

International Humanitarian Law and Hybrid Warfare

Piotr Łubiński

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Chapter 3

Four conceptual views of lawfare

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3 Four conceptual views of lawfare

The use and misuse of international law constitute the foundation of most hybrid operations.¹ In Chapters I and II, the author delineated the distinction between hybrid warfare and hybrid threats. This chapter seeks to establish an appropriate classification of lawfare within the broader spectrum of hybrid warfare and hybrid threats.

Hybrid operations incorporate multiple elements, and similarly, the term “lawfare” itself is hybrid in nature – and is derived from the combination of “warfare” and “law”. From a linguistic perspective, the inclusion of “warfare” suggests a connection to armed conflict. The literal interpretation of the word indicates some form of weaponisation of the law to manipulate or instrumentalise changes to the existing international legal order.² However, is this truly the case? Can lawfare be applied exclusively to armed conflicts, or, like other elements of hybrid operations, can it serve as a spill-over mechanism between legal regimes governing both wartime and peacetime?

The importance of lawfare, as highlighted by Sauri, underscores that law is not merely a peripheral factor but an essential and strategic component of hybrid operations, including hybrid warfare. Law shapes both the conceptualisation and conduct of war. The international legal framework governing warfare establishes mutual expectations among belligerents regarding their behaviour on the battlefield. Hybrid adversaries exploit this stabilising function

1 Tropin, Z. (2021) *Lawfare as Part of Hybrid Wars: The Experience of Ukraine in Conflict with Russian Federation*, Security and Defence Quarterly, Volume 33, No. 1, p. 16.

2 Mosquera, A., and Bachmann, S. (2016) *Lawfare in Hybrid Wars: The 21st Century Warfare*, Journal of International Humanitarian Legal Studies, Volume 7, No. 1, p. 62.

The debate about the nature and semiotics of the word lawfare is eloquently presented in Tiefenbrun, S.W. (2010) *Semiotic Definition of Lawfare*, Case Western Reserve Journal of International Law, No. 43, p. 29.

of the law to gain a military advantage over their opponent, therefore making the law a force multiplier.³ Sari's position is supported by many others.⁴

At the very initial stage, lawfare should be understood as a coordinated and orchestrated effort, often resulting in spill-over effects that blur the established boundaries between peace and war, which are then further intensified by propaganda campaigns.⁵ The chapter will initially address the issue of definitions and typology with a belief that it is worth defining (to address Michael P. Scharf and Elizabeth Andersen's rhetorical question raised in their article).⁶ Furthermore, specific cases will be analysed from the perspective of hybrid warfare and hybrid threats to seek a proper legal forum in the matrix of *ius ad bellum*, *ius in bello*.

Timeline and introductory definitions

It is hard to establish a clear timeline of the lawfare definition, but at least a few dates have to be mentioned. Kittire identifies one of the earliest instances of the term lawfare in Hugo Grotius' *Mare Liberum* (1609), dating back to the 17th century. He argues that this work was a Dutch response to Portugal's efforts to exclude the Dutch East India Company (DEIC) from the lucrative spice trade in the Indian Ocean. Commissioned by the DEIC, Grotius developed a legal theory asserting that "the sea is common to all nations". Through legal argumentation, he achieved what Dutch military power could not, thereby solidifying the principle of freedom of the seas in modern international

3 Sari, A. (2019) "Hybrid warfare, law, and the Fulda Gap", in Ford, C.M., and Williams, W.S. (eds), *Complex Battlespaces: The Law of Armed Conflict and the Dynamics of Modern Warfare*, New York, NY: Oxford University Press, p. 163.

4 Bodnieks, V. (2023) *Defensive Lawfare and Deterrence: Analysis of Latvia's Approach to Legal Bases in the Context of Hybrid Warfare (2014–2022)*, Security and Defence Quarterly, Volume 42, No. 2, p. 55; Lubiński, P. (2022) *Hybrid Warfare or Hybrid Threat – The Weaponization of Migration as an Example of the Use of Lawfare – Case Study of Poland*, Polish Political Science Yearbook, No. 51, p. 1. Available at: <https://doi.org/10.15804/ppsy202208> [Accessed 3 May 2025].

5 Dunlap, C.J. Jr (2001) "Law and military interventions: preserving humanitarian values in 21st century conflicts", prepared for the Humanitarian Challenges in Military Intervention Conference, Carr Center for Human Rights Policy, Kennedy School of Government, Harvard University, Washington, DC, 29 November 2001.

6 Scharf, M.P., and Andersen, E. (2010) *Is Lawfare Worth Defining – Report of the Cleveland Experts Meeting – September 11, 2010*, Case Western Reserve Journal of International Law, No. 43, p. 11.

law.⁷ More recently Werner⁸ points out publications from the 1970s of John Carlson and Neville Yeomans, who used the term lawfare.⁹

The contemporary idea of lawfare was introduced in Liang and Xiangsui's *Unrestricted Warfare*, where international law warfare was considered.¹⁰ Furthermore, it was developed in the so-called "Three Warfare" concept, published in 2003,¹¹ where legal warfare, known as lawfare, was considered as a "struggle for legal superiority by mobilising domestic and international laws to gain political initiative and military victory with methods of legal warfare including legal deterrence, legal attack, legal counterattack, legal binding, and legal protection".¹² Almost at the same time, the idea was also presented by Charles J. Dunlap, who defined the notion as "[t]he strategy of using – or misusing – law as a substitute for traditional military means to achieve an operational objective".¹³

From both a conceptual and legal perspective, four distinct approaches to lawfare can be identified:

- 1) law as a means of warfare – a weapon.
- 2) lawfare as being militarised – a method of warfare that constitutes an integral part of armed violence.¹⁴
- 3) lawfare as the exploitation of weaknesses and loopholes in international law, outside the context of armed conflict. This approach, often characterised by bad faith and instrumentalisation, operates in contradiction to the existing legal order.
- 4) lawfare as a tool for influencing adversaries through the existing international legal framework, particularly via courts and tribunals.

7 Kittrie, O. (2016) *Lawfare: Law as a Weapon of War*, Oxford: Oxford University Press, 1st edn, p. 8.

8 Werner, W.G. (2010) *The Curious Career of Lawfare*, Case Western Reserve Journal of International Law, No. 43, p. 61. Available at: <https://scholarlycommons.law.case.edu/jil/vol43/iss1/4> [Accessed 3 May 2025].

9 Carlson, J., and Yeomans, N. (1975) "Whither Goeth the Law - Humanity or Barbarity" in Smith, M., and Crossley, D. (eds), "*The way out – radical alternatives in Australia*", in Smith, M., and Crossley, D. (eds), Melbourne: Lansdowne Press. Available at: <https://www.laceweb.org.au/whi.htm> [Accessed 3 May 2025].

10 Liang, Q., and Xiangsui, W. (1999) *Unrestricted Warfare*, Beijing: PLA Literature and Arts Publishing House, p. 55.

11 Clarke, M. (2019) *China's Application of the 'Three Warfares' in the South China Sea and Xinjiang*, Orbis, No. 63, p. 191. Available at: <https://nsc.crawford.anu.edu.au/publication/14240/chinas-application-three-warfares-south-china-sea-and-xinjiang> [Accessed 3 May 2025].

12 Lee, S. (2014), *China's "Three Warfares": Origins, Applications, and Organizations*, Journal of Strategic Studies, Volume 37, No. 2, p. 203.

13 Dunlap, C.J. Jr (2008) *Lawfare Today: A Perspective*, Yale Journal of International Affairs, Volume 3, No. 1, p. 35.

14 The author initially does not refer to International Humanitarian Law (IHL) wording, such as armed conflict. This is because hybrid warfare situations often fall outside the scope of the traditional dichotomy.

Each of these perspectives has its proponents, and some individuals may subscribe to more than one approach. Nevertheless, this categorisation provides some clarity, particularly in distinguishing between *ius in bello* (law in war) and *ius ad bellum* (the law governing the resort to war).

The first approach – is law a weapon?

Before addressing detailed definitions and subsequent case studies, the author discusses initial linguistic considerations and addresses the first approach to lawfare. A number of scholars use the term “lawfare” to describe law as a weapon. For instance, Kittirie titled his book *Lawfare: Law as a Weapon of War*. Similarly, Munoz Mosquera and Bachmann refer to “the use of law as a weapon”.¹⁵ Leach writes that “China and Russia are increasingly using law as a weapon against the United States”.¹⁶ It is noteworthy to mention the 2010 Cleveland Experts Meeting, which resulted in a special issue of the “Case Western Reserve Journal of International Law” convened entirely to discuss and define the term lawfare. This gathering brought together leading scholars and practitioners, many of whom played a pivotal role in shaping the understanding of the concept. Several scholars who were part of this distinguished group explored the use of lawfare as a weapon. Notable individuals included Susan W. Tiefenbrun, who presented a paper titled “*Semiotic definition of lawfare*”, in which she defined lawfare as “a weapon” when discussing its use before courts and tribunals.¹⁷ Prof. Luban, who presented a similar position, describing lawfare as “the use of law as a weapon of war against a military adversary”,¹⁸ and David Crane (although the author believes that it his publicist approach somewhat resembles “*licentia poetica*”).¹⁹ Certain confusion is introduced by Tawia Ansah, who understands the use of lawfare as both weapon of war and method of warfare.²⁰ Interesting linguistically, yet beyond the scope of this publication, is David Scheffer’s concept of “soft weapon”.²¹

15 Mosquera, A., and Bachmann, S. (2016) *Lawfare in Hybrid Wars: The 21st Century Warfare*, Journal of International Humanitarian Legal Studies, Volume 7, No. 1, p. 63.

16 Leach, B. (2023) *Lawfare for the Future*, University of Illinois Journal of Law, Technology & Policy, Volume 2023, No. 1 [Accessed 3 May 2025], p. 56.

17 Tiefenbrun, S.W. (2010) *Semiotic Definition of Lawfare*, Case Western Reserve Journal of International Law, No. 43, p. 29.

18 Luban, D. (2010) *Carl Schmitt and the Critique of Lawfare*, Case Western Reserve Journal of International Law, No. 43, p. 457.

19 Crane, D. (2010) *The Take Down: Case Studies regarding “Lawfare” in International Criminal Justice: The West African Experience*, Case Western Reserve Journal of International Law, No. 43, p. 201.

20 Ansah, T. (2010) *Lawfare: A Rhetorical Analysis*, Case Western Reserve Journal of International Law, No. 43, p. 87, 104, 107. Available at: <https://scholarlycommons.law.case.edu/jil/vol43/iss1/6> [Accessed 3 May 2025].

21 Scheffer, D. (2010) *Whose Lawfare Is It, Anyway?*, Case Western Reserve Journal of International Law, No. 43, p. 215. Available at: <https://scholarlycommons.law.case.edu/jil/vol43/iss1/14> [Accessed 3 May 2025].

The author disagrees with the weaponised approach. Most readers are likely to perceive law as something intangible – an instrument whose application may influence methods of warfare rather than functioning as a means of warfare or a weapon in itself. This intuitive and linguistic interpretation aligns with the legal perspective. The “Hague Law”, the oldest branch of International Humanitarian Law (IHL), delineates a distinction between the means and methods of warfare.²² Oddly enough, neither of the terms “methods of warfare” nor “methods of combat” have been explicitly defined in treaty law. Furthermore, no efforts were made to establish such definitions during the deliberations that preceded adopting the Additional Protocols to the Geneva Conventions.²³ Therefore, only the Commentaries on the Additional Protocols clarify that the term “means of warfare” specifically refers to weapons, while the term “methods of warfare” refers to the manner in which these weapons are employed.²⁴

Through treaties, international law considers and regulates a number of types of weapons, such as edged weapons (Article 23 of Hague Convention IV; API Articles 35–37), whilst firearms have been regulated by a number of treaties starting with the 1868 St Petersburg Declaration “*Renouncing the use, in time of war, of certain explosive projectiles*”; up to the regulations on Weapons of Mass Destruction (Biological, Chemical, or Nuclear). None of these regulations equates law with a weapon.

As to the doctrine, consensus also exists on what a weapon is. For example, Boothby defines a weapon as a piece of equipment

that can be applied to a military object or enemy combatant. The means whereby this is achieved will involve a device, munition, implement, substance, object, or piece of equipment, and it is that device (...) used directly to deliver force during hostilities.²⁵

To conclude, law is not and should not be considered a weapon. Therefore, law and lawfare may not and should not be considered a means of warfare – unless someone is using a law book to physically assault another person.

22 Gaggioli, G., and Melzer, N. (2020) “*Methods of warfare*”, in Saul, B., and Akande, D. (eds), *The Oxford Guide to International Humanitarian Law*, Oxford: Oxford Academic, p. 235.

23 Gaggioli, G., and Melzer, N. (2020) *Ibidem*, p. 237.

24 Gaggioli, G., and Melzer, N. (2020) *Ibidem*, p. 236.

25 Boothby, W.H. (2016) *Weapons and the Law of Armed Conflict*, Oxford: Oxford University Press, p. 4.

The second approach – a weaponised definition or *ius in bello* spectrum of lawfare

Before presenting the second approach, it is worth pointing out the evolving interpretation of lawfare – particularly through the shifting perspective of Charles Dunlap, one of the first proponents of the concept – who underscores the conceptual ambiguity surrounding its classification within the framework of warfare. In 2001 he contended law as a weapon of war, with lawfare being considered as a method of warfare where law is used as a means of realising a military objective²⁶ (the author believes that Dunlap’s early conception aligns lawfare with traditional instruments of war). Until 2008, this view persisted, with law being described as a weapon – a direct substitute for conventional military force.²⁷ However, by 2011, Dunlap’s formulation had matured, emphasising lawfare as “the strategy of using or misusing law as a substitute for traditional military means to achieve a warfighting objective”,²⁸ thereby falling more into the methods rather than the means of methods category. In 2017 Dunlap did not ease his concerns regarding approach to lawfare. He distinguished lawfare as a means of warfare, rather than merely a method. He presented lawfare a strategic alternative to traditional military force – used to achieve similar objectives through legal mechanisms. While methods of warfare refer to how force is applied (e.g., tactics or procedures), lawfare functions as a non-kinetic means – a tool or weapon that complements or substitutes physical force. Thus, in the context of warfare, lawfare represents a means through which power is exerted, not just a method of conducting operations.²⁹

This debate is not merely semantic; it reflects a deeper theoretical tension between lawfare as a tangible tool of conflict versus its function as a procedural or strategic approach within *ius in bello*. Consequently, a critical question emerges: does lawfare – particularly when employed manipulatively – constitute a method of warfare? The complexity of this question lies at the intersection of legal interpretation and military strategy, and its resolution demands a nuanced engagement with both doctrinal legal theory and the operational realities of contemporary conflict.

This question is far from straightforward. Once again, the author will refer to the Commentaries on the Additional Protocols (AP). The term “means of combat” or “means of warfare” generally refers to the type of weapons

26 Dunlap, C.J. Jr (2001) “*Law and military interventions: preserving humanitarian values in 21st century conflicts*”, Carr Center for Human Rights, John F. Kennedy School of Government, Harvard University, Working Paper, p. 4. Available at: <https://people.duke.edu/~pfeaver/dunlap.pdf> [Accessed 3 May 2025].

27 Dunlap, C.J. Jr (2008) *Lawfare Today: A Perspective*, Yale Journal of International Affairs, Volume 3, No. 1, Winter, p. 146.

28 Dunlap, C.J. Jr (2008) *Ibidem*, p. 315.

29 Dunlap Jr, C.J. (2017) *Lawfare 101: A Primer*, Military Review, Volume 97, No. 3, p. 8–17. Available at: https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6434&context=faculty_scholarship [Accessed 3 May 2025].

used, while the expression “methods of combat” generally refers to the way in which such weapons are used.³⁰ Such a strict interpretation would preclude the possibility to consider classifying a number of practices, including lawfare, as methods of warfare. In this regard, the author aligns with the perspectives of Gaggioli and Melzer, according to whom AP Commentaries adopt an overly restrictive interpretation, which would, for instance, exclude such acts as denial of quarter or perfidy from the scope of prohibited methods of warfare,³¹ as well as excluding lawfare from the debate.

Support for this perspective can be found in the book *How Does Law Protect in War?*, which offers a somewhat more compelling interpretation. It defines methods of warfare as: “(i) the way and manner in which weapons are used; (ii) any specific tactical or strategic approaches to conducting hostilities that are not directly related to weapons but are intended to overwhelm and weaken the adversary.”³² This definition is valuable as it highlights that methods of warfare extend beyond the mere use of weapons and aligns with the perspective of another distinguished scholar attending the above-discussed Cleveland expert meeting, Leila Sadat, who interprets lawfare as a tactic and, therefore, a method of warfare.³³

A most precise understanding of *methods of warfare* should encompass any specific way of employing weapons or conducting hostilities, irrespective of their legality or appropriateness. This includes a broad range of actions, from the use of emblems, flags, uniforms, and weapons or other equipment to the selection of targets for attack.³⁴

The scope of instrumentalising international law, as well as its weaponisation to the extent that it becomes a method of warfare, will be thoroughly examined in the following discussion. For the sake of clarity, the author will reference the original definitions provided by scholars who conceptualise the use of law as a weapon, despite the author’s disagreement with their perspective. This approach ensures that their viewpoints are accurately represented. However, from the standpoint of legal methodology, scientific reasoning and linguistic meaning, this work argues that their concept lacks a solid foundation. This, however, does not contradict the argument that lawfare may instrumentalise – or even potentially weaponise – international law.

30 ICRC (1987) “*Commentary on Additional Protocol I, Article 51 – protection of the civilian population*”, p. 622, Point 1957. Available at: <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-51/commentary/1987> [Accessed 3 May 2025].

31 Gaggioli, G., and Melzer, N. (2020) *op. cit.*, p. 237.

32 M. Sassòli, Bouvier, A., and Quintin, A. (2025) *How Does Law Protect in War? Conduct of Hostilities, Part III. Means and Methods of Warfare*. Available at: https://casebook.icrc.org/law/conduct-hostilities#footnote51_rx8f5kj [Accessed 3 May 2025].

33 Sadat, L.N., and Geng, J. (2010) *On Legal Subterfuge and the So-Called “Lawfare” Debate*, Case Western Reserve Journal of International Law, Volume 43, No. 1, p. 153. Available at: <https://scholarlycommons.law.case.edu/jil/vol43/iss1/9> [Accessed 3 May 2025].

34 Gaggioli, G., and Melzer, N. (2020) *op. cit.*, p. 238.

Once again, the weaponised definition of “lawfare” must be critically examined in light of legal interpretations. Andrea Beck emphasises three key elements: (1) the misuse or manipulation of legal norms, (2) the pursuit of military objectives through such misuse, and (3) the consequent erosion or subversion of the broader legal framework.³⁵ Hill explains that lawfare means “(...)the misuse of the law to achieve military objectives”. In this respect, the military nature of the objective is crucial, since aggressive legal maneuvers alone are not enough to constitute lawfare.³⁶ A similar approach is presented by Tropin³⁷ and Laurie Blank, another participant of the seminar discussed previously, who also sees lawfare as a method of warfare and includes, *inter alia*, perfidy as a case study.³⁸

Yet, the wording “realising a military objective” is misleading, taking into consideration a legal interpretation of the notion. Military objectives are defined by IHL as in API Article 52: “objects which, by their nature, location, purpose, or use, make an effective contribution to military action, and the total or partial destruction, capture, or neutralisation of which would provide a definite military advantage³⁹ (*vide* rule 8, Customary law). This interpretation is overly narrow and excludes a range of lawfare practices targeting civilians and civilian objects. A broader and more inclusive definition is offered by Bachman and Mosquera, who conceptualise lawfare as a method of warfare that employs nonkinetic means with the intent to influence the adversary in pursuit of strategic objectives.⁴⁰ Orde Kittrie characterises lawfare as an action where:

(1) the actor uses law to create the same or similar effects to 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.⁴¹

Such an action is executed in a coordinated manner and constitutes an approach to hostilities using hybrid methods. This position is supported by Kittrie’s findings on the Chinese approach, as exemplified in *Legal Warfare*

35 Beck, A. (2014) *China’s Strategy in the Arctic: A Case of Lawfare?*, The Polar Journal, Volume 4, No. 2, p. 306–318, doi: 10.1080/2154896X.2014.954886, p. 309.

36 Hill, H. (2014) “*Lawfare and the International Criminal Court: Questions & Answers*”. Cited in Beck, A. (2014) *China’s Strategy in the Arctic: A Case of Lawfare?*, The Polar Journal, Volume 4, No. 2, p. 309.

37 Tropin, Z. (2021) *Lawfare as Part of Hybrid Wars: The Experience of Ukraine in Conflict with the Russian Federation*, Security and Defence Quarterly, Volume 33, No. 1, p. 17.

38 Blank, L.R. (2010) *Finding Facts but Missing the Law: The Goldstone Report, Gaza and Lawfare*, Case Western Reserve Journal of International Law, Volume 43, p. 282.

39 *Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3.

40 Mosquera, A., and Bachmann, S. (2016) *Ibidem*, p. 72.

41 Kittrie, O. (2016) *Ibidem*, p. 8.

in *Modern War* (2005) by Xun Hengdong. Hengdong argues that the IHL should not be regarded as an inviolable set of boundaries, but rather as a strategic tool to achieve specific objectives, such as shaping and manipulating the perceptions of the international community.⁴²

What can be identified from the above definitions is the implication that lawfare as a method of hybrid warfare can be used to achieve a military goal or goals. Those goals can be multidimensional, ranging from purely military ones, such as “the destruction of the enemy’s main forces on the battlefield”, and “the downfall of civilised States”, which results from the direct assault of foes, internal decay, combined with the consequences of exhaustion in war,⁴³ to misuse of existing IHL. To achieve complex hybrid objectives, actors may employ tactics involving sustained acts of perfidy or human shields, including the orchestration of scenarios that can be deliberately misconstrued as violations of the IHL by the adversary. From that perspective, the use or misuse of international law is directly linked to the destruction of the enemy. Such acts often occur through the use of cyberspace, especially within the cognitive domain, and may involve violations of the principle of distinction.

The considerations included in the previous chapters indicate that hybrid threats operate below the threshold of armed conflict. Therefore, the militarised use of law in the form of lawfare may not, and shall not, be considered as such. Only hybrid warfare is considered as falling within the IHL paradigm, triggered by armed conflict (NIAC/IAC).⁴⁴ Therefore, instrumentalised violations of IHL can be considered as hybrid warfare lawfare; with perfidy and human shields serving as prime examples, as those acts betray the adverse party’s trust in international law⁴⁵ and are aimed at obtaining military goals.

Perfidy

Perfidy constitutes an example of an intentional breach of law aimed at military goals, being, therefore, an example of *ius in bello* hybrid warfare. It had already been prohibited by Article 23(b) of Hague Convention (IV) respecting the Laws and Customs of War on Land⁴⁶ and was subsequently prohibited by Article 147 of Geneva Conventions.⁴⁷ Prohibition of perfidy is defined in

42 Kittrie, O. (2016) *Ibidem*, p. 162.

43 Liddell Hart, B.H. (1952) *The Objective in War*, Naval War College Review, Volume 5, No. 4, December, p. 27.

44 Newton, M.A. (2010) *Illustrating Illegitimate Lawfare*, Case Western Reserve Journal of International Law, No. 43, p. 255. Available at: <https://scholarlycommons.law.case.edu/jil/vol43/iss1/16> [Accessed 3 May 2025].

45 Kolb, R. (2017) *Good Faith in International Law*, Oxford, Hart Publishing, p. 252.

46 *Hague Convention (IV) respecting the Laws and Customs of War on Land and its annexed Regulations* (adopted 18 October 1907, entered into force 26 January 1910), Article 23(b), Article 27.

47 *Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War* (adopted 12 August 1949, entered into force 21 October 1950), 75 UNTS 287, Article 147.

Article 37(1) of the Additional Protocol to the 1949 Geneva Convention and in addition to being regulated by Additional Protocol I, it also attained a customary law character, thus becoming applicable to both Non-International Armed Conflicts (NIAC) and International Armed Conflicts (IAC).⁴⁸ API stipulates that: It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:

- (a) “the feigning of an intent to negotiate under a flag of truce or of a surrender;
- (b) the feigning of an incapacitation by wounds or sickness;
- (c) the feigning of civilian, non-combatant status; and
- (d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict”.

On the contrary ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation.⁴⁹

The debate over perfidy addresses the most fundamental application of IHL. The horrors of war necessitate the creation of mechanisms to preserve human dignity even in the darkest times. IHL serves as a critical safeguard, ensuring that despite the brutality of war, fundamental humanitarian principles are upheld.⁵⁰ Military commanders and their legal advisors do not treat the law of armed conflict as a mere intellectual pursuit. Instead, modern international humanitarian law has evolved as a necessary restraint to humanise warfare while still enabling commanders to fulfil their mission, even amid fear, moral uncertainty, and the brutal realities of violence.⁵¹ As Kolb argues, perfidy violates this presumption and good faith laid down in the body of IHL. It is nothing less than the use of certain legal provisions and related obligations for purposes for which they were never intended or granted. In other words,

48 ICRC Customary Law, “Rule 65”. Available at: <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule65> [Accessed 3 May 2025].

49 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, Article 37.

50 *Vide* number of scholars including *inter alia* Schmitt, M. (2011) *Essays on Law and War at the Fault Lines*, The Hague: T.M.C. Asser Press; Dinstein, Y. (2004) *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge: Cambridge University Press.

51 Newton, M.A. (2010) *op. cit.*, p. 256.

perfidy is a great *détournement de pouvoir* or misuse of authority. Citing *The British Military Manual* of 1958, Kolb explains,

Good faith ... is essential in war, for without it hostilities could not be terminated with any degree of safety short of the total destruction of one of the contending parties. Should it be found impossible to rely on the good faith, thus conceived, of the adversary, there is a grave danger of war degenerating into excesses and indiscriminate violence, the prevention of which has been the aim of the modern laws of war.⁵²

Therefore, under IHL, violating law in bad faith or with the intention of misuse clearly satisfies Beck's three conditions of weaponised lawfare.⁵³

Acts of perfidy may be committed both within Non-International Armed Conflicts (NIAC) and International Armed Conflicts (IAC) by both states and armed non-state actors. Despite the overall condemnation of perfidy, there are numerous examples of perfidious attacks by both States and Armed Non-State Actors (ANSA). For example, on 19 January 2011, Iraqi insurgents used an ambulance bomb to attack an Iraqi police station in Diyala province, killing five and wounding 76 individuals, the majority of whom were civilians. Similarly, in Afghanistan, on 17 April 2011, a suicide bomber used an ambulance to infiltrate a police checkpoint and then detonated his bomb, killing six.⁵⁴ What is concerning is that some Islamic clerics, such as one of the Muslim Brotherhood leaders, Ibn Baz, justified such attacks. Additionally, these attacks targeting civilians, i.e. acts which, as mentioned above, constitute perfidy, were justified by Sheikh Qaradawi.⁵⁵ What is far more concerning, however, are the practices of certain states regarding perfidy. For example, Russian Forces in Ukraine were using civilian uniforms during military engagements.⁵⁶ There were also reports about Russian forces using OSCE vehicles⁵⁷ to approach Ukrainian posts and then launch attacks.⁵⁸ It is beyond the scope of this

52 Kolb, R. (2017) *op. cit.*, p. 253.

53 Beck, A. (2014) *China's Strategy in the Arctic: A Case of Lawfare?*, *The Polar Journal*, Volume 4, No. 2, p. 309.

54 Jackson, R. (2012) "Perfidy in non-international armed conflicts", in Watkin, K., and Norris, A.J. (eds), *Non-International Armed Conflict in the Twenty-First Century*, Newport, Rhode Island, Naval War College, p. 237–238.

55 Munir, M. (2008) *Suicide Attacks and Islamic Law*, *International Review of the Red Cross*, Volume 90, No. 869, p. 75.

56 Rzeczpospolita (2022) "Bucza pod Kijowem – Rosjanie przebijają się za cywilów, ciała są zaminowane [*Bucha near Kyiv – Russians disguise themselves as civilians, bodies are mined*]". Available at: <https://www.rp.pl/konflikty-zbrojne/art35997031-bucza-pod-kijowem-rosjanie-przebijaja-sie-za-cywilow-ciala-sa-zaminowane> [Accessed 3 May 2025].

57 OSCE (2023) "Further information on OSCE vehicles filmed in Donbas". Available at: <https://www.osce.org/secretariat/536335> [Accessed 3 May 2025].

58 IPHR (2022) "War crimes in the Wake of Russia's military onslaught on Ukraine". Available at: <https://www.iphronline.org/war-crimes-in-the-wake-of-russia-s-military-onslaught-on-ukraine.html> [Accessed 3 May 2025].

publication to present more such cases. However, it is necessary to underline that the states' and ANSA's use of law runs contrary to the letter of law, exploiting humanitarian presumptions to obtain military goals. The United Nations Fact Finding Mission Report on the Gaza Conflict states, "rockets and mortars were launched in close proximity to homes and alleyways in the hope that the presence of civilians nearby would deter Israel from responding".⁵⁹

The act of perfidy contributes to a significant dynamic commonly observed in coordinated hybrid warfare operations. Specifically, persistent violations of fundamental norms by one party in a conflict can lead to the other party's disregard for minimum legal standards. Additionally, these violations may be exploited to generate propaganda materials. Such materials could falsely accuse the aggrieved side of, for instance, attacking humanitarian convoys. This strategy aims to manipulate international public perception through a technique akin to reflexive control, as exemplified by the operations conducted by Hamas in October 2023. This may result in the so-called spill-over effect, which also constitutes hybrid threats (*vide* Chapter 5).

Human shields

Human shields are another example of *ius in bello* lawfare, a strategy that exploits legal and moral frameworks to achieve military goals. The primary purpose of using human shields – whether voluntarily or involuntarily – is to protect military targets, personnel, or combat operations by leveraging the presence of civilians. Actors employing this tactic are aware that harming human shields may lead to significant civilian casualties, thereby forcing the attacking party into a dilemma, as striking a legitimate target may cause excessive collateral damage. The use of involuntary human shields exacerbates the profound moral and legal dilemma concerning the victims' status, to an even larger extent than voluntary ones. It is frequently manipulated to influence international public opinion through both social and traditional media channels.

The most comprehensive prohibition of the human shield was introduced by Article 51(7) of the Additional Protocol I:⁶⁰

59 Human Rights Council (2009) "*Human rights in Palestine and other occupied Arab territories: report of the United Nations Fact Finding Mission on the Gaza conflict*", A/HRC/12/48, 15 September, p. 450–451. Available at: http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC_Report.pdf [Accessed 3 May 2025].

60 Bouchié de Belle, S. (2008) *Chained to Cannons or Wearing Targets on Their T-Shirts: Human Shields in International Humanitarian Law*, International Review of the Red Cross, Volume 90, No. 872, p. 885–886. doi: <https://doi.org/10.1017/S1816383109000216> [Accessed 3 May 2025].

The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.⁶¹

Prohibition of the use of human shields in NIAC and IAC has obtained customary law status.⁶² The ban covers three types of situations: when civilians are placed on or close to military objectives, when military objectives are placed in the midst of civilians and when “movements” of the civilian population are used to cover military operations.⁶³

It is challenging to pinpoint the most notorious organisation for using human shields, as this reprehensible practice has been documented throughout history.⁶⁴ Over the last decade, instances of the use of human shields by ISIS were observed in Mosul⁶⁵ and in Raqqa during the battle for the ISIS stronghold.⁶⁶

ISIS also employed a tactic of using human shields as their fighters escaped from Manbij in northern Syria. Civilians were placed in a convoy comprising 500 vehicles. The Pentagon sources indicated that the convoy was not targeted due to concerns about harming civilians.⁶⁷

Probably the best documented case is the use of human shields by Hamas (and other organisations in Gaza),⁶⁸ which employed a similar tactic during

61 International Committee of the Red Cross (ICRC) (1977) *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 1125 UNTS 3.

62 Rule 97. Doswald-Beck, L., and Henckaerts, J.-M. (2005) *Customary International Humanitarian Law*, Cambridge: Cambridge University Press, p. 337. <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule97> [Accessed 3 May 2025]

63 Bouchié de Belle, S. (2008) *op. cit.*, p. 885.

64 Gordon, N., and Perugini, N. (2020) *Human Shields: A History of People in the Line of Fire*, 1st edn, Oakland, CA: University of California Press.

65 Perugini, N., and Gordon, N. (2017) “*The human shields of Mosul: how the international coalition is framing civilians in Iraq as ISIL’s human shields*”. Al Jazeera. Available at: <https://www.aljazeera.com/opinions/2017/4/2/the-human-shields-of-mosul> [Accessed 3 May 2025].

66 VOA News by AP (2017) “*IS holds terrified civilians as human shields in Syrian City*”. Available at: <https://www.voanews.com/a/islamic-state-terrified-civilians-human-shields-raqqa-syria/3787090.html> [Accessed 3 May 2025].

67 Dunlap, C.J. (2016) *No Good Options against ISIS Barbarism? Human Shields in 21st Century Conflicts*, AJIL Unbound, No. 110, p. 311. Available at: https://scholarship.law.duke.edu/faculty_scholarship/3720/ [Accessed 3 May 2025].

68 Aday, S. et al (2019), “*Hybrid threats: Hamas’ use of human shields in Gaza*” in Aday, S., Andžāns, M., Bērziņa-Čerenkova, U., Granelli, F., Gravelines, J., Hills, M., Holmstrom, M., Klus, A., Martinez-Sanchez, I., Mattiisen, M., Molder, H., Morakabati, Y., Pamment, J., Sari, A., Sazonov, V., Simons, G., and Terra, J. (2019) *Hybrid Threats: A Strategic Communications*

IDF encounters in the Gazan wars of 2008 and 2014,⁶⁹ as well as in the ongoing conflict in 2023–25. Hamas was accused of launching rockets, artillery, and mortars from or near densely populated civilian areas, often using locations protected under the Geneva Convention, such as schools, hospitals, or mosques.⁷⁰ Additionally, Israel alleges that Hamas took advantage of the imminent attack early warning system, by encouraging civilians to voluntarily shelter the targets by acting as human shields in an attempt to prevent the attacks.⁷¹

This Hamas strategy aims to inflict maximum casualties on the IDF while shielding Hamas' forces and infrastructure from the IDF, which holds a (considerable) military advantage. It acknowledges the risk of civilian casualties and even exploits civilians for the purposes of internal and external propaganda.⁷² These attacks exemplify hybrid warfare, as they combine violations of the principle of distinction, online propaganda, and the strategic manipulation of legal norms to undermine international law.

The use of human shields fulfils several key objectives of hybrid warfare and lawfare. One such objective is the exploitation of civilian casualties to accuse Israel of committing war crimes, potentially leading to international sanctions. Hamas understands that public opinion is often shaped to a larger extent by images of civilian suffering than by legal arguments. To control the narrative, Hamas actively records incidents, sometimes manipulating footage to obscure its military presence, and disseminates this material through various media channels, including social media. This strategy aims to constrain Israel's strategic options and inflict reputational damage.

Additionally, Hamas seeks to exert continuous political pressure through international institutions such as the United Nations and the European Union (EU), advocating for sanctions and legal action against Israel in international tribunals. The group also exploits Israel's commitment to minimising collateral damage and adhering to international law, using these principles as strategic vulnerabilities. By embedding military operations within civilian areas, Hamas forces the IDF to either limit its actions or face accusations of violating international law.

Furthermore, Hamas actively gathers evidence, often with the assistance of affiliated organisations, to substantiate claims of IDF war crimes. The current IDF response, as well as violations of international humanitarian law by Israel, are analysed in the chapter discussing the instrumentalisation of terror.⁷³

Perspective, Riga: NATO Strategic Communications Centre of Excellence, p. 151. Available at: <https://www.stratcomcoe.org/publications/hybrid-threats/> [accessed 3 May 2025].

69 Mosquera, A., and Bachmann, S. (2016), *op. cit.*, p. 76.

70 Aday, S. et al (2019) *op. cit.*, p. 149.

71 Rubinstein, A., and Roznai, Y. (2011) *Human Shields in Modern Armed Conflicts: The Need for a Proportionate Proportionality*, Stanford Law & Policy Review, 22, p. 98.

72 Aday, S. et al (2019) *op. cit.*, p. 158.

73 Aday, S. et al (2019) *op. cit.*, p. 158.

In the case of ISIS, a number of similarities occurred regarding the use of lawfare, yet compared to Hamas, a different pattern emerged. The organisation openly rejects adherence to any legal framework. As Prof. Naz Modirzadeh has noted, “ISIS is explicitly saying we will never apply international law”.⁷⁴ Instead, ISIS employs misleading ideological reasoning, drawing upon Third World Approaches to International Law (TWAAIL) to construct a narrative that positions its actions not only as a rejection of the Sykes-Picot Agreement but as a broader defiance of the entire international legal order, including fundamental rights such as the right to life.⁷⁵

These observations lead to a critical conclusion: the same entity can simultaneously exploit legal mechanisms through lawfare, for example, by using human shields, while also placing itself outside the bounds of legal accountability by engaging in terrorism and systematic violations of international law.

From an international legal perspective, a particularly pressing concern is the use of human shields by states. Over the past three decades, multiple instances of human shielding have been documented, including Saddam Hussein’s actions during the First Gulf War in Iraq,⁷⁶ as well as cases observed during the Bosnian War and the conflict in Kosovo.⁷⁷

The second decade of the 21st century saw further egregious uses of human shields, particularly in Syria, where Bashar al-Assad’s government forces repeatedly employed this tactic in Idlib,⁷⁸ including using children.⁷⁹

Of particular concern is the use of human shields by members of the P5 during the ongoing aggression in Ukraine. While reaching definitive legal conclusions on specific cases remains premature, the extensive evidence documenting these incidents warrants thorough and impartial international scrutiny. Numerous credible sources confirm the systematic use of human shields in such locations, among others, Ivankiv and Obukhovychi (Kyiv Oblast⁸⁰), as well as Yahidne (Donetsk Oblast).⁸¹ Even more disturbingly, Russian

74 Modirzadeh, N., and March, A. (2016) “*ISIS and the challenge to international law*”, University of Melbourne. Available at: <https://law.unimelb.edu.au/alumni/mls-news/issue-16-october-2016/isis-and-the-challenge-to-international-law> [Accessed 3 May 2025].

75 Miller, J. (2016) “*Why Islamic state militants care so much about Sykes-Picot*”. Available at: <https://www.rferl.org/a/why-islamic-state-cares-so-much-about-sykes-picot/27738467.html> [Accessed 3 May 2025].

76 Rubinstein, A., and Roznai, Y. (2011) *op. cit.*, p. 96.

77 Rubinstein, A., and Roznai, Y. (2011) *op. cit.*, p. 97.

78 “HRW Report Syria: local residents used as human shields”. Available at: <https://www.hrw.org/news/2012/03/25/syria-local-residents-used-human-shields> [Accessed 3 May 2025].

79 France24 (2012), “*Syrian children used as shields, UN report says*”. Available at: <https://www.france24.com/en/20120612-syria-government-forces-torture-execute-use-children-uman-shields-un-report-says> [Accessed 3 May 2025].

80 BBC (2022), “*Ukraine War: ‘Ussian soldiers held us as human shields*”. Available at: <https://www.bbc.com/news/world-europe-61020565> [Accessed 3 May 2025].

81 PBS (2022), “*Hundreds of Ukrainian villagers were held as human shields for weeks, as evidence of possible Russian war crimes mount*”. Available at: <https://www.pbs.org/newshour/show>

forces have reportedly used children as shields for their tanks in Novyi Bykiv (Chernihiv Oblast).⁸² Similar incidents have been documented in Sumy, Kyiv, Chernihiv, and Zaporizhzhia oblasts, as reported by Lyudmila Denisova, Ukraine's Human Rights Ombudsman, in a statement to *The Guardian*.⁸³

If the allegations of human shielding by Russian forces are accurate – as overwhelming evidence suggests – then Russia has unequivocally violated IHL. Those responsible for such actions are liable to prosecution as war criminals.⁸⁴ Furthermore, these acts constitute a flagrant breach of the principle of good faith in international law and contradict established state practices.

The widespread and systematic nature of these violations strongly suggests that human shielding is not an isolated incident but rather a deliberate and institutionalised strategy sanctioned at the highest levels of the Russian military command. As such, these actions amount to a clear and intentional breach of IHL. Consequently, they satisfy three of Beck's lawfare criteria and exhibit additional characteristics of hybrid warfare.

As in the case of perfidy, the use of human shields represents a deeply concerning aspect of coordinated hybrid warfare operations. The systematic violation of fundamental legal norms may lead to intended unlawful collateral damages, including those involving children, and can be strategically exploited for propaganda purposes, allowing the perpetrating party to manipulate the narrative and falsely accuse the victimised side of targeting civilians or humanitarian operations.⁸⁵

The third approach to lawfare – a hybrid threat perspective

The third approach to lawfare derives from a strictly militarised perspective beyond the confines of armed conflict. This approach leans toward understanding lawfare as a form of acts violating good faith in international law and instrumentalisation, which may operate in the spectrum up to violation *ius ad bellum*, and, therefore, to hybrid threats.

From a definitional point of view, let us refer again to Bachmann, because, as previously recognised, he supports the military aspect of lawfare.⁸⁶ However, he also puts lawfare outside a purely military context, claiming that it can be

/investigators-find-more-evidence-of-russian-war-crimes-as-the-west-pledges-aid-to-ukraine [Accessed 3 May 2025].

82 Boffey, D. (2022), "Ukrainian children used as 'human shields' near Kyiv, say witness reports", *The Guardian*. Available at: <https://www.theguardian.com/world/2022/apr/02/ukrainian-children-used-as-human-shields-near-kyiv-say-witness-reports> [Accessed 3 May 2025].

83 Boffey, D. (2022), *op. cit.*,

84 Schmitt, M.N. (11 April 2022), "Ukraine symposium – weaponizing civilians: human shields in Ukraine", Lieber Institute. Available at: <https://lieber.westpoint.edu/weaponizing-civilians-human-shields-ukraine/> [Accessed 3 May 2025].

85 Aday, S. et al (2019) *op. cit.*, p. 149.

86 Mosquera A., and Bachmann, S. (2016) *op. cit.*, p. 72–73.

used in the context of hybrid warfare and/or influence operations.⁸⁷ These 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 and they are executed synergically in the environment”.⁸⁸ A similar perspective is offered by Tropin, who defines lawfare as the strategic misuse of legal instruments to delegitimise the actions of an opponent or to legitimise one’s own conduct, thereby securing advantages in military operations or within broader spheres of social interaction. Tropin situates lawfare both within the context of armed conflict – where IHL is applicable – and beyond it, extending the concept to the general use of law as a tool in international relations.⁸⁹ He concludes that it is unacceptable to limit lawfare to IHL/AC only, which concurs with the author’s view.

Similar approaches revolve around the Chinese “Three Lawfare” concept known as *falu zhan*, according to which, lawfare is a “struggle for legal superiority by mobilising domestic and international laws to gain the political initiative and military victory”.⁹⁰ It often occurs in grey areas of *ius ad bellum*. Orde Kittrie lists a number of Chinese manuals that focus on such approaches. For example, in 2024, the People’s Liberation Army (PLA) published “Analysis of 100 Cases of Legal Warfare”, coauthored by Cong Wensheng. This manual discusses “controlling the enemy through the law, or using the law to constrain the enemy”. Another of Kittrie’s findings emerges from “The Science of Military Strategy”, noting that “war is not only a military struggle, but also a comprehensive contest on fronts of politics, economy, diplomacy, and law”.⁹¹ The importance of lawfare reached such a magnitude that the People’s Republic of China adopted “legal warfare” as a major component of its strategic doctrine and is currently waging it in the maritime, aviation, space, cyber, and other domains. The examples of scholarly discussion of this phenomenon are provided in the footnote.⁹²

This approach conceptualises lawfare as an act that contravenes the existing international legal obligations binding on states and, to a lesser extent, on non-state actors. It should be understood as the antithesis of good faith

87 Mosquera A., & Bachmann, S. (2016) *op.cit.*, p. 73.

88 Mosquera A., and Bachmann, S. (2016) *op.cit.*, p. 73.

89 Tropin, Z. (2021) *Lawfare as Part of Hybrid Wars: The Experience of Ukraine in Conflict with Russian Federation*, Security and Defence Quarterly, Volume 33, No. 1, p. 17.

90 Lee, S. (2014) *op. cit.*, p. 203.

91 Kittrie, O. (2016), *Lawfare: Law as a Weapon of War*, 1st edn, Oxford: Oxford University Press, p. 162.

92 *Vide* Kittrie, O. (2016), *Ibidem*, p. 162.; Kraska, J., and Wilson, B. (2009), “China wages maritime ‘Lawfare’, foreign policy”. Available at: <http://foreignpolicy.com/2009/03/12/china-wages-maritime-lawfare/> [Accessed 3 May 2025]; Pedrozo, R. (2012), *The Building of China’s Great Wall at Sea*, Ocean & Coastal L.J., Volume 17, p. 253; Kline, R.T. (2013) *The Pen and the Sword: The People’s Republic of China’s Effort to Redefine the Exclusive Economic Zone Through Maritime Lawfare and Military Enforcement*, Mil. L. Rev., Volume 216, p. 122.

legal practice, involving the intentional instrumentalisation of actions aimed at undermining established legal norms, particularly those operating below the threshold of the formal application of the IHL. Due to the complexity and depth of the legal analysis involved, this subchapter limits the number of case studies presented. However, it remains essential to grasp the nuanced characteristics of the operation in question, which, despite its intricacies, clearly falls within the broader category of lawfare.

The instrumentalisation of migration – the Belarus case study

A prime example of lawfare outside the scope of armed conflict is the instrumentalisation of migration. This practice has been observed in multiple instances, but the most prolonged and organised operation – utilising various hybrid methods, including disinformation – was orchestrated by Belarus in Central and Eastern Europe (CEE).

This operation, which began in 2021, revolved around hybrid threats with the potential to escalate into hybrid warfare and has presented numerous legal challenges. While the exact figures are difficult to determine, *Politico* reported that more than 4,000 illegal crossings from Belarus were registered in Lithuania in 2021 alone – an alarming increase from just 81 in 2020.⁹³ By the summer of 2021, various sources estimated that the number of migrants could reach 10,000.⁹⁴ A similar surge was observed at Poland’s border, where illegal crossings rose to around 40,000 per year, resulting in injuries to approximately 100 law enforcement officers and soldiers in 2024 alone.⁹⁵ Belarusian authorities played a direct role in facilitating these migration flows. They issued visas, arranged flights to Minsk, and then transported individuals to the borders of Lithuania, Poland, and Estonia. The European Commission accused Belarusian leader Alexander Lukashenko of luring migrants with false promises of easy EU entry as part of an “inhuman, gangster-style approach”. As the Commission spokesman, Peter Stano, put it, “Upon arrival, they are being pushed to the border and forced to make an illegal entry into the European Union”.⁹⁶ Belarusian border guards and intelligence services, including the KGB, were implicated in facilitating these illegal crossings, sometimes using force against migrants with

93 Euronews (2021) “‘Absolutely unacceptable’: Belarus accused of using migrants in its fight with EU”. Available at: <https://www.euronews.com/2021/07/12/absolutely-unacceptable-belarus-accused-of-using-migrants-in-its-fight-with-eu> [Accessed 3 May 2025].

94 von der Burchard, H. (2021) “Belarus migrant arrivals could reach 10,000 in weeks, warns Lithuanian minister”. *Politico*, 4 August. Available at: <https://www.politico.eu/article/belarus-migrant-arrivals-growing-lithuania-minister-warns/> [Accessed 3 May 2025].

95 Gazeta Prawna (2024), “Nearly a hundred officers injured at the border with Belarus in 2024”. Available at: <https://www.gazetaprawna.pl/wiadomosci/kraj/artykuly/9643639> [Accessed 4 April 2025].

96 The Guardian (2025), “Asylum seekers being forcibly expelled at EU borders, says top rights lawyer”. Available at: <https://www.theguardian.com/uk-news/2025/mar/03/asylum-seekers-being-forcibly-expelled-at-eu-borders-says-top-rights-lawyer> [Accessed 19 March 2025].

tear gas and batons.⁹⁷ Investigations revealed that Belarusian state-controlled travel agencies promoted and organised these migration routes, misleading migrants into believing they would gain easy access to the EU. Upon arrival, they were directed toward border crossings and, in some cases, provided with tools to breach barriers. Those who failed to cross were often forced to remain at the border, where reports surfaced of Belarusian authorities assaulting those unable to enter the EU successfully.⁹⁸ Beyond direct facilitation, this operation was reinforced by a prolonged disinformation campaign aimed at destabilising the affected states and creating internal divisions within Lithuania, Poland, and the EU over the issue of migration.⁹⁹ Influence operations are a core element of both hybrid threats and hybrid warfare, and the Russia-Belarus campaign followed a dual approach: on the one hand, portraying migrants as victims, and on the other, fostering a negative perception of them.¹⁰⁰ For instance, in Poland, 17% of Russian-backed content focused on cultivating anti-immigration sentiment.¹⁰¹ This aligns with Russia's established *modus operandi*. According to NATO StratCom COE, similar tactics were employed in Nordic countries, where dominant Russian narratives depicted migrants as

97 European Commission (2021), “Statement by Commissioner Ylva Johansson on Belarus’ hybrid attack on the EU’s borders”. Available at: https://ec.europa.eu/commission/press-corner/detail/en/statement_21_5867 [Accessed 19 March 2025].

98 European Commission (2021) “Statement by Commissioner Ylva Johansson on Belarus’ hybrid attack on the EU’s borders”, European Commission, 9 November. Available at: https://ec.europa.eu/commission/presscorner/detail/en/statement_21_5867 [Accessed 3 May 2025].

99 Wóycicki, K., Kowalska, M., and Lelonek, A. (2015), “Russian disinformation war against Poland”, Fundacja im. Kazimierza Pułaskiego, p. 9. Available at: <https://pulaski.pl/wp-content/uploads/2015/02/RAPORT-Rosyjska-wojna-dezinformacyjna-przeciwko-Polsce.pdf> [Accessed 4 April 2025].

100 Sputnik News (2025) “Uchodźcy [Refugees]”, *Sputnik Polska*, 25 April. Available at: <https://pl.sputniknews.com/search/?query=uchod%C5%B4cy> [Accessed 3 May 2024]. OSCE Academy in Bishkek (2018) “Policy Brief No. 42”. Available at: http://www.osce-academy.net/upload/file/42_BRIEF_WEB.PDF [Accessed 3 May 2025]; Uniwersytet Marii Curie-Skłodowskiej (2020) “*Biuletyn Politologiczny [Political Science Bulletin]*”. Available at: <https://phavi.umcs.pl/at/attachments/2020/0908/080841-biuletyn-politologia-vissn.pdf> [Accessed 3 May 2025]; EUvsDisinfo (2020) “The pro-Kremlin narrative about Migrants”, EUvsDisinfo, 10 November. Available at: <https://euvsdisinfo.eu/the-pro-kremlin-narrative-about-migrants/> [Accessed 3 May 2025]; Fakenews.pl (2023) “Nie, Imigranci Nie Biją Ani Nie Podduszają Dzieci Nad Dymem [No, immigrants do not beat or suffocate children over smoke]”, 13 March. Available at: <https://fakenews.pl/spoleczenstwo/nie-imigranci-nie-bija-ani-nie-podduszaja-dzieci-nad-dymem/> [Accessed 3 May 2025].

101 Infoops Foundation (2025) “A short review of the infosphere-based information and psychological operations targeting relations between Poland and Ukraine”. Available at: <https://infoops.pl/a-short-review-of-the-infosphere-based-information-and-psychological-operations-targeting-relations-between-poland-and-ukraine/> [Accessed 3 May 2025].

destabilising factors, often emphasising themes such as “Radical Islam as a threat” and “Islamic culture as a source of instability”.¹⁰²

The measures implemented by the Belarusian authorities have been extensively criticised as constituting hybrid threats lawfare aimed at destabilising the EU. The intentional manipulation of migration patterns precipitated a humanitarian crisis along the EU’s eastern frontiers, characterised by pervasive reports of violence and inhumane treatment of migrants. Significantly, this exploitation of migration coincided with the Russian military escalation in Belarus. This buildup was a precursor to the 2022 invasion of Ukraine, exemplifying the spill-over effects and coordinated efforts used in hybrid threats and warfare.¹⁰³

Difficulties with the legal framework of the instrumentalisation of migration

As discussed in Chapter 2, the findings indicate that hybrid threats operate below the threshold of armed conflict, spanning a spectrum that extends up to the use of force. Therefore, it was necessary to determine whether the instrumentalisation of migration reaches the level of violating the prohibition on the use of force and, consequently, constitutes an act of aggression.

The Rome Statute of the International Criminal Court helps to define the crime of aggression by the article 8 *bis*:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

102 “Russia’s footprint in the Nordic-Baltic information environment”. Available at: <https://stratcomcoe.org/russias-footprint-nordic-baltic-information-environment> [Accessed 3 May 2025]; Juurvee, I., Carrasco Rodriguez, B., Cepurītis, M., Keišs, A., and Marnot, D. (2019/2020) “Russia’s footprint in the Nordic-Baltic information environment 2019/2020”, p. 37. Available at: <https://stratcomcoe.org/publications/russias-footprint-in-the-nordic-baltic-information-environment-20192020/24> [Accessed 3 May 2025].

103 Yeryoma, M. (2025) “Belarus weekly: Belarus to host over 13,000 Russian troops for Zapad-2025 joint military drills”, Kyiv Independent. Available at: <https://kyivindependent.com/belarus-week-belarus-to-host-over-13-000-russian-troops-for-zapad-2025-joint-military-drills/> [Accessed 3 May 2025].

- (e) The use of armed forces of one state which are within the territory of another State with the agreement of the receiving state, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other state for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.¹⁰⁴

This list is complemented by a comprehensive analysis of the acts of aggression provided by Patrycja Grzebyk in her monograph on the crime of aggression.¹⁰⁵

In the circumstances mentioned above, pushing migrants does not involve *inter alia* armed forces, invading a neighbouring country or committing equivalent acts.¹⁰⁶ The interpretation of the final point, (g) “sending on behalf of a State armed bands, groups or irregular to carry out acts of armed forces”, can be problematic as migrants sent to CEE states were, according to all sources, unarmed and did not constitute any organised group. They were a rather loose group of persons originating from various Middle East countries without any military capacity or capability to achieve acts equating to the accomplishment of an armed attack in Lithuania, Estonia, or Poland. Neither were they deployed to carry out armed actions,¹⁰⁷ which would meet the criteria of gravity similar to other listed acts, such as invasion or bombardment. At the same time, the potential threat of Belarus modifying its *modus operandi* could not be ruled out. The same channels used for smuggling migrants could

104 United Nations (1998) *Rome Statute of the International Criminal Court*, 2187 UNTS 90, Article 8 *bis*. Available at: <https://treaties.un.org/doc/source/docs/RC-Res.6-ENG.pdf> [Accessed 3 May 2025].

105 Grzebyk, P. (2013) *Criminal Responsibility for the Crime of Aggression*, London-New York: Routledge, p. 62–69.

106 This situation has the potential to escalate into border incidents as a result of the mere act of Belarusian military forces crossing the border. According to media sources, units of the Belarusian Armed Forces recently crossed the Lithuanian border, reportedly pushing migrants across the frontier. After a few minutes, these forces returned to Belarus. For further details on this incident, see the relevant reports. TVN24 (2025) “*Belarusian soldiers illegally crossing border with Lithuania and pushing migrants to Belarus / Białoruscy żołnierze nielegalnie przekroczyli granicę z Litwą*”. Wepchnęli 35 migrantów na terytorium Republiki. Available at: <https://tvn24.pl/swiat/litwa-straz-graniczna-bialoruscy-zolnierze-nielegalnie-przekroczyli-granice-wepchneli-35-migrantow-5196413> [Accessed 3 May 2025].

107 Cahin, G. (2010) “*The responsibility of other entities: armed bands and criminal groups*”, in Crawford, J. et al (eds), *The Law of International Responsibility*, Oxford Commentaries on International Law. Available at: <https://doi.org/10.1093/law/9780199296972.003.0026> [Accessed 3 May 2025].

also be used to send armed groups, fulfilling the conditions of aggression. The rising number of Polish servicemen who have been killed or wounded suggests that this is not a merely theoretical concern.¹⁰⁸

Instrumentalisation refugee law and human rights state obligation

Lawfare sees the exploitation of refugee and human rights law applicable in the victim state, which states are obliged to follow in good faith, and leads to the violation of individuals' rights. The major body of law protecting people seeking refuge starts with the Geneva Convention of 1951, along with the New York Additional Protocols of 1967, which regulate the status of refugees. Currently, most states are bound by the Convention,¹⁰⁹ which has resulted in a worldwide consensus that persons

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it¹¹⁰

can seek refuge in a neighbouring country or in any other country party to the Convention. Additionally, Poland is, as are most of the European countries, bound by the EU law,¹¹¹ as well as by the European Convention of Human Rights (ECHR).

ECHR provides that

The Court decided, without prejudice to any duties that Belarus may have under international law regarding the situation of the applicants, to

108 Gazeta Prawna (2025) “*Prawie stu mundurowych rannych na granicy z Białorusią w 2024 roku [Nearly a hundred officers injured at the Border with Belarus in 2024]*”, 20 February. Available at: <https://www.gazetaprawna.pl/wiadomosci/kraj/artykuly/9643639,prawie-stu-mundurowych-rannych-na-granicy-z-bialorusia-w-2024-roku.html> [Accessed 3 May 2025].

109 United Nations General Assembly (1951) “*Convention relating to the Status of Refugees*”. UNTS, 189, p. 137–221. Adopted on 28 July 1951. United Nations, Treaty Series, Volume 189, p. 137, 28 July 1951. Available at: <https://www.unhcr.org/sites/default/files/legacy-pdf/3b73b0d63.pdf> [Accessed 3 May 2025].

110 Convention Relating to the Status of Refugees, *op.cit.*,

111 European Parliament and Council (2013) “*Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person*”. Official Journal of the European Union, L180, 29.6.2013. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013R0604> [Accessed 3 May 2025].

apply Rule 39 and request that the Polish and Latvian authorities provide all the applicants with food, water, clothing, adequate medical care and, if possible, temporary shelter. It clarified, at the same time, that this measure should not be understood as requiring that Poland or Latvia let the applicants enter their territories. The Court also noted that this decision was taken in accordance with the fact that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens.¹¹²

Similar reasoning was presented by the European Commission. As Adalbert Jahnz, EC spokesman for home affairs, stated, “We (the Commission) do not finance fences, but our funding supports integrated border management solutions that ensure that irregular border crossings do not go undetected and are then linked to effective and fast migration management and asylum systems”.¹¹³ His statement concurred with the statement of the EC spokesman Christian Wigand, who said that the “EC firmly rejects attempts to instrumentalise people for political purposes. In addition, orderly, robust border management and full respect for the fundamental rights of migrants are needed as the only effective and humane way of managing migration”.¹¹⁴ The constant Belarusian pressure resulted in a more robust stance from the EU bloc. The EC authorised member states, including Poland, to temporarily suspend certain asylum rights under specific circumstances. This measure is intended to address situations where migrants are perceived to be used as tools for political pressure, particularly by Belarus and Russia. The EC stated that such suspensions should be “exceptional, temporary, and proportionate”.¹¹⁵

To conclude, by inducing migration movement, hybrid aggressor states undermine both the legal regimes of international protection available to refugees, stretching the system and rendering it ineffective. Consequently, in the long run, the protection of refugees may be endangered and thus constitute acts *contra legem* in terms of refugee protection.

112 ECHR 244 (2021), 25 August 2021. “*The European Court of Human Rights indicated interim measures in the cases Amiri and Others v. Poland (application no. 42120/21) and Ahmed and Others v. Latvia*”, p. 1. Available at: <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7100942-9612632&filename=Interim%20measures%20Poland-Latvia-Belarus%20border.pdf> [Accessed 3 May 2025].

113 “*Brussels will not fund Lithuania’s border fence with Belarus*” Available at: <https://www.lrt.lt/en/news-in-english/19/1458242/brussels-will-not-fund-lithuania-s-border-fence-with-belarus> [Accessed 3 May 2025].

114 Harper, J. (2021) “*EC says it won’t let illegal migration into EU*”, The First News (Warsaw, 8 November 2021). Available at: <https://www.thefirstnews.com/article/ec-says-it-wont-let-illegal-migration-into-eu-24239> [Accessed 3 May 2025].

115 Associated Press (2024) “*EU proposes temporary asylum measures to back Poland, Latvia, Lithuania*”, AP News (11 December 2024). Available at: <https://apnews.com/article/76afdf972cc6fe12fc5bba6447e60c8c> [Accessed 3 May 2025].

States' responsibility for the instrumentalisation of migration – the question of attribution

Since it has been established that the instrumentalisation of migration does not meet the legal threshold required to consider it an act of aggression under international law, attention must shift to other dimensions of hybridity that such actions may represent.¹¹⁶ In particular, this raises the critical question of attribution: to what extent can such practices be ascribed to the deliberate conduct of the Belarusian state? Attribution in the cases of hybrid threats – especially those involving non-kinetic, nonmilitary tactics, such as the manipulation of migratory flows – remains a complex and contested domain revolving around the concept of plausible deniability.

As the International Court of Justice (ICJ) stated in the Bosnian Genocide decision: “the fundamental principle governing the law of international responsibility is that a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf”.¹¹⁷ Belarus fulfils the requirement of attribution in various ways.¹¹⁸ The Lukashenko regime tightly controls the state apparatus. Numerous flights to Minsk have been observed carrying individuals holding official state-issued tourist visas. Moreover, the government’s involvement in transporting migrants to the borders with Poland, Latvia, and Lithuania is well-documented. Furthermore, numerous videos depict the direct engagement of state apparatus in facilitating the migration process. Therefore, attributing the discussed activity to the Belarusian state is beyond doubt. It is clear that the conduct of organs of a State of Belarus resonates with Article 4 of ARSIWA, which provides

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.¹¹⁹

116 Kleczkowska, A. (2021) “What does the ‘hybrid attack’ carried out by Belarus against the EU borders mean in reality? An international law perspective”. EJIL: Talk!, 13 December. Available at: <https://www.ejiltalk.org/what-does-the-hybrid-attack-carried-out-by-belarus-against-the-eu-borders-mean-in-reality-an-international-law-perspective/> [Accessed 20 May 2025].

117 “Application of the convention on the prevention and punishment of the crime of genocide” (Bosnia and Herzegovina v. Serbia and Montenegro), [2007] ICJ Rep 43 [Bosnian Genocide Case], at para. 406.

118 For example, the state’s own airline is used to transport persons, migrants are granted state documents, namely tourist visas, the state officials escort them to the border, etc.

119 United Nations (2001) “Draft articles on responsibility of states for internationally wrongful acts, with commentaries”, in *Yearbook of the International Law Commission, 2001, Vol. II, Part Two*, New York: United Nations. Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [Accessed 3 May 2025].

To conclude, the instrumentalisation of migration is attributable to Belarus, as its actions meet the criteria set out in the ICJ's judgement and Article 8 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).¹²⁰

The instrumentalisation of migration as a breach of the state's international obligations

The foundational principles of international law emphasise the importance of peaceful coexistence, mutual respect, and cooperation among states. In this context, Article 2(2) of the United Nations Charter affirms that all Members "shall fulfil in good faith the obligations assumed by them in accordance with the present Charter", thereby ensuring that every state enjoys the rights and benefits of membership. This principle of good faith underpins the legal and moral obligations of states within the international system. The UN Charter was further elaborated upon by the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations* (UN General Assembly Resolution 2625). In its preamble, Resolution 2625 recalls, *inter alia*, that "the peoples of the United Nations are determined to practice tolerance and live together in peace with one another as good neighbours". The Declaration articulates core principles of friendly relations and cooperation, which may be summarised as follows: *inter alia*, that "(...) the peoples of the United Nations are determined to practice tolerance and live together in peace with one another as good neighbours (...)" It states, as follows :

(...)

- 2) The duty to settle international disputes by peaceful means in such a manner that
- 6) The duty to respect the principle of sovereign equality of States; and
- 7) The duty to fulfil in good faith the obligations assumed by it in accordance with the Charter.¹²¹

The forcible pushing of migrants intentionally collected in distant lands by the state of Belarus specifically violates principles 6, 7, and 2. In the Corfu Channel case, the ICJ stated that it is "every state's obligation not to knowingly allow its territory to be used contrary to the rights of others".¹²² Such

120 Article 8, ARSIWA. *Ibidem*.

121 General Assembly Resolution 2625 41 (XXV) adopted by acclamation in 1970, entitled the Declaration of the Principles of International Law concerning Friendly Relations and Cooperation among States under the Charter of the United Nations.

122 *International Court of Justice (1949) Corfu Channel Case* (United Kingdom v. Albania), Judgment of 9 April 1949, *ICJ Reports* 1949, p. 4, 22. Available at: <https://www.icj-cij.org/en/case/1/judgments> [Accessed 3 May 2025].

acts result in responsibility for any actions producing injury committed by the respondent State. The actions of the Belarusian state appear to be deliberately orchestrated to create pressure on neighbouring countries by encouraging or facilitating the movement of migrants toward their borders. As a result, these neighbouring countries are forced to bear the significant costs associated with processing asylum applications and providing housing and other support for the migrants.

This situation benefits Belarus in multiple ways. First, it imposes financial and administrative burdens on other states, thereby weakening their internal systems and creating political tensions. Second, and more critically, Belarus is reportedly profiting from this process – using vulnerable migrants as a means of revenue. Many reports suggest that the Belarusian government either directly or indirectly profits through visa fees, travel arrangements, or facilitation services provided to migrants under the guise of legal entry into Europe. In essence, these individuals are instrumentalised for political and economic gain.¹²³

Thus, while the neighbouring countries deal with the humanitarian and financial consequences, Belarus reaps both strategic and economic benefits from a crisis it has played a role in engineering.

Additionally, Poland and Belarus have signed a number of documents regulating their mutual relationships. Some general observance lies in Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969, which says that “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”.¹²⁴ The current situation leads to the violation especially of the *Treaty on Good Neighbourhood and Friendly Cooperation*.¹²⁵ Article 1 invokes the principle of sovereign equality, as well as the inviolability of borders, territorial integrity, the peaceful resolution of disputes and non-interference in internal affairs.¹²⁶ Although the treaty does not introduce a mechanism for resolving disputes, Article 6 of the treaty stipulates that, “The two states

123 Noryskiewicz, A. (2021) “*Migrants and refugees caught up in Belarus-EU ‘hybrid warfare’ are freezing to death in no man’s land*”, *CBS News*, 8 October. Available at: <https://www.cbsnews.com/news/poland-belarus-eu-border-migrants-refugees-caught-in-middle-and-dying/> [Accessed 3 May 2025].

124 United Nations, 1969. *Vienna Convention on the Law of Treaties*. UNTS, 1155, p. 331–512. Adopted on 23 May 1969. United Nations, Treaty Series, Vol. 1155, p. 331, 23 May 1969. Available at: <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf> [Accessed 20 May 2025].

125 *Traktat między Rzeczpospolitą Polską a Republiką Białoruś o dobrym sąsiedztwie i przyjaznej współpracy*, podpisany w Warszawie dnia 23 czerwca 1992 r. Dz.U. 1993 nr 118 poz. 527 / *Treaty between the Republic of Poland and the Republic of Belarus on Good Neighbourhood and Friendly Cooperation*, signed in Warsaw on 23 June 1992, OJ 1993 No. 118, item 527.

126 Sucharitkul, S. (1996) “*The principles of good-neighbourliness in international law*”, Publications, Paper 559. Available at: <http://digitalcommons.law.ggu.edu/pubs/559> [Accessed 3 May 2025].

declared their willingness to resolve any disputes in accordance with the UN Charter and documents of the Organisation for Security and Cooperation in Europe (OSCE) (Article 6).¹²⁷

Application of the Trail Smelter Principle – the notion of harm

Sending migrants through the border against the will of the host state resembles the Trail Smelter Case. In the 1930s, American farmers' crops were affected by the noxious emissions of their livestock from the Canadian Trail smelter.¹²⁸ The situation led to the issuing decision that clarified the notion of interstate relations:

no State has the right to use or permit the use of its territory in such a manner as to cause injury [in this case] by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.¹²⁹

The Trail Smelter Tribunal required a clear demonstration of harm.¹³⁰ Such alleged harms can be measured based on data provided by the governmental institutions of the affected states. However, the average cost of caring for refugees and asylum-seekers amounted to \$10,000 per person per year,¹³¹ meaning it may have cost Poland as much as \$100,000,000.¹³² Not to mention the erection of a security barrier, the project included a 5.5-metre-high steel wall extending approximately 186 kilometers, equipped with surveillance systems such as motion detectors and cameras. The total cost of this initiative

127 Sucharitkul, S. (1996), *op.cit.* 559,

128 Trail Smelter Case (United States, Canada) United Nations (1951) *Reports of International Arbitral Awards, Vol. III (1905–1982)*, New York: United Nations. Available at: https://legal.un.org/riaa/cases/vol_III/1905-1982.pdf [Accessed 3 May 2025].

129 Trail Smelter Arbitral Decision, 35, *American Journal of International Law*, 684, 716 (1941). See Annex to this volume. Cited in Peavey-Joanis, J. (2006) “*A Pyrrhic victory – applying the Trail Smelter Principle to state creation of refugees*”, in Bratspies, R., and Miller, R. (eds), *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration*, Cambridge: Cambridge University Press, p. 256.

130 Peavey-Joanis, J. (2006) *Ibidem*, p. 260.

131 Martin, P. (1995) *Asylum in Europe: Numbers and Costs*, Migration News, Volume 2, No. 12, December. Available at: <https://migration.ucdavis.edu/mn/more.php?id=337> [Accessed 3 May 2025].

132 This data is hard to assess, yet is based on Notes From Poland (2025). “*Attempted crossings from Belarus fell by half in 2024 after tough Polish border measures*”. Available at: <https://notesfrompoland.com/2025/01/10/attempted-crossings-from-belarus-fell-by-half-in-2024-after-tough-polish-border-measures/> [Accessed 13 May 2025]. Ärzte ohne Grenzen. (2025). “*Trapped between borders: migrants at the Poland-Belarus frontier*”. Available at: <https://www.aerzte-ohne-renzen.de/sites/default/files/2025-02/2025-msf-poland-belarus-trapped-between-borders.pdf> [Accessed 13 May 2025]. It is estimated that around 100,000 border crossings were registered. The figure of 100 million USD is also an estimate, based on the assumption that all migrants would remain in Poland.

was estimated at €353 million (approximately \$407 million).¹³³ As such, the Trail Smelter principle provides that states are internationally responsible for harms occurring outside their borders due to activities taking place within their jurisdiction.¹³⁴ Therefore, a state that intentionally creates a migration influx should be held accountable financially for its actions and should only have a limited role in the context of refugees.

Belarus is currently conducting a hybrid operation targeting at least three EU member states – Poland, Lithuania, and Latvia – although other states may also be indirectly affected.¹³⁵ This operation involves a deliberate manipulation of international law, in a manner that contravenes the principle of good faith. However, at its current stage, the operation does not fall under the regulatory framework of the IHL and, therefore, cannot be formally classified as hybrid warfare. Instead, it constitutes an act of lawfare, situated below the threshold of armed conflict and thus best characterised as a hybrid threat. Notably, this situation carries the potential to escalate into aggression or/and an armed conflict, particularly if migrants are instrumentalised to carry out, or become involved in, acts of violence against the targeted states. The operation has been closely coordinated with broader influence campaigns aimed at spreading anti-migration sentiment across Europe. Furthermore, it coincided with the significant buildup of Russian military forces within Belarus in the months leading up to the 2022 escalation in Ukraine, suggesting a broader strategic alignment between the governments in Minsk and Moscow.¹³⁶

Passportisation

The collapse of the Soviet Union in December 1991 left approximately 25 million ethnic Russians and tens of millions of Russian-speaking individuals outside the borders of the newly independent Russian Federation. These populations, scattered across the former Soviet republics, found themselves in unfamiliar political and cultural contexts, often facing marginalisation,

133 Al Jazeera (2022) “*Poland begins work on \$400m Belarus border wall against refugees*”. Available at: <https://www.aljazeera.com/news/2022/1/25/poland-begins-work-on-400m-belarus-border-wall-against-migrants> [Accessed 20 May 2025].

134 Peavey-Joanis, J. (2006) “A Pyrrhic victory –applying the Trail Smelter Principle to state creation of refugees”, in Bratspies, R., and Miller, R. (eds), *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration*, Cambridge: Cambridge University Press, *op.cit.*, p. 265.

135 The orchestrated influx of migrants from Belarus has impacted other EU member states, such as Germany. Vide Connolly, K. (2024) “*Germany steps up controls at borders in response to irregular migration*”, *The Guardian* (10 September 2024). Available at: <https://www.theguardian.com/world/article/2024/sep/10/germany-steps-up-controls-at-borders-in-response-to-irregular-migration> [Accessed 3 May 2025].

136 Yeryoma, M. “*Belarus Weekly: Belarus to host over 13,000 Russian troops for Zapad-2025 joint military drills*”, *Kyiv Independent*. Available at: <https://kyivindependent.com/belarus-week-belarus-to-host-over-13-000-russian-troops-for-zapad-2025-joint-military-drills/> [Accessed 3 May 2025].

particularly in the Baltic states. Under increasing domestic pressure to address the plight of these communities – especially amid accusations of discrimination – the Yeltsin administration began to reorient Russian foreign policy toward its so-called “near abroad”.¹³⁷

By the mid-1990s, a new foreign and security doctrine began to crystallise under the leadership of Foreign Minister and later Prime Minister Evgenii Primakov. This doctrine asserted Russia’s status as a great power with unique responsibilities in Eurasia, rooted in both geography and historical legacy. Within this framework, the protection and cultivation of ties with ethnic Russians and Russian-speaking compatriots abroad were elevated as central pillars of national interest and tools of geopolitical influence.¹³⁸

Despite the conceptual clarity of the Primakov doctrine, Russia’s limited internal capacity in the 1990s constrained its practical application. This changed with the rise of Vladimir Putin to the presidency in 2000. As the Kremlin consolidated power and reasserted itself on the international stage, diaspora policy was deployed as an instrument of regional influence, particularly in ongoing conflicts in Georgia, Moldova, and Ukraine. Putin’s approach blended the promotion of ethnic and linguistic solidarity with a broader conception of Russian civic statehood, seeking to unify disparate groups through the historical and cultural legacy of the Russian Empire and the Soviet Union.¹³⁹

Importantly, Moscow also began to implement a policy of passportisation – the strategic distribution of Russian citizenship to populations abroad – as a means of consolidating influence in contested or strategically significant regions. This policy extended not only to ethnic Russians (*russkii*) but to a wide array of communities deemed part of Russia’s civilisational sphere, underpinning Moscow’s evolving doctrine of Eurasianism and belief in her great power status.¹⁴⁰

The tactic described above can be classified as a lawfare within the spectrum of hybrid threats. This practice has the potential to escalate to a *casus belli* and subsequent aggression, thereby exemplifying the complexities and risks associated with hybrid strategies.¹⁴¹

The Federal Law on Citizenship of the Russian Federation, enacted in 2002, facilitated the acquisition of Russian nationality by former Soviet nationals

137 Melvin, N. (2020) “*Russia’s policy of passport proliferation*”, Royal United Services Institute (1 May 2020). Available at: <https://rusi.org/explore-our-research/publications/commentary/russias-policy-passport-proliferation> [Accessed 3 May 2025].

138 Melvin, N. (2020). *Ibidem*.

139 Melvin, N. (2020). *Ibidem*.

140 Melvin, N. (2020). *Ibidem*.

141 “*How soft power works: Russian passportization and compatriot policies paved way for Crimean annexation and war in Donbas*” (2021) Atlantic Council (8 April 2021). Available at: <https://www.atlanticcouncil.org/blogs/ukrainealert/how-soft-power-works-russian-passportization-and-compatriot-policies-paved-way-for-crimean-annexation-and-war-in-donbas/> [Accessed 3 May 2025].

and “compatriots” residing abroad.¹⁴² Article 14 of the Russian Federation’s Citizenship Law provides that former Soviet citizens residing in post-Soviet republics who have remained stateless may acquire Russian citizenship through a simplified procedure. This mechanism is further supported by Article 7 of the same law, as well as Article 15 of the 1999 Federal Law on the State Policy of the Russian Federation Regarding Compatriots Living Abroad.¹⁴³ Leveraging this legislation, Moscow initiated a widespread campaign in 2002 to grant Russian citizenship to inhabitants of Abkhazia and South Ossetia, significantly increasing the proportion of local residents holding Russian passports from approximately 20% to between 80–90% by the late 2000s.¹⁴⁴ This widespread passport distribution served as a pretext for the Russian Federation’s military intervention in 2008, under the guise of protecting its newly minted “citizens”.¹⁴⁵ Similarly, by 2019, Russia had extended this policy to over 700,000 individuals in separatist-controlled areas of the Donbas region.¹⁴⁶

These regulations were underpinned by the Russian Constitution, which extends protections to citizens beyond its national borders. Article 61(2) of the Constitution of the Russian Federation guarantees Russian citizens state protection and patronage while abroad. The significance of this provision was notably emphasised in August 2008, when President Dmitry Medvedev invoked this constitutional duty during an emergency meeting of the Security Council, stating, “As President... I am obliged to protect the life and dignity of Russian citizens, wherever they might be”.¹⁴⁷ Consequently, the Kremlin justified its military intervention in Georgia by citing the need to protect Russian citizens in South Ossetia and Abkhazia, many of whom held Russian passports.¹⁴⁸

142 Hoffmann, T., Chochia, A., and Makarychev, A. (2019) *The Institution of Citizenship and Practices of Passportization in Russia’s European Neighbourhood Policies: Russia and the EU*, Volume 1, Routledge, p. 223–238.

143 Federal Law No 62-FZ of 31 May 2002 “*On citizenship of the Russian Federation*”, Articles 7, 14; Federal Law No 99-FZ of 24 May 1999 “*On the state policy of the Russian Federation regarding compatriots living abroad*”, Article 15. Available at: <https://www.refworld.org/legal/legislation/natlegbod/2002/en/18028> [Accessed 25 April 2025].

144 Melvin, N. (2020) *op.cit.*

145 Nilsson, N. (2018) “*Russian hybrid tactics in Georgia*”. Silk Road Paper. Stockholm: Institute for Security and Development Policy, p. 24. Available at: <https://www.isdp.eu/publication/russian-hybrid-tactics-georgia> [Accessed 25 April 2025].

146 Euronews (2022) “*Russia has issued 720,000 fast-track passports in separatist-held areas of eastern Ukraine*”, 17 February. Available at: <https://www.euronews.com/2022/02/17/russia-has-issued-720-000-fast-track-passports-in-separatist-held-areas-of-eastern-ukraine> [Accessed 25 April 2025].

147 Konstitutsiya Rossiyskoy Federatsii [Constitution of the Russian Federation], Article 61(2); Medvedev, D. (2008) cited in “*Transcript of meeting with Security Council Members*” (President of Russia, 8 August). Available at: <http://en.kremlin.ru/events/president/news/1043> [Accessed 25 April 2025].

148 Melvin, N. (2020) *op.cit.*

In 2020, amendments to Russian citizenship law further facilitated the acquisition of citizenship through expedited procedures for residents of neighbouring post-Soviet states. These reforms included the removal of restrictions on dual citizenship and aimed to attract millions of new claimants. As a result, analysts estimated that these changes could lead to “adding 5–10 million new Russian citizens, especially among ethnic Russians and Russian-speakers in the post-Soviet ‘near abroad’”.¹⁴⁹ Russia has deliberately constructed a domestic legal framework to justify external intervention. A key aspect of this strategy involves the expansive application of citizenship laws, enabling the creation of Russian nationals within foreign territories. Complementing this approach is the Russian domestic regulation “*On defence*”,¹⁵⁰ which authorises the deployment of troops abroad to safeguard Russian citizens.¹⁵¹ Such actions constitute a clear manifestation of lawfare.¹⁵² This *modus operandi* follows a discernible pattern: initially, Russia facilitates the expedited naturalisation of a significant number of residents in a strategically targeted region. It then promotes a narrative – often through state-controlled media – that these individuals are subject to persecution or humanitarian crises inflicted by the host state.¹⁵³ A frequent tactic includes invoking legalistic language and unsubstantiated claims, such as allegations of genocide against Russian populations in contested territories.¹⁵⁴ Subsequently, Russia asserts a legal and moral obligation to intervene in order to protect its citizens. Once *de facto* control is achieved – whether through proxy forces or direct military intervention – Moscow frequently imposes its citizenship on the remaining population, further consolidating its authority over the region.¹⁵⁵ This strategy has been observed in South Ossetia, Abkhazia, Transnistria, Crimea, and the Donbas.¹⁵⁶

149 Melvin, N. (2020) *op.cit.*

150 Federal Law No. 61-FZ of 31 May 1996 “*On defence*” (as amended) Available at: <https://www.prlib.ru/en/node/353971> Translation available at: <https://cis-legislation.com/document.fwx?rgn=1572> [Accessed 25 April 2025].

151 Melvin, N. (2020) *op.cit.*

152 Voyger, M. (2018) *Russian Lawfare – Russia’s Weaponisation Of International and Domestic Law: Implications for the Region and Policy Recommendations*, Journal on Baltic Security, Volume 4, No. 2, p. 35–42.

153 Federal Law No 62-FZ of 31 May 2002 “*On citizenship of the Russian Federation*”, Article 15. *op.cit.*

154 Burkhardt, F. (2022) “*assports as pretext: how Russia’s invasion of Ukraine could Start*”, War on the Rocks, 17 February. Available at: <https://warontherocks.com/2022/02/passports-as-pretext-how-russias-war-on-ukraine-could-start/> [Accessed 25 April 2025].

155 Melvin, N. (2020) *op.cit.*

156 Harary, E. (2024) “*In Ukraine, Russian passportization generates effective denationalization*”, *Opinio Juris*, 4 January. Available at: <https://opiniojuris.org/2024/01/04/in-ukraine-russian-passportization-generates-effective-denationalization/> [Accessed 25 April 2025].

Extraterritorial citizenship as lawfare: legal boundaries of Russia's passportisation policy

Determining whether *passportisation* constitutes a violation of international law requires an assessment across multiple legal frameworks. While states possess the sovereign right to regulate their own nationality laws, the extra-territorial application of such laws is limited by the principles of territorial sovereignty and non-intervention. According to international law, each state retains sovereignty over its territory and internal affairs, including the authority to determine its own nationals. However, Russia's unilateral naturalisation of inhabitants residing in parts of Georgia and Ukraine constitutes a breach of these principles. Such actions undermine the territorial integrity of the affected states and represent interference in matters falling within their domestic jurisdiction. This interpretation is consistent with the 1923 advisory opinion of the Permanent Court of International Justice (PCIJ) in the *Nationality Decrees Issued in Tunis and Morocco*, which affirmed that, "in the present state of international law, questions of nationality are in principle within [a State's] reserved domain".¹⁵⁷ While international law permits dual or multiple nationality, employing this practice strategically on a collective scale arguably violates the spirit – if not the letter – of the principle of nonintervention, which prohibits coercive interference in the internal affairs of another state.¹⁵⁸ The International Court of Justice, in the *Nottebohm* case (1955), held that nationality must reflect a "genuine connection" between the individual and the state conferring it.¹⁵⁹ In the context of Georgia, an EU-sponsored Independent International Fact-Finding Mission (IIFFMCG) concluded that Russia's policy of distributing passports to residents of Abkhazia and South Ossetia constituted an infringement of Georgia's sovereignty.¹⁶⁰ These findings align with research by Burkhardt, who argues that the mass naturalisation

157 *Nationality Decrees Issued in Tunis and Morocco* (Advisory Opinion) [1923] PCIJ Rep Series B No 4, 24. Discussed in Regional Bureau for Europe (RBE), *Nationality Laws of the Former Soviet Republics*, UN High Commissioner for Refugees (UNHCR), 1 July 1993. Available at: <https://www.refworld.org/legal/natlegcomp/unhcr/1993/en/39359> [Accessed 25 April 2025], <https://www.refworld.org/legal/natlegcomp/unhcr/1993/en/39359> [Accessed 03 April 2025].

158 Deutsch (2020) "Russia's "Passportisation" of the Donbas', the mass naturalisation of Ukrainians is more than a foreign policy tool", SWP Comment 2020/C 41, 3 August. Available at: <https://www.swp-berlin.org/10.18449/2020C41/> [Accessed 25 April 2025].

159 *Nottebohm Case* (Liechtenstein v. Guatemala), Second Phase, Judgment, ICJ Reports 1955, p. 4. Discussed in Regional Bureau for Europe (RBE), *Nationality Laws of the Former Soviet Republics*, UN High Commissioner for Refugees (UNHCR), 1 July 1993. Available at: <https://www.refworld.org/legal/natlegcomp/unhcr/1993/en/39359> [Accessed 25 April 2025].

160 Independent International Fact-Finding Mission on the Conflict in Georgia (IIFFMCG), Report Vol. II, September 2009, p. 171. Available at: https://www.mpil.de/files/pdf4/IIFFMCG_Volume_III.pdf [Accessed 25 April 2025].

of residents of another state for the purpose of territorial revisionism constitutes a misuse of the sovereign right to confer nationality.¹⁶¹

The threat of use of force and aggression

Under Article 2(4) of the United Nations Charter, the threat or use of force against the territorial integrity or political independence of any state is explicitly prohibited.¹⁶² While international law recognises a narrow and controversial exception for the use of force to rescue a state's nationals abroad in extreme circumstances – often framed as a form of self-defence or humanitarian intervention – such justification lacks merit in this context. In both 2008 and the period from 2014 to 2022, the individuals whom the Russian Federation claimed to protect were not facing large-scale attacks from their respective governments, except in situations precipitated by Russia's own actions. As noted earlier, prior to Russia's full-scale invasion of Ukraine in 2022, there was no credible evidence of genocide or systematic harm against Russian passport holders in the Donbas region; rather, these claims appear to have been deliberately fabricated to justify Russian aggression.¹⁶³

Moreover, even if genuine threats to nationals existed, the unilateral use of force for their protection, absent the consent of the host state, remains legally ambiguous and is generally considered impermissible under international law. Russia's invocation of the "protection of nationals" doctrine in relation to its actions in Crimea and Donbas was widely rejected as unlawful by the United Nations Secretary-General and the majority of states.¹⁶⁴ Following the annexation of Crimea in 2014, both the EU and the US declared that they would not recognise Russian passports issued to Ukrainian citizens residing in the occupied territories.¹⁶⁵ This practice of *passportisation* was subsequently employed by the Russian Federation as a *casus belli*. On 21 February 2022, the Russian government formally recognised the self-proclaimed Donetsk and Luhansk "People's Republics", simultaneously invoking the defence of Russian citizens in those regions. Merely three days later, on 24 February, Russia launched a full-scale invasion of Ukraine, citing among its objectives the protection

161 Burkhardt, F. (2022) *op.cit.*

162 United Nations (1945) *Charter of the United Nations, op.cit.*

163 Burkhardt, F. (2022) *op.cit.*

164 *Vide* United Nations General Assembly (2014) "Resolution 68/262: territorial integrity of Ukraine". Available at: https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_res_68_262.pdf [Accessed 13 May 2025]; Milanovic, M. (2014) "Russia's legal justification for Crimea is implausible", *European Journal of International Law: EJIL: Talk!*, 17 March. Available at: <https://www.ejiltalk.org/russias-legal-justification-for-crimea-is-implausible/> [Accessed 13 May 2025].

165 Poiedynok, O. (2024) "Ukraine's approach to Russian 'passportization' requires balancing national security and individual rights". Available at: <https://www.justsecurity.org/103355/ukraine-russian-passportization-security-rights/#:~:text=The%20compulsory%20acquisition%20of%20Russian,to%20which%20Ukraine%20is%20a> [Accessed 3 May 2025].

of individuals in Donbas, alongside the unfounded claim of “denazifying” Ukraine.

In effect, Russia’s prior *passportisation* of Donbas served as a legalistic pretext for an act of aggression. The United Nations General Assembly, in its March 2022 resolution, condemned the invasion as a violation of Ukraine’s sovereignty and territorial integrity.¹⁶⁶ No credible international institution accepted Russia’s justification based on the alleged protection of its citizens. Notably, in *Ukraine v. Russia* (2022), the International Court of Justice issued provisional measures against the Russian Federation, implicitly rejecting its manufactured claim of genocide as a pretext for war.¹⁶⁷

When a hybrid threat becomes a hybrid warfare method

The aforementioned legislative acts pose significant risks to international legal norms and regional stability.¹⁶⁸ They exemplify a bad-faith manipulation of legal frameworks to achieve objectives that would otherwise necessitate the use of overtly unlawful force.¹⁶⁹

In the post-annexation context, a clear convergence between hybrid warfare and hybrid threats becomes apparent. The European Court of Human Rights, in *Ukraine v. Russia (re: Crimea)* (2023), noted that compelling Crimean residents to accept Russian citizenship faced them with an “impossible choice”, thereby violating their right to respect for private and family life under Article 8 of the European Convention on Human Rights.¹⁷⁰ This practice breaches IHL, which explicitly prohibits an occupying power from coercing the population of occupied territories into pledging allegiance to them or from stripping them of their protected-person status by altering their nationality, as codified in Article 47 of the Fourth Geneva Convention.¹⁷¹ Therefore, this is another

166 United Nations General Assembly (2022) “*Resolution ES-11/1, aggression against Ukraine / Rezolucja ES-11/1, Agresja przeciwko Ukrainie*”, 2 March. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/294/24/PDF/N2229424.pdf?OpenElement> [Accessed 3 May 2025].

167 *Ukraine v. Russian Federation, Provisional Measures*, ICJ Rep 2022.

168 Peters, A. (2019) “*Passportisation: risks for international law and stability*”. MPIL Research Paper No. 2019-17. Max Planck Institute for Comparative Public Law & International Law. Available at: <https://ssrn.com/abstract=3463590> [Accessed 3 May 2025].

169 Voyger, M. (2018) *Russian Lawfare – Russia’s Weaponisation of International and Domestic Law: Implications for the Region and Policy Recommendations*, Journal on Baltic Security, Volume 4, No. 2, p. 35–42.

170 *Ukraine v. Russia (re: Crimea)* App no 20958/14 (ECtHR, 16 December 2023) para. 536. *Vide* Poiedynok, O. (2024) *op.cit.*; Poiedynok, O. (2024) *op.cit.*

171 Geneva Convention (1949) *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War* (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, Article 47.

case of the spill-over effect and the coexistence of hybrid threats with hybrid-methods of warfare.

The fourth approach to lawfare: a critique of its militarisation

A fourth conceptualisation of lawfare regards it not only as the instrumentalisation of law but also as its deliberate and strategic use to achieve political or ideological objectives. One prominent proponent of this view is Prof. Susan Tiefenbrun, who defines lawfare as “a weapon designed to destroy the enemy by using, misusing, and abusing the legal system and the media in order to raise a public outcry against that enemy”.¹⁷² Despite her use of the term “weapon” (the concept of which was rebutted above), her discussion does not imply a military application. Rather, Tiefenbrun identifies a range of lawfare techniques, including initiating lawsuits before international courts, manipulating international institutions through legal discourse to discredit opponents, and prosecuting foreign states in domestic courts for both military and civilian actions. She also includes the phenomenon of libel tourism within the scope of lawfare.¹⁷³ A similar interpretation of lawfare is offered by Kittrie, who examines Chinese military publications addressing legal strategies within warfare. The 2007 People’s Liberation Army (PLA) manual titled “Under Informatized Conditions: Legal Warfare” defines legal warfare as “activities conducted by using the law as a weapon and through measures and methods such as legal deterrence, legal attack, legal counterattack, legal restraint, legal sanctions, and legal protection”. Another relevant source cited by Kittrie is “The Science of Military Strategy”, which asserts that “war is not only a military struggle, but also a comprehensive contest on fronts of politics, economy, diplomacy, and law”. These ideas are situated within the broader doctrinal framework of “Unrestricted Warfare”, which laid the foundation for China’s evolving perception of multidimensional conflict, including legal dimensions.¹⁷⁴ This position aligns with Sangkuk Lee’s findings on the Chinese concept of the “Three Warfares”.¹⁷⁵ Parallel insights are found in the work of Jean and John Comaroff, who describe lawfare as “recourse to legal instruments, with the violence inherent in the Law, to commit acts of political coercion”.¹⁷⁶ Similarly, Siri Gloppen (2017) offers a more narrowly defined concept, describing lawfare as “the mobilisation of legal strategies that include

172 Tiefenbrun, S.W. (2010) *op.cit.*, p. 29.

173 Tiefenbrun, S.W. (2010) *op. cit.*, p. 53–57.

174 Kittrie, O. (2016) *op. cit.*, p. 162.

175 Lee, S. (2014) *op. cit.*, p. 203.

176 Comaroff, J., and Comaroff, J. (2009) *Law and Disorder in Postcolony*, Social Anthropology/Anthropologie Sociale, Volume 15, p. 144.

some form of litigation, with the motive of social transformation beyond victory via an individual judicial process”.¹⁷⁷

Despite the use of militarised terminology, these understandings of lawfare are unrelated to the law of armed conflict or *ius ad bellum*. The ambiguity surrounding this final understanding of lawfare is perhaps best illustrated by case studies presented by Michael A. Newton and Cristiano Zanin Martins, as well as Pedro Estevam Serrano and Cristiano Zanin Valim in *Lawfare: Waging War through Law*. The authors analyse diverse instances of lawfare, including the politically motivated prosecution of US Senator Ted Stevens,¹⁷⁸ the legal actions against Brazilian President Luiz Inácio Lula da Silva,¹⁷⁹ and corporate legal warfare exemplified by the so-called Siemens Case.¹⁸⁰ It is beyond dispute that litigation is frequently employed – and occasionally misused – as a strategic tool. One particularly concerning manifestation of this trend is the emergence of SLAPPs (Strategic Lawsuits Against Public Participation), which are designed not necessarily to succeed on legal grounds but rather to censor, intimidate, or silence critics.¹⁸¹ These lawsuits operate by burdening defendants – often journalists, activists, NGOs, or concerned citizens – with overwhelming legal costs and procedural hurdles, thereby deterring them from continuing their public engagement. The primary goal of SLAPPs is not legal victory but the suppression of dissent and curtailment of democratic discourse, particularly in contexts involving political accountability or corporate misconduct. In response, several jurisdictions have adopted anti-SLAPP legislation,¹⁸²

177 Gloppen, S. (2017) *Conceptualising Lawfare: Legal Mobilisation and the Search for Accountability in the Global South*, *Third World Quarterly*, Volume 38, No. 3, p. 528–544.

178 Senator Ted Stevens was accused of receiving undeclared gifts and home renovations. The DOJ filed charges shortly before a grand jury decision and held the trial in Washington, DC, despite the case being centred in Alaska. The prosecution adopted an aggressive approach, leading to Stevens’ conviction just before the 2008 elections. Later, an FBI agent revealed that exculpatory evidence had been withheld, violating the Brady Rules. The Attorney General dismissed the case, and Stevens was acquitted in 2009. An investigation confirmed prosecutorial misconduct, demonstrating how legal processes were strategically used to target a political figure and sway electoral outcomes, amplified by media influence. Martins, C., Martins, V., and Valim, R. (2021) *Lawfare: Waging War through Law*, Routledge. Available at: <https://doi.org/10.4324/9781003158257> [Accessed 3 May 2025].

179 This case was controversially assigned to the 13th Federal Court in Curitiba, presided over by Judge Sergio Moro, despite lacking jurisdictional basis. The authors highlight the use of aggressive legal tactics – such as preventive detention, media-driven narratives, and lack of concrete evidence – to criminalise Lula. They argue that the judicial process was distorted to delegitimise and neutralise a political opponent, illustrating the core dynamics of lawfare. Martins, C., Martins, V., and Valim, R. (2021) *op. cit.*, p. 69.

180 The authors highlight how the “anti-corruption” operation against Siemens Aktiengesellschaft (AG) coincided with the intensification of a trade embargo on Iran by the US in 2006. Martins, C., Martins, V., and Valim, R. (2021) *op. cit.*, p. 64.

181 Pring, G.W., and Canan, P. (1996) *SLAPPs: Getting Sued for Speaking Out*, Philadelphia, PA: Temple University Press, p. 203.

182 International Center for Not-for-Profit Law (ICNL) (2023) “*Anti-SLAPP laws: a primer*”, ICNL. Available at: <https://www.icnl.org/resources/anti-slapp-laws> [Accessed 3 May 2025].

which seeks to safeguard freedom of expression and enable early dismissal of lawsuits that serve primarily to stifle public participation.¹⁸³ Gregorczyk and Słowiński present a compelling case study of this phenomenon in their podcast analysis of SLAPPs in Serbia.¹⁸⁴

However, conflating these domestic and international litigation practices with the militarised framing found in certain interpretations of “lawfare” is both misleading and analytically flawed. Such conflation may stem from fundamentally different legal traditions, especially between the US and continental Europe.¹⁸⁵ The US legal culture, with its adversarial and often instrumentalist orientation, tends to conceptualise legal mechanisms as tactical tools, whereas European traditions generally adhere more closely to formalist and rights-based interpretations of law. That is particularly concerning when arguments about lawfare are used against the most important, independent, and impartial international courts, such as the International Court of Justice or the International Criminal Court.¹⁸⁶

In summary, this fourth interpretation of lawfare – as the strategic, weaponised instrumentalisation of legal mechanisms – extends the concept beyond its conventional association with warfare. Scholars such as Tiefenbrun, Kittrie, and the Comaroff have advanced this interpretation, focusing on the weaponisation of legal procedures and institutions. Yet, despite the frequent use of militarised terminology, these accounts do not establish a concrete link to legal regimes governing hostilities. This conceptual ambiguity risks undermining the analytical utility of “lawfare” by blurring distinctions between legitimate legal advocacy, strategic litigation, and overt political manipulation.

183 European Commission, “SLAPPs – Strategic lawsuits against public participation”. Available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law_en [Accessed 3 May 2025].

184 Gregorczyk, B., and Słowiński, Ł., “O wolności prasy w Serbii / On press freedom in Serbia: a report by Barbara Gregorczyk and Łukasz Słowiński”. Radio Nowy Świat. Available at: <https://nowywiad.online/dusanka-dordevic-ma-6-mieszkan-a-vladimir-gak-daje-dzieciom-miod-na-potencje> [Accessed 3 May 2025].

185 The debate over the issue of freedom of speech is excellently presented in this article, which provides an in-depth analysis of the challenges involved in moderating content that may fuel hybrid operations from a transatlantic perspective. *Vide* Kohl, U. (2022) *Platform Regulation of Hate Speech – A Transatlantic Speech Compromise?*, *Journal of Media Law*, Volume 14, No. 1, p. 25–49. Available at: <https://doi.org/10.1080/17577632.2022.2082520> [Accessed 3 May 2025].

186 The Lawfare Project (2024) “*The Lawfare Project’s statement on illegitimate ICC arrest warrants against Israeli official*”, The Lawfare Project, 17 December. Available at: <https://www.thelawfareproject.org/releases/2024/12/17/the-lawfare-projects-statement-on-illegitimate-icc-arrest-warrants-against-israeli-official> [Accessed 13 May 2025]; Foundation for Defense of Democracies (2024) “*Corrupt to its core: world reacts to ICC warrants against Netanyahu and Gallant*”, FDD, 22 November. Available at: <https://www.fdd.org/analysis/2024/11/22/corrupt-to-its-core-world-reacts-to-icc-warrants-against-netanyahu-and-gallant/> [Accessed 13 May 2025].

In this place it is hard not to give voice to another participant of the Cleveland Seminar on lawfare, the distinguished William Schabas:

Inevitably, I would be asked, – what does it mean? My answer, based upon what I learned at the conference and in preparation for it, would be something along the following lines: – A word coined within the United States military and subsequently adopted by right-wing ideologues as a way of stigmatising legitimate recourse to legal remedies, particularly within an international law context.¹⁸⁷

The rhetorical adoption of military vocabulary to describe legal strategies likely reflects divergent legal cultures. In particular, it signifies the unnecessary securitisation of the term, rendering it conceptually misleading. Securitisation is an intersubjective and intertextual process through which certain issues are incorporated into the realm of security. It is understood as a speech act – premised on the idea that language not only communicates information but also constructs social realities.¹⁸⁸ Using such militarised language, without clearly defined conceptual boundaries, may ultimately distort legal analysis and contribute to the erosion of legal standards under the pretext of strategic necessity. A more rigorous and context-sensitive delineation of the term is therefore imperative – both to uphold the normative integrity of international law and to preserve the credibility of legal scholarship.

Old wine in a new bottle – a critical look through the lens of Judge Higgins

As mentioned earlier, the origins of lawfare can be traced to Grotius.¹⁸⁹ However, the instrumentalisation of international law – both in times of peace and armed conflict – as a component of hybrid warfare and hybrid threats necessitates a more focused and nuanced consideration of the general approach to international law, and in particular, the principle of good faith. The use of lawfare in its various forms has become a normalised practice among states in the realm of international relations. Historically, such practices were often framed within the context of diplomatic engagement or as part of proceedings before international courts and arbitral tribunals or restoring to war. But the new post-Second World War order brought a different approach,

187 Schabas, W.A. (2010) *Gaza, Goldstone, and Lawfare*, Case Western Reserve Journal of International Law, No. 43, p. 307. Available at: <https://scholarlycommons.law.case.edu/jil/vol43/iss1/18/> [Accessed 3 May 2025].

188 Ziętek, A.W. (2017) *The Securitisation of Migration in the Cultural Security of Europe / Sekurytyzacja migracji w bezpieczeństwie kulturowym Europy*, Teka Komisji Politologii i Stosunków Międzynarodowych, Volume 12, No. 3, p. 23–35. Available at: <https://doi.org/10.17951/teka.2017.12.3.23> [Accessed 3 May 2025].

189 Kittrie, O. (2016) *op. cit.*, p. 4.

one that favoured outlawing war. This left international law in a conundrum as to whether the purpose of international law was to keep the *status quo* or serve a mechanism of non-war subjugation. This issue was fiercely discussed in a seminal meeting which became a cornerstone for understanding the role of international law. The meeting was organised by the American Society of International Law and held in conjunction with the Royal Institute, on the theme of “*Diverging Anglo-American attitudes to international law*”. In June 1971, in her introductory remarks, Judge Higgins said famously:

In England (. . .) there is a profound mistrust of the injection of policy considerations into international law. If our American colleagues believe that international law is a tool of social engineering, ours to build with, the British prefer to emphasise its neutrality in respect of social values, and further suggest that policy becomes indistinguishable from politics. The introduction of policy considerations, many British would argue, makes international law unscientific and unpredictable. They urge that neutral rules are the protection of the weak against the strong; that the acknowledgement of policy considerations introduces a subjective element.¹⁹⁰

And as she added, “pragmatism” as a creed is symbiotically related to the perception of law as “rules”, with “good common sense”.¹⁹¹ What is particularly problematic, however, is that certain states – let alone non-state actors, whose standing under international law is significantly more limited – act in open defiance of the fundamental principles of international law.¹⁹²

Lawfare in its variety seems to offer divergent shades of what the author considers at least a violation of “common sense and good faith” and, from the perspective of this monograph, violations of IHL.¹⁹³

This debate falls into the category of instrumentalising or misuse of international law for military or political purposes as well as addressing the issue of whether lawfare is a novelty. In the author’s opinion, it is not. However, something has profoundly changed. Lawfare in the form of open violation of international law or acting in bad faith poses a serious threat to the integrity of the international legal order, especially considering that the methods of lawfare employed by the Russian Federation systematically undermine the

190 Higgins, R. (2009) “*Introduction*”. In *Themes and Theories: Selected Essays, Speeches, and Writings in International Law*, 1st edn, Part 1: International Legal Theory, Oxford: Oxford University Press, p. 17.

191 Higgins, R. (2009) *Ibidem*, p. 17.

192 Tropin, Z. (2021) *Lawfare as Part of Hybrid Wars: The Experience of Ukraine in Conflict with Russian Federation*, Volume 33, No. 1, p. 19. Available at: <http://doi.org/10.35467/sdq/132025> [Accessed 3 May 2025].

193 *HPCR Manual on International Law Applicable to Air and Missile Warfare*, Cambridge: Cambridge University Press, p. 27.

foundational concepts that underpin the broadly accepted consensus of international law.¹⁹⁴ Such overt and flagrant violations have not been witnessed since the Second World War, constituting a sustained form of pressure – manifested through hybrid warfare, hybrid threats, or a combination of both.

That brings us to more contemporary considerations so eloquently presented by Sari. In his seminal article, the author revived a critical debate reminiscent of the discourse in June 1971, notably involving Hans Morgenthau, a pivotal figure in international relations realist theory. Sari observes the inherent tragedy of international law well, viewed through a classical positivist lens, advocating that international law is fundamentally instrumental, and designed to achieve various ends – predictability, justice, security, and the good life. However, he further opines that the contentious nature of these objectives renders international law itself vulnerable to contestation and instrumentalisation for conflicting objectives and interests.¹⁹⁵ The author concurs with Sari’s claim that there is constant tension between those advocating maintaining the established international order and those aiming to overthrow it. The politicisation of international law is thus an unavoidable consequence. To preserve its essential role, international law must continually reaffirm its commitment to legal formalism and its unique operational methodologies. Without these, it risks devolving into mere politics, thereby losing its capacity to function distinctly within the societal framework it seeks to regulate. International law is ensnared in a paradox where an “instrumental use of rules forms a core feature of the system, yet where certain forms and manifestations of instrumentalisation are deeply corrosive to a rules-based international order”.¹⁹⁶ This complex interplay underscores the delicate balance international law must maintain to remain effective and relevant in a constantly evolving global landscape,¹⁹⁷ of which lawfare is the prime emanation.

Conclusions

The concept of lawfare embodies a multifaceted and strategic use of international law that operates across various domains of *ius ad bellum* and *ius in bello*. Therefore, lawfare is not merely confined to the theatres of armed conflict; rather, it also extends into peacetime operations, reflecting a broader spectrum of application. Moreover, the integration of lawfare into the fabric of hybrid warfare reveals its capacity to undermine multilateral legal protections and manipulate legal norms for strategic gains.

194 Tropin, Z. (2021) *op. cit.*, p. 19.

195 Sari, A. (2020) *Legal Resilience in an Era of Grey Zone Conflicts and Hybrid Threats*, Cambridge Review of International Affairs, Volume 33, No. 6, p. 846–867. Available at: <https://doi.org/10.1080/09557571.2020.1752147> [Accessed 3 May 2025].

196 Aurel Sari (2020) *op. cit.*, p. 849–851.

197 Aurel Sari (2020) *op. cit.*, p. 849–851.

As far as hybrid threats are concerned, the exploitation of legal frameworks can lead to increased political tensions and potentially destabilise regions, as seen in scenarios involving nonmilitary threats, such as orchestrated migrations or cyber-operations directed at sovereign nations. The evolving doctrine of hybridity, which incorporates lawfare as an important component, necessitates a nuanced understanding of how international law is leveraged by state and non-state actors. The strategic manipulation of legal paradigms not only challenges the integrity of international legal institutions but also calls into question the motivations – whether being rooted in good or bad faith – behind such actions.

As the landscape of modern conflict continues to evolve, so too must our interpretations and applications of international law. The need for an adaptive legal framework is imperative to address the novel challenges posed by hybrid warfare/threats lawfare. This will ensure that international law remains a mechanism capable of upholding justice, security, and peace in the international community. If it is not addressed, lawfare constitutes a potent threat to international legal order.

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