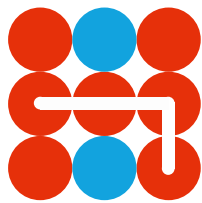

Strategic Analysis January 2018

Blurred Lines: Hybrid Threats and the Politics of International Law

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Hybrid CoE



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'States are engaged in a constant struggle for power and the legal domain is not immune from this competition. Western nations and institutions must re-engage with the politics of international law to prevail in the current strategic environment', writes Aurel Sari, a Senior Lecturer in Law at the University of Exeter in the United Kingdom.

'There is no intermediate state between peace and war', wrote Hugo Grotius, one of the founding figures of modern international law, in 1625. Today, the notion that peace and war are separated by a sharp dividing line is usually met with scepticism. International relations is an 'arena of continuous competition', warns the new National Security Strategy of the United States adopted in December 2017. States are engaged in a constant struggle for power and the binary distinction between peace and war does not reflect this reality.

It would be naïve to believe that four hundred years ago, Grotius lived in a world of clear boundaries, whilst we have the misfortune to be born in an era of ambiguity. When Grotius declared peace and war to be mutually exclusive conditions with no

middle ground between them, what he had in mind was not peace and war in a material sense, understood as the absence or presence of hostilities. Rather, he was concerned with peace and war as a formal relationship.

In the modern period, nation states have always competed for influence using a broad range of tools at their disposal. War in the technical sense referred to a legal condition marked by certain formalities, such as a declaration of war. However, more often than not, states eschewed formal war in favour of engaging in warlike acts under another name. The traditional separation between peace and war is therefore a legal construct which did not fully coincide with the absence or presence of actual fighting.



There is widespread concern in the West that adversaries and competitors are abusing legal thresholds for their own tactical and strategic advantage

Nonetheless, the dividing line between peace and war remains key to the contemporary international legal system. As the United Nations Charter makes clear, peace is the normal condition in international affairs and war is the exception. States are under an obligation not to use force in their international relations and to settle their disputes peacefully. By way of exception, the use of force is permitted in self-defence or where it is authorised by the Security Council for the purposes of maintaining or restoring international peace and security.

Critical to this scheme are certain legal thresholds. Under the United Nations Charter, the use of force in self-defence is permissible only if an 'armed attack' occurs. Similarly, transitioning from law-enforcement to warfighting is permissible only if an 'armed conflict' exists.

There is widespread concern in the West that adversaries and competitors are abusing these thresholds for their own tactical and strategic advantage. Take the collective security guarantee enshrined in Article 5 of the North Atlantic Treaty. This provision is engaged only when an 'armed attack' occurs. An adversary prepared to combine subversive activities with the use of force falling below the level

of intensity of an armed attack may advance its strategic interests without, however, provoking a forcible response from the Alliance.

Legal concepts and thresholds are thus central to hybrid threats. The fact that legal thresholds are vulnerable to exploitation underlines one of the enduring dilemmas of international affairs: there is no escaping the fact that international law is a political project that is, moreover, open to manipulation for partisan ends.

The Russian Federation's intervention in Crimea illustrates the point. There is no doubt that the deployment of Russian units to take control of the Crimean Peninsula in February and March 2014 amounted to a use of force against Ukraine's political independence and territorial integrity in breach of the United Nations Charter. In a speech delivered on 14 March 2014, President Vladimir Putin nevertheless dismissed the charge that Russia had violated its international obligations. 'Russia's Armed Forces never entered Crimea; they were there already in line with an international agreement', he declared, referring to the arrangements governing the presence of the Russian Black Sea Fleet. 'We did not exceed the personnel limit of our armed forces

in Crimea, which is set at 25,000', he continued, 'because there was no need to do so.'

These statements are disingenuous. Even if Russia did not exceed the maximum number of troops it was entitled to station in Crimea under the Black Sea Fleet agreements, President Putin glossed over the fact that those agreements did not entitle Russian units to take control of the peninsula. Their actions, not their numbers, were in breach of the applicable stationing agreements. President Putin's comments are thus best seen as an attempt to clothe with the mantle of legality an action that was a brazen violation of international law.

the post-Cold War order has passed. Russia and China are asserting their interests with greater confidence, including in the legal domain. Chinese President Xi Jinping's most recent New Year address is symptomatic. 'As a responsible major country', President Xi declared, 'China must speak out.' He went on to promise that China will actively fulfil its due responsibility and duty in international affairs, acting as 'an upholder of the international order.' However, as China's maritime activities suggest, its concept of international order does not necessarily coincide with that of the West.

States have gamed the legal dividing lines between peace and war for centuries. What is new, however, is the contemporary strategic environment.

None of this should be taken to suggest that international law is not proper law. International law is a distinct system that operates according to its own normative logic. However, it does intersect with other social systems and, as such, does not provide a neutral, Archimedean vantage point from which to contemplate the world. Nor does any of the foregoing imply that international law does not matter. International law is an instrument for the promotion of national interests. Even cynics seek legal advice. Nor is any of this new. States have gamed the legal dividing lines between peace and war for centuries. What is new, however, is the contemporary strategic environment.

The cards of world politics are being reshuffled. The unipolar moment of

The legal environment itself has changed. The rules governing warfare are evolving in response to the prevalence of transnational conflicts and the impact of human rights norms, but key elements of the law remain unsettled. States are reluctant to commit themselves to specific legal positions in areas of rapid technological progress, such as the cyber domain and automation, thereby ceding the initiative to other actors. Meanwhile, in the West, legal questions have turned into a permanent fixture of the debates over the legitimacy of military deployments.

All of these developments point to the renewed significance of international law in the current strategic setting. Western nations and institutions face a twofold challenge in this respect.



‘Lawfare’ can be defined as the use or misuse of law as a substitute for traditional military means to achieve an operational objective.

The instrumental use of law by adversaries and competitors to advance their objectives poses a direct challenge to Western interests. In the context of armed conflict, this practice is often described as ‘lawfare’, defined as the use or misuse of law as a substitute for traditional military means to achieve an operational objective. The use of civilians as human shields to render military targets immune from attack offers a clear example. However, the use of law for tactical and strategic purposes is not confined to armed conflict. For instance, the Russian Federation has relied on peacekeeping agreements, the conferral of Russian citizenship and the recognition of the secessionist regions of Abkhazia and South Ossetia to advance its interests in and against Georgia. Russia thus actively employs law and legal processes as a tool to complement its diplomatic, information, military, economic, financial and intelligence activities.

The second challenge involves a threat to the integrity of the international legal system and its ability to serve as an effective regulatory framework. Persistent and serious breaches of international law undermine respect for the rule of law in international affairs, while the exploitation of legal thresholds and gray areas diminishes legal certainty. The instrumentalisation of law

risks politicising international legal processes and discourse to the point where their ability to contribute to the resolution of political disputes is compromised. To confront these challenges, the West must engage in the *politics of international law* with renewed vigour.

Recognising that adversaries and competitors deploy law for instrumental purposes, Western nations and institutions should strengthen their ability to defend their interests in the legal sphere and to promote their vision of international order. This requires, first of all, an acknowledgment that law is a domain of competition, just like the land, maritime, air, information and cyber domains are. It also requires developing appropriate legal capabilities, mechanisms and frameworks for individual and collective action to confront hostile legal activities and narratives.

Recognising further the dangers that the instrumentalisation of law for political purposes presents, Western nations and institutions should defend the integrity of the international legal system. The West cannot respond to the subversion and violation of international norms in kind without undermining the rule of law. Nor can it expect that its own transgressions will not create unwelcome precedents. The interventions in

Western nations should strengthen their ability to defend their interests in the legal sphere and to promote their vision of international order by developing appropriate legal capabilities, mechanisms and frameworks for individual and collective action to confront hostile legal activities and narratives.

Kosovo and Iraq come to mind here. Accordingly, the West must find ways of utilising international law against its adversaries in a manner that safeguards its underlying values and preserves the subtle distinction between the use and abuse of the law.

Against this background, Western nations and institutions should take concrete measures in three areas.

First, they should strengthen their legal preparedness. This involves developing a better understanding of the legal strategies pursued by adversaries and, more generally, the means and methods of legal competition. It also involves identifying legal threats and taking stock of legal vulnerabilities at the national and institutional level. It requires monitoring hostile legal activities and narratives as well as sharing best practices among allies on how to counter them.

Second, they should strengthen their legal resilience and deterrence. This involves responding to the legal threats posed by adversaries and addressing legal vulnerabilities. Not only must national legal systems and institutional frameworks be capable

of withstanding hostile legal action and narratives, but they must also provide the regulatory basis for an effective and timely response against hybrid threats at the individual and collective level.

Third, they should strengthen their capability for legal defence. This involves defending the legal domain against adversaries, preserving the rule of law at the domestic and international level against hostile subversion and employing law and legal arguments to maintain legitimacy. It requires putting in place processes and capabilities to deny adversaries the benefits of using law as an asymmetric lever of influence and to inflict legal and reputational costs upon them by challenging their authority, legality and legitimacy.

Given the nature of the problem, responsibility for a renewed engagement with the politics of international law must be shared between Western nations and institutions, including NATO and the EU. But this responsibility must also be shared between the legal and the policy communities. Condemning lawyers to the role of legal technicians who ‘fix problems with rules’ is inadequate.

If our strategic condition is characterised by increased competition in the legal domain and the blurring of the faultlines between peace and war, then we must look care-

fully at the boundaries between legal advice and policy-making, and between lawyering and strategic communication, in our response.

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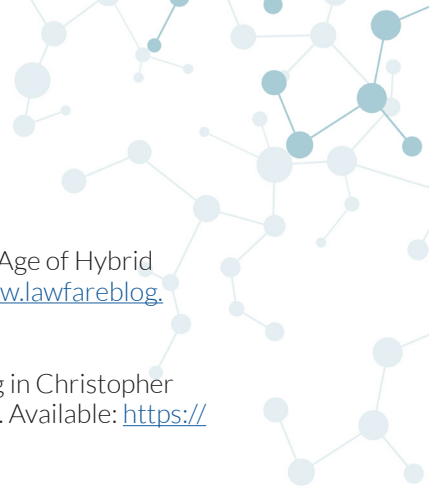
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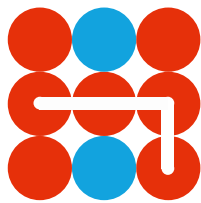
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