

# Legitimizing and Operationalizing US Lawfare

## The Successful Pursuit of Decisive Legal Combat in the South China Sea

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The term *lawfare*, first coined by Maj Gen Charles Dunlap, USAF, retired, in 2001, now enjoys widespread, if varied, usage. General Dunlap most recently defined *lawfare* as “the strategy of using—or misusing—law as a substitute for traditional military means to achieve a warfighting objective.”<sup>1</sup> Although its study as a concept is relatively new in the United States, being popularized only within the past decade, states have employed lawfare for centuries. The most prominent, current example is China’s strategy of lawfare in the South China Sea, with many current scholars arguing that China has been more successful in employing lawfare strategies as compared to the United States or other Western nations. This article argues that the United States must recognize, define, and legitimize its own use of lawfare through a comprehensive strategy to generate success in the South China Sea. In turn, this article provides a recommended definition of *lawfare*, contrasts the United States’ and China’s use of lawfare in the South China Sea, and discusses potential options for the United States’ strategic legitimization and operationalization of lawfare.

### Overview of Lawfare

As asymmetric warfare and gray-zone conflicts become more prevalent, lawfare’s relevance is increasingly heightened. Before General Dunlap, writing as a US Air Force Judge Advocate, developed his aforementioned definition, he viewed “law as a weapon of war” and lawfare as “a method of warfare where law is used as a means of realizing a military objective.”<sup>2</sup> Orde Kittrie, in his book *Lawfare: Law as a Weapon of War*, defined two major types of lawfare: instrumental lawfare and compliance-leverage disparity lawfare. *Instrumental lawfare* is the use of legal tools as a substitute for conventional military action, in, for example, creating or reinterpreting international law to disadvantage an adversary. The United States exercised instrumental warfare when disabling the Iraqi Air Force and when utilizing financial lawfare against Iran.<sup>3</sup> In this instance, the president used executive orders and Congress passed statutes that identified and imposed sanctions on

financial institutions that supported the proliferation of nuclear weapons, which coerced Iran to negotiate about its nuclear weapons program at the time.

Separate from instrumental lawfare, nations use *compliance-leverage disparity lawfare* to gain advantages “from the greater influence that law and its processes exert over an adversary.”<sup>4</sup> An example would be terrorists operating among civilians to inhibit the operations of the Law of War—adhering nations, such as United States.<sup>5</sup> Similarly, China utilizes compliance-leverage disparity lawfare through signing nonproliferation treaties publicly, yet not fully committing by, for instance, using private-sector proxies to augment Iran’s nuclear program. These examples demonstrate that the United States and China employ lawfare in varying manners. However, there are disparities in both countries’ emphases on “the rule of law” and in their views on the necessity of a lawfare strategy.

### **The United States versus China Today**

Whereas the United States fails to officially define a lawfare policy, it is one of the tenets of China’s “Three Warfares.” This doctrine includes psychological, media, and legal warfare, which are closely integrated with China’s kinetic capabilities at the strategic and tactical levels.<sup>6</sup> Although Beijing’s definition is very similar to that of the United States, China’s understanding of lawfare differs for a few reasons. First, as expressed by Sun Tzu and exemplified in China’s Three Warfares, Beijing has a long-standing belief that defeating the enemy without fighting is the “pinnacle of excellence.” This belief amplifies its focus on lawfare.<sup>7</sup> Moreover, as detailed by Kittrie, China’s tumultuous legal history, with its constant removal and reconstruction of law, lends itself to a natural favoring of instrumental lawfare. The People’s Liberation Army’s handbook on international law states that officers “should not feel completely bound” by international laws that are harmful to China’s national interests and should look to beneficial international laws while “evading those detrimental to [their] interests.”<sup>8</sup> China’s legal mind-set is aggressive, utilizing “legal activities that are designed specifically to hamstring the opponent.”<sup>9</sup> Specifically, Beijing recognizes an objective then selects and examines laws that China can undermine to achieve that objective. It also takes advantage of the United States’ comparatively strict conformance to international law through compliance-leverage disparity lawfare. This is evident not only with nonproliferation treaties but also in maritime and space law.<sup>10</sup> Beijing also wages instrumental warfare in these arenas, particularly maritime, by attempting to alter customary international law (CIL; e.g., United Nations Convention for the Law of the Sea [UNCLOS]) through rapid publication of China’s ideas, advocacy in international forums, and establishment of domestic laws in its favor combined with military pressure.

In contrast, the United States occupies a more defensive, rule-based approach toward lawfare that is constrained by its lack of a systematic, strategic doctrine. Nevertheless, the United States has creatively used lawfare within the past decade. Kittrie describes the United States' coordination with nongovernmental organizations (NGO) that scrutinize public satellite imagery to publicize other nations' war crimes. Moreover, Washington has achieved enormous successes in suing banks and other organizations that fund terrorism.<sup>11</sup> However, Kittrie also explains that, unlike China, which supports the private sector actively acting as proxies and using lawfare in favor of state interests, the United States' executive branch maintains control over foreign policy and prefers limited lawfare action with the private sector given such behavior might be disruptive to international relations.

The concern over a lack of defined strategy in addition to the United States' rule-restraining culture presses for consideration of both international support and legal constraints.<sup>12</sup> Unlike the Chinese mind-set, which uses law as a weapon, government leaders in the United States are more diligent about employing policy objectives that are in compliance with the law.<sup>13</sup> Ultimately, these concerns combine to create a primarily negative—although adapting—and bounded US perspective about lawfare. Consequently, the United States views lawfare as separate from military operations and has not legitimized it as a defense strategy.

However, the South China Sea presents the United States with opportunities to use legal warfare. China has already begun doing this through building and militarizing islands as well as through attempting to alter CIL by popularizing its interpretation of the United Nations Convention for the UNCLOS.<sup>14</sup> Beijing originally contended that UNCLOS forbids foreign naval operations in China's exclusive economic zone (EEZ). China also asserted that it has territorial claims over waters within its nine-dash line. In fact, in 2009, Beijing disseminated maps of its nine-dash line that depicted it cutting into other nations' EEZs. In this self-contradicting argument, China now holds that Chinese archipelagos and features have EEZs that validate the nine-dash line.<sup>15</sup> Other nations, including the United States, argue for freedom of navigation established by CIL, and, in response, used limited lawfare. For example, the United States supported, and perhaps enabled, the Philippines to take China to arbitration over UNCLOS, where the Philippines prevailed (although China has arguably ignored the rulings).<sup>16</sup> Here, China simply failed to follow the law rather than enact lawfare through choosing to take advantage of the absence of law itself or of the international community's unwillingness to enforce law. Moreover, strengthening their position of the law, the United States holds forums and publicizes works that advance Washington's position on UNCLOS. Examples here include the *Commander's Handbook on Operational Law*, the Pacific Command annual international military law and operations conference, the

Department of State's Limits in the Seas series, and the "kinetic demonstrations of its legal positions" through freedom of navigation operations (FONOP).<sup>17</sup> However, despite these efforts, Beijing has done a remarkable job of advancing China's viewpoints and, in turn, establishing and expanding its dominance in the South China Sea.

### **The United States' Lawful Pursuit of Legal Combat**

The United States can generate lawfare successes in the South China Sea if it legitimizes and systematizes its own use through a comprehensive strategy. A strategy could also establish lawfare precedent for other nations to follow while upholding the rule of law and international order. As a world superpower, if the United States publicizes and legitimizes its approach, it could be highly influential on other nations, especially allies, as was demonstrated with the United States and Israel modeling each other's tactics against terrorism.<sup>18</sup> Moreover, a comprehensive strategy could constrain use of lawfare when required, such as ensuring the private sector is not interfering with foreign policy. Additionally, such a strategy could form an effective and organized force structure to align military and legal instruments of power, increase government innovation, and allow for more effective communication within the government and between the government and private sectors. Through completing all these actions, the United States can enable more effective use of lawfare, specifically in the South China Sea.

In the development of a lawfare strategy, it is extremely important that the United States consider allied opinions,<sup>19</sup> as the strategy should be in accordance with international law and norms.<sup>20</sup> However, a defined lawfare strategy should also explain that offensive, instrumental lawfare is a necessary component of US strategy that is required to uphold America's valid interests. As put forth by Dean Cheng and Orde Kittrie, some possibilities include aggressively publicizing violations, intensely studying other nations' cultures and legal history to identify advantages (legal "red teaming" as explained by Aurel Sari at the 2020 LENS Conference), and popularizing the US legal mind-set through published research and media.<sup>21</sup> Moreover, Washington should detail further means and methods toward private integration into the government sector given such measures offer outside perspectives and ways to coordinate with NGOs. The strategy should also provide ways to expand legal defensive and resilience capabilities,<sup>22</sup> including aligning laws to avoid exploitable loopholes and inconsistencies. To that end, it would be beneficial to study past examples of lawfare utilized by different countries to identify patterns and to be very intentional about new legal advancements and precedent.<sup>23</sup> Additionally, the doctrine should provide a means to integrate lawfare

personnel and strategies into current force structure and military objectives, as the Chinese have done, to optimize its effectiveness.

A lawfare strategy containing these components could yield meaningful results in the South China Sea. China's use of lawfare in the South China Sea demonstrates its systematic approach to lawfare, which has aided in the military pressure placed on nearby nations, forcing their consideration of lawfare tactics.<sup>24</sup> Although the United States has used lawfare here in a limited, semi-successful manner, if Washington approximated Beijing's methodical approach—rapidly publishing works and seriously analyzing sources of exploitation in Chinese law—in combination with US military strength and influence at international forum, it would be much a more effective strategic tool against China. This, in turn, could persuade the international community to reject Chinese interpretations of law and perhaps join the United States in tactics such as FONOPs. As demonstrated by previous use of lawfare by the United States in Iran, as detailed by Kittrie, its proactive outreach can be quite influential.<sup>25</sup> Although China wields more power internationally than Iran, Washington could still utilize these strategies, US military force, and an increased understanding of Chinese culture, which takes advantage of Beijing's need to “save face.” However, as Cheng warns, the United States should be wary of China leveraging Japan's current “peaceful” laws or using cyberwarfare to delay US strategic efforts.<sup>26</sup> The United States should also be prepared for Beijing to use financial lawfare due to China's considerable economic power or even leverage Law of Armed Conflict distinguishability tactics (compliance-leverage disparity lawfare) in the event of escalation.<sup>27</sup> However, through an increased focus on lawfare, enabled by a legitimate doctrine, Washington would have the opportunity not only to protect the United States and allies through increased resilience and prevention of degradation of the rule of law but also cripple China's systematic approach in the South China Sea.

## **Conclusion**

The United States should devise a comprehensive, systematic lawfare strategy promptly and decisively while also considering its allies and their roles in upholding the rule of law. This implementation could have beneficial, dramatic effects on the current status of the situation in the South China Sea, as well as on relations with China, Russia, rogue states, and nonstate actors. Ultimately, lawfare should become more relevant and resolutely employed for defensive and offensive purposes in US policy. 🌐

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### Notes

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