure of the International Court of Justice, 1960–1989, Part One', 60 *British Yearbook of International Law* 4, (1989) at 25.

*foi qui régit le comportement des sujets du droit international dans leurs rapports mutuels*".<sup>66</sup>

At this point, we would like to affirm our view that the deliberate non-application of good faith when implementing international agreements amounts to Hadesian Lawfare. However, this can be argued only if the following conditions<sup>67</sup> are met:

- a) Although the action may be permitted by the international agreement, it renders the purpose of the agreement null and void;
- b) Although the action may be based in the interpretation rules established by Articles 31–33 of the 1969 Vienna Convention of the Law of the Treaties, the understanding is clearly unfounded; and
- c) Although the actions may be difficult to characterize as breaches of an international obligation, the party in breach describes the facts rhetorically using law arguments that clearly demean it.

In support of these criteria, one can argue that the situation in Ukraine shows that Russia has engaged in Hybrid Warfare not only against Ukraine, but also against NATO by distorting international law. An example is President Putin's declaration that Russia intervened, under international humanitarian law, "to defend the rights of Russian-speakers living abroad".<sup>68</sup> These commentators present Russia's abuse of law and argue that any Russian claim to have the right of intervention in Ukraine under international humanitarian 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>69</sup>

66 M. Virally, 'Textes internationaux ayant une portée juridique dans les relations mutuelles entre leurs auteurs et textes qui en sont dépourvus', 60 *Annuaire de l'Institut de Droit International* (1984), at 228.

67 The idea is drawn from U. Linderfalk 'The Concept of Treaty Abuse: On the Exercise of Legal Discretion'. Final Draft Version (2014), at 37, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2526051](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526051), (last accessed 20 August 2015).

68 Cited in E. Buckley and I. Pascu, 'NATO's Article 5 and Russian Hybrid Warfare', *Atlantic Council* 17 March 2015, <https://http://www.atlanticcouncil.org/blogs/natosource/nato-s-article-5-and-russian-hybrid-warfare> (last accessed 17 August 2015).

69 See e.g., Buckley and Pascu, *ibid.*

Mark Voyger in support of the above argues that “[w]hile Russia is not in control of the entire international legal system, and thus not fully capable of changing it ‘*de jure*’, it is definitely trying to erode its fundamental principles ‘*de facto*’”. He also presents his argument with relevant examples of how Russia uses Lawfare extensively and in its different approaches in order to give sense to Gerasimov’s doctrine:

- a) Modification of internal laws to affect external territories: “bill amendment on the incorporation of territories of neighbouring States providing for the annexation of regions of neighbouring States following popular local referenda (FEB–MAR 2014)”;
- b) Citizenship: “citizen law amendment using residency claims dating back to USSR and Russian Empire to grant current Russian citizenship (APR 2014);
- c) Passports: “the practice of giving away Russian passports to claim the presence of Russian citizens in neighbouring regions (Abkhazia, South Ossetia, Crimea);
- d) Misuse of United Nations Security Council: “the attempts to use the UN SC to sanction potential Russian opening of “humanitarian corridors”
- e) Use of ‘fake’ internal legal proceedings: “the sentencing of Ukrainian officials *in absentia* by Russian courts”; and
- f) Misleading use of the term “peacekeeping”: “the vigorous propaganda fabricating a legal case to justify the sending of Russian “peacekeeping forces” into East Ukraine to prevent “a humanitarian catastrophe” or “a genocide” against Russian speakers”.<sup>70</sup>

The above shows that Russia is currently using Lawfare maliciously with the aim of confusing public opinion by debasing law. The interpretation of international agreements in a circumstantial manner amounts to lack of good faith, which ends up being an *abus de droit* and can give rise to State responsibility,<sup>71</sup> in the case of Russia as an example for States supporting non-State actors. On this point, more longitudinal studies on other fundamental elements of

70 M. Voyger, ‘Russia’s Use of ‘Legal’ as an Element of its Comprehensive Warfare Strategy’ 1(2) *Land Power Magazine* (2015), at 20.

71 ‘1075th Meeting’, 1 *Yearbook of the International Law Commission* 1970, (1971) at 181, para. 40. See also ILC, ‘Articles on Responsibility of States for Internationally Wrongful Acts 2001’, <https://legal.un.org/avl/ha/rsiwa/rsiwa.html> (last accessed 3 June 2016), and the ‘Articles on the Responsibility of International Organizations New York’, (2011), <https://legal.un.org/avl/ha/ario/ario.html>, (last accessed on 19 August 2015).

international responsibility are required to produce empirical data and observations in support of the argument that those using malicious Lawfare, amounting to *abus de droit*, bear responsibility for internationally wrongful acts.

### Conclusion

The main conclusions 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. Unscrupulous and malicious use of Lawfare by State and non-State actors alike must not discourage international actors from continuing to act in compliance with international law. Zeus must not give up in spite of Hades' temporary successes.

In such a legal (and ethical) asymmetry law-abiding international environment, actors need to use Lawfare affirmatively to ensure that public international law is being applied within its full remit. Such 'preemptive' Zeusian Lawfare will give the political and military leadership the necessary room to fine-tune the planning and conduction of military operations reflecting on anticipated Lawfare by the opponent. Lawfare counteraction has extreme limitations in terms of time, space and applicable procedures. 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 – tangible and virtual, and the 'dictates' of compliance with the rule of law: to follow democratic procedures and be subject to court review and public opinion scrutiny. Moreover, law-abiding actors will also confront both international organizations to which they belong and which have been 'infected',<sup>72</sup> by Hadesian Lawfare and international tribunals used by non-law-abiders who know the non-intuitive nature of international humanitarian law.<sup>73</sup> This requires a comprehensive legal approach and broader legal interoperability, which includes the use of affirmative Lawfare in an offensive and defensive manner.

This paper on Hybrid War has shown some examples of malicious Lawfare as a central component of a Hybrid Warfare concept of a non-law-abiding opponent-/enemy. Above, the authors offer some suggestions to the political and military leaders of democratic law-abiding States on how to use Lawfare

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72 Kittrie, *supra* note 33, at 339.

73 *Ibid.*, at 215.



as an element of one's own comprehensive counter-strategy. The examples of Hamas and Russia, which were used in the text to highlight what might become a new trend in 21<sup>st</sup> century conflict, with the evolving situation in Syria and Iraq highlighting this trend. The use of Hadesian Lawfare yields tangible benefits for its operators as it distorts public opinion and the ethical-legal discourse in societies, which are compliant with international law and the rule of law. This is when the international legal reality gets murky and desperately calls for a Zeusian Lawfare as part of a comprehensive counterstrategy against such threats and means.

Employing Zeusian Lawfare also means that Lawfare must be approached as a means of warfare, a weapon: Lawfare can be used in an offensive (extra warnings, targeting recording, sanctions) or defensive (media training on selected topics, safeguarding of inquiry processes, information liaison with courts) manner against an opponent who is prone to ignoring the rule of law. The examples of Hamas in Israel/Palestine and the Taliban in Afghanistan and Pakistan with their disregard and even contempt for international humanitarian law and human rights law highlight the need for such proactive Lawfare. This, however, requires extensive pre-planning and continuous training of their users in order to convince the political (and military) leadership with sound arguments in support of Lawfare actions to counter the malicious application of law.

To conclude, Lawfare appears taking up a necessary and central role as a main component of current Hybrid Warfare operations and opens a broad spectrum for specialist and collaborative research by both academia and practitioners, for warfare is part of the world we live in. Our role as democratic societies in times of War and Conflict is governed by rules and adherence to the rule of law unlike our opponents' conduct. By opting for affirmative Lawfare qualified within legal constraints, we ensure that our choice of how to respond to threats of Hybrid Warfare will not only be successful but also legitimate.