

**Legal Resilience in an Era of Gray Zone  
Conflicts and Hybrid Threats**

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Exeter Centre for International Law

Working Paper Series

2019/1

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Cite as Aurel Sari, "Legal Resilience in an Era of Gray Zone Conflicts and Hybrid Threats", ECIL Working Paper 2019/1.

# Legal Resilience in an Era of Gray Zone Conflicts and Hybrid Threats

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**Abstract** The international system has entered a period of increased competition, accompanied by a steady retreat from multilateralism and international institutions. The purpose of this article is to place these developments within the context of three concepts that have risen to prominence in recent years: lawfare, hybrid warfare and gray zone conflicts. In doing so, the article makes three arguments. The instrumental use of international law for strategic purposes forms an integral feature of the international system. Although the notions of lawfare, hybrid warfare and gray zone conflict all contribute towards a better understanding of the instrumentalization of international law, neither offers a complete framework for analysis and policy action. The challenges posed by the use of international law for strategic ends are therefore best countered by adopting a legal resilience perspective and fostering an operational mindset.

## Introduction

Throughout most of the world, Canada is renowned for its contribution to the cause of multilateralism, international institutions and the progressive development of international law. Canadians often pride themselves on their country's long-standing commitment to the international rule of law.<sup>1</sup> It therefore seems out of character for Canada to stand accused of a

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1. See O. E. Fitzgerald, *et al.*, 'Conclusion', in O. E. Fitzgerald, *et al.* (eds), *Reflections on Canada's Past, Present and Future in International Law* (2018) 481.

blatant violation of its international obligations. Yet this is the charge levelled against it by the Russian Federation.

On 17 October 2018, the Cannabis Act entered into force in Canada.<sup>2</sup> The Act created a regulatory framework that permits the controlled production, distribution, sale and possession of cannabis. By legalizing the recreational use of the drug, the Act put Canada on a collision course with three international drug control treaties.<sup>3</sup> As the International Narcotics Control Board, the body charged with overseeing the implementation of the agreements, has pointed out, the Cannabis Act is incompatible with Canada's international commitments.<sup>4</sup> Russia's accusations against Ottawa are not unfounded, it seems. Nevertheless, their tone is curious. In its statements on the matter, Russia complained of Canadian 'high-handedness' and emphasized the deliberate and fundamental nature of its violation of the applicable rules.<sup>5</sup> It also accused the Canadian Government of consciously destroying the international drug control regime, promoting selective compliance with international agreements, failing to perform its obligations in good faith and belying its self-professed support for a rules-based world order. Notwithstanding Canada's failure to comply with its obligations, these accusations ring hollow. Their mocking tenor does little to conceal their primary objective, which is to paint a picture of Canadian duplicity and disdain for international rules that stands in contrast with Russia's record of strict compliance and its heartfelt concern for the fate of the international legal order.

The passing of the Cannabis Act and Russia's attempts to turn it into a propaganda coup present a sorry spectacle. They are just one sign among many which suggest that the rules-based international order is in trouble. The last decade has seen the return of a multipolar international

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2. Cannabis Act (SC 2018, c 16).

3. Single Convention on Narcotic Drugs, 30 March 1961, 520 UNTS 151; Convention on Psychotropic Substances, 21 February 1971, 1019 UNTS 175; United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 20 December 1988, 1582 UNTS 95. See R. Habibi and S. J. Hoffman, 'Legalizing Cannabis Violates the UN Drug Control Treaties, but Progressive Countries Like Canada Have Options' (2018) 49 *Ottawa Law Review* 427.

4. Statement by the International Narcotics Control Board on the entry into force of Bill C-45 legalising cannabis for non-medical purposes in Canada, 17 October 2018, UNIS/NAR/1362.

5. Ministry of Foreign Affairs, Comment by the Information and Press Department on Canada's steps to legalise cannabis for recreational use, 22 June 2018, 1199-22-06-2018; Statement of the Permanent Representative of the Russian Federation to the International Organizations in Vienna Ambassador Mikhail Ulyanov at the 2nd intersessional CND meeting, Vienna, 25 June 2018, 28 June 2018, 1240-28-06-2018; Statement of the Permanent Representative of the Russian Federation to the International Organizations in Vienna Mr Mikhail Ulyanov at the 5th intersessional meeting of the Commission on Narcotic Drugs, Vienna, November 7, 2018, 8 November 2018, 2127-08-11-2018.

system marked by the resurgence of realpolitik, increased competition between great powers and a gradual retreat from multilateralism.<sup>6</sup> By annexing Crimea, Russia has violated one of the core principles of international law,<sup>7</sup> the rule against the acquisition of another State's territory through force.<sup>8</sup> China is asserting its interests more vigorously in the international arena, claiming parts of the South China Seas<sup>9</sup> and rejecting the award rendered against it in this matter by the Permanent Court of Arbitration.<sup>10</sup> Western powers too are prepared to disregard international rules at times, as they did by striking Syrian regime targets in response to chemical attacks on civilians in April 2018.<sup>11</sup>

These incidents feed into broader concerns about the future direction of the international system. Recent withdrawals from international institutions and agreements, such as Burundi's departure from the International Criminal Court<sup>12</sup> and the US renunciation of the Iran nuclear

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6. See M. J. Mazarr, *et al.*, *Understanding the Emerging Era of International Competition: Theoretical and Historical Perspectives* (RAND, 2018).
  7. T. D. Grant, *Aggression against Ukraine: Territory, Responsibility, and International Law* (2015); R. Geiß, 'Russia's Annexation of Crimea: The Mills of International Law Grind Slowly But They Do Grind' (2015) 91 *International Law Studies* 425; J. Bering, 'The Prohibition of Annexation: Lessons from Crimea' (2017) 49 *New York University Journal of International Law and Politics* 747.
  8. GA Res 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 24 October 1970, 122–123. See S. Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (1996).
  9. E.g. Note Verbale CML/8/2011 from the Permanent Mission of the People's Republic of China to the UN Secretary-General, 14 April 2011; Note Verbale CML/17/2009 from the Permanent Mission of the People's Republic of China to the UN Secretary-General, 7 May 2009. See F. Dupuy and P.-M. Dupuy, 'A Legal Analysis of China's Historic Rights Claim in the South China Sea' (2013) 107 *American Journal of International Law* 124; Z. Gao and B. B. Jia, 'The Nine-Dash Line in the South China Sea: History, Status, and Implications' (2013) 107 *American Journal of International Law* 98.
  10. *The South China Sea Arbitration (Philippines v. China)* (Permanent Court of Arbitration, 2016). For the Chinese position, see Ministry of Foreign Affairs of China, 'Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines' (2016) 15 *Chinese Journal of International Law* 905.
  11. J. Goldsmith and O. Hathaway, *Bad Legal Arguments for the Syria Airstrikes*, Lawfare, 14 April 2018, <https://lawfareblog.com/bad-legal-arguments-syria-airstrikes>. But see C. Dunlap, *Yes, There Are Plausible Legal Rationales for the Syria Strikes*, Lawfare, 19 April 2018, <https://www.lawfareblog.com/yes-there-are-plausible-legal-rationales-syria-strikes>.
  12. UN Secretary-General, Depositary Notification, C.N.805.2016.TREATIES-XVIII.10, 28 October 2016. See M. Ssenyonjo, 'State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and the Gambia' (2018) 29 *Criminal Law Forum* 63. More generally, see K. J. Alter, J. T. Gathii and L. R. Helfer, 'Backlash against International Courts in West, East and Southern Africa: Causes and

agreement,<sup>13</sup> suggest that support for multilateralism is waning.<sup>14</sup> International law and institutions appear increasingly impotent. Judge James Crawford has captured the prevailing mood by observing that nowadays international law is invoked in ‘an increasingly antagonistic way’, whilst at other times it is ‘apparently or even transparently ignored.’<sup>15</sup>

The present article places these developments within the context of the debates over lawfare and the legal dimension of hybrid warfare and gray zone conflicts, with the aim of moving these debates onto new, more fruitful ground. The paper advances three core arguments. First, it suggests that the instrumentalization of law and legal processes is an integral feature of the international system, one from which a certain creed of realism draws the mistaken conclusion that a rules-based international order cannot possibly exist. Second, it argues that the notions of lawfare, hybrid warfare and gray zone conflict all contribute towards a better understanding of the role that international law plays in the contemporary strategic environment, but that neither of these three concepts offers a complete framework for analysis and policy action. Finally, it suggests that the challenges posed by the instrumentalization of international law are best countered by adopting a legal resilience perspective and fostering an operational mindset.

## **The tragedy of international law**

To some, the dire state of international law and multilateralism merely confirms that the notion of a rules-based international order is a delusion. In the aftermath of the Cold War, John Mearsheimer warned against the ‘false promise’ of international institutions as a means for promoting peace and stability,<sup>16</sup> a view echoed in the latest US National Security Strategy.<sup>17</sup> More recently, Patrick Porter has argued that a rules-based international order is unattainable.<sup>18</sup> The world is a ‘tragic place’

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Consequences’ (2016) 27 *European Journal of International Law* 293.

13. Remarks by President Trump on the Joint Comprehensive Plan of Action, 8 May 2018, <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-joint-comprehensive-plan-action/>.
14. H. G. Cohen, ‘Multilateralism’s Life Cycle’ (2018) 112 *American Journal of International Law* 47.
15. J. Crawford, ‘The Current Political Discourse Concerning International Law’ (2018) 81 *Modern Law Review* 1, 1.
16. J. J. Mearsheimer, ‘The False Promise of International Institutions’ (1994) 19 *International Security* 5.
17. The White House, *The National Security Strategy of the United States of America*, December 2017. The Strategy paints a picture of continuous competition between States and a failure of international institutions to restrain and integrate revisionist powers, such as China.
18. P. Porter, *Sorry, Folks. There Is No Rules-Based World Order*, National Interest, 28 August 2016, <http://nationalinterest.org/blog/the-skeptics/sorry-folks-there-no-rules-based-world-order-17497>; See also P. Porter, *A World Imagined: Nostalgia and Liberal Order* (CATO Institute, 2018).

where great powers break the rules at their discretion if it serves their interests.<sup>19</sup> To believe that order in international relations can be based on strict rules is to engage in wishful thinking.

Realist scholars are right to pour scorn on the legalist belief that formal rules and institutions can supplant power politics. But legalism so defined offers a thoroughly romanticized account of the role of law in international affairs, one that is little more than a caricature. Law is a function of political society, as EH Carr counselled many years ago.<sup>20</sup> This means that law's authority derives, ultimately, from politics. But it also means that law serves a distinct social need. Law provides society with predictability. It affords a sense of 'regularity and continuity' without which political life would not be possible.<sup>21</sup> Porter suggests that a workable international order must be forged not by lawyers, but by canny diplomats relying on 'compromise, adjustment, mutual concessions and a continually negotiated universe, backed by deterrence and material strength.'<sup>22</sup> Yet it is difficult to see how such compromise, adjustment, concessions, negotiations and even deterrence<sup>23</sup> could be sustained without formal rules and institutions—or lawyers, for that matter.

Classic realists were more perceptive in this respect. Discussing the decentralized nature of international law in his *Politics among Nations*, Hans Morgenthau made the following observation:

Governments... are always anxious to shake off the restraining influence which international law might have upon their international policies, to use international law instead for the promotion of their national interests, and to evade legal obligations which might be harmful to them. They have used the imprecision of international law as a ready-made tool for furthering their ends. They have done so by advancing unsupported claims to legal rights and by distorting the meaning of generally recognized rules of international law.<sup>24</sup>

This passage does not paint a flattering picture of international law, but it depicts its operation in more accurate terms than the cliché of legalism. In 2014, Russia did not simply invade and annex Crimea with a passing reference to the Melian Dialogue,<sup>25</sup> but offered an elaborate legal argument

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19. Porter, *Sorry, Folks* (n. 18).

20. E. H. Carr, *The Twenty Years' Crisis 1919–1939* (1939), 227–231.

21. Ibid, 232. See also N. Luhmann, *Law as a Social System* (2004), 142–172.

22. Porter, *Sorry, Folks* (n. 18)

23. T. C. Schelling, *Arms and Influence* (2008), 49–55.

24. H. J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (1948), 214.

25. Thucydides, *The Peloponnesian War* (2009), 5.84–5.111. The Melian Dialogue is regarded as a classic illustration of the necessities of power, famous for making the point that 'The strong do what they can: the weak suffer what they must' (ibid, 5.89). See F. M. Wassermann, 'The Melian Dialogue' (1947) 78 *Transactions and Proceedings*

to justify its actions.<sup>26</sup> According to President Putin, in the absence of a legitimate executive authority in Ukraine, Russia intervened to protect the people of Crimea and to create the conditions in which they could exercise their right of self-determination, ostensibly in line with the bilateral agreements governing the presence of Russian forces on the Crimean Peninsula.<sup>27</sup> The use of legal rhetoric for strategic ends has a long tradition. On 17 September 1939, the Soviet Union justified its invasion of Poland by arguing that the Polish State and Government had ceased to exist, that Soviet-Polish treaties therefore had lost their validity and that Russian military action was necessary to protect the life and property of the population of Western Ukraine and Western White Russia.<sup>28</sup>

Sceptics will object that the use of international legal arguments for the purposes of territorial aggrandizement hardly amounts to a ringing endorsement of a rules-based international order. But this misses the point. As Josef Kunz once quipped, most international lawyers are comfortable working with two international laws: one for their own nation and one for their enemies.<sup>29</sup> The rules, processes and institutions of international law facilitate cooperation between international actors in pursuit of their goals and values, but at the same time they also enable conflict by sustaining disagreement and competition. International law constrains and enables both friends and foes alike. Taking this insight to its logical conclusion, Monika Hakimi has recently argued that fostering cooperation and conflict are in fact symbiotic functions of international law.<sup>30</sup> To annex Crimea, Moscow has relied on well-established international instruments. It first recognized the ‘Republic of Crimea’ as a sovereign and independent State<sup>31</sup> and then entered into an international

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*of the American Philological Association* 18.

26. C. J. Borgen, ‘Law, Rhetoric, Strategy: Russia and Self-Determination before and after Crimea’ (2015) 91 *International Law Studies* 216; T. Ambrosio, ‘The Rhetoric of Irredentism: The Russian Federation’s Perception Management Campaign and the Annexation of Crimea’ (2016) 27 *Small Wars and Insurgencies* 467.
27. Address by the President of the Russian Federation, 18 March 2014, <http://en.kremlin.ru/events/president/news/20603>. For an assessment of these claims, see P. M. Olson, ‘The Lawfulness of Russian Use of Force in Crimea’ (2014) 53 *Military Law and the Law of War Review* 17.
28. The Ambassador in the Soviet Union (Steinhardt) to the Secretary of State, Moscow, 17 September 1939, in United States Department of State, *Foreign Relations of the United States: Diplomatic Papers, 1939*, I (1956), 428–429, 428–429. On Soviet efforts to justify the invasion of Poland, see S. Plokhy, ‘The Call of Blood: Government Propaganda and Public Response to the Soviet Entry into World War II’ (2011) 52 *Cahiers du Monde russe* 293.
29. J. L. Kunz, ‘The Problem of the Progressive Development of International Law’ (1945) 31 *Iowa Law Review* 544, 549.
30. M. Hakimi, ‘The Work of International Law’ (2017) 58 *Harvard International Law Journal* 1. See also I. Hurd, *How to Do Things with International Law* (2017).
31. Decree of the President of the Russian Federation No 147, ‘On the recognition of the Republic of Crimea’, 17

agreement with the ‘Republic’ to incorporate its territory into the Russian Federation.<sup>32</sup> In response, the member States of the European Union utilized Article 215 of the Treaty on the Functioning of the European Union<sup>33</sup> to adopt restrictive measures against Russia with the declared aim of increasing the costs of its infringement of the territorial integrity, sovereignty and independence of Ukraine.<sup>34</sup> Realists who see in the annexation of Crimea merely a violation of the prohibition to use force, and thus the irrelevance of law in the face of *realpolitik*, overlook the fact that international law and power interact in more subtle ways.<sup>35</sup>

Yet herein lies the tragedy of international law. Seen from a classic positivist perspective, international law, like any legal system, is instrumental in nature. Its purpose is to serve other ends: predictability, justice, security, the good life. However, since those ends are contested, international law itself is contestable and open to instrumentalization in the service of conflicting objectives and interests.<sup>36</sup> There is a constant tension between those seeking to preserve the *status quo* embodied in the international system and those hoping to overthrow it.<sup>37</sup> The politicization of international law therefore is inevitable. All questions of international law are political to a greater or lesser extent.<sup>38</sup> Nonetheless, international law must constantly reassert its distinct logic and *modus operandi* of legal formalism to avoid collapsing into politics,<sup>39</sup> otherwise it would no longer be capable of performing a distinctly legal function in the society it is meant to serve.<sup>40</sup>

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March 2014, <http://publication.pravo.gov.ru/Document/View/0001201403180002> (in Russian).

32. Agreement between the Russian Federation and the Republic of Crimea on the Accession of the Republic of Crimea to the Russian Federation and the Formation of New Federal Constituent Entities, 18 March 2014, <http://publication.pravo.gov.ru/Document/View/0001201403180024> (in Russian).
33. Consolidated Version of the Treaty on the Functioning of the European Union, 13 December 2007 [2012] OJ C 326/1.
34. Council Regulation 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia’s actions destabilizing the situation in Ukraine [2014] OJ L 229/1.
35. Ironically, in so doing they display a remarkable lack of realism about the operation of international law. See I. Brownlie, ‘The Reality and Efficacy of International Law’ (1982) 52 *British Yearbook of International Law* 1.
36. It is a mistake, therefore, to assume that a rules-based international order must necessarily be a pluralist and liberal one. See G. Simpson, ‘Two Liberalisms’ (2001) 12 *European Journal of International Law* 537.
37. H. J. Morgenthau, *Die internationale Rechtspflege, ihr Wesen und ihre Grenzen* (1929), 75–78; Carr (n. 20), 230.
38. Morgenthau (n. 37) 69; H. Lauterpacht, *The Function of Law in the International Community* (1933), 155.
39. See Luhmann (n. 21), 76–141.
40. In the *South West Africa Cases, Second Phase (Liberia v. South Africa; Ethiopia v. South Africa)*, (Advisory Opinion) (1966) ICJ Rep. 6, para 49, the International Court of Justice put this point as follows: ‘Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered.’

International law is thus caught in a dynamic where the instrumental use of rules forms a core feature of the system, yet where certain forms and manifestations of instrumentalization are deeply corrosive to a rules-based international order.<sup>41</sup> For example, State recognition constitutes a legitimate means to give effect to the right of self-determination of peoples, as happened in the case of Ukraine following its declaration of independence on 24 August 1991.<sup>42</sup> By contrast, using State recognition as a means to carry out the forcible annexation of another State's territory, as occurred more recently in Crimea, undermines the rule of law.<sup>43</sup> In these two cases, it is relatively straightforward to distinguish between the use and abuse of legal process, as measured against the substantive values enshrined in the international legal order as it presently exists. However, in other situations the dividing line between the legitimate and illegitimate instrumentalization of international law may not be so clear.<sup>44</sup>

### **Making sense of the strategic environment**

None of these dilemmas are novel.<sup>45</sup> However, they have gained renewed vigour as a result of the more competitive international environment, the progressive legalization of foreign affairs and the growing appetite for legal accountability.<sup>46</sup> They thus lie at the heart of what Judge Crawford has called the turn to a more antagonistic international law.

Lawyers for the most part have struggled to frame this development in appropriate terms. In recent years, three concepts have vied for their attention: lawfare, hybrid warfare and gray zone conflict. Although all three concepts make a useful contribution to a better understanding of the role of international law as a medium of strategic competition, they also suffer from certain shortcomings and analytical blind spots.

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41. Generally, see B. Z. Tamanaha, *Law as a Means to an End: Threat to The Rule of Law* (2006).

42. R. Rich, 'Recognition of States: The Collapse of Yugoslavia and the Soviet Union' (1993) 4 *European Journal of International Law* 36, 40–42.

43. Y. Shany, 'Does International Law Grant the People of Crimea and Donetsk a Right to Secede: Revisiting Self-Determination in Light of the 2014 Events in Ukraine' (2014) 21 *Brown Journal of World Affairs* 233.

44. E.g. J. S. Morton, 'The Legality of NATO's Intervention in Yugoslavia in 1999: Implications for the Progressive Development of International Law' (2002) 9 *ILSA Journal of International and Comparative Law* 75, 99–101.

45. See L. Henkin, *How Nations Behave: Law and Foreign Policy* (2nd, 1979), 88–98; M. Koskenniemi, 'The Politics of International Law' (1990) 1 *European Journal of International Law* 4; M. Koskenniemi, 'The Politics of International Law—20 Years Later' (2009) 20 *European Journal of International Law* 7.

46. P. Rowe, *Legal Accountability and Britain's Wars 2000–2015* (2016).

## *Lawfare*

The notion of lawfare was introduced into mainstream legal discourse by Major General Charlie Dunlap.<sup>47</sup> In his initial writings, Dunlap described lawfare as a ‘method of warfare where law is used as a means of realizing a military objective’.<sup>48</sup> The example that most readily comes to mind is the deliberate violation by an adversary of its legal obligations in the hope of obtaining an illicit advantage on the battlefield. The law of armed conflict prohibits using the presence or movement of civilians to render certain points or areas immune from military operations, in particular in an attempt to shield military objectives from attack or to shield, favour or impede military operations.<sup>49</sup> However, the fact that an adversary employs human shields in violation of this prohibition does not relieve another belligerent from its duty to protect civilians.<sup>50</sup> By prioritizing the protection of civilians, the law thus affords unscrupulous adversaries with an asymmetric advantage: placing civilians near military objectives may shield the latter from attack, provided that the attacking party continues to abide by its own obligations.

In the eyes of most commentators, lawfare is firmly associated with acting in bad faith.<sup>51</sup> However, in later writings, Dunlap emphasized its essentially neutral character.<sup>52</sup> If law is a means of warfare, then the question whether its use is beneficial or harmful depends entirely on who is employing it for what purpose and against whom. Law, therefore, does not differ much from a rifle: whether or not a rifle is a good thing depends in large measure on which end of it one happens to stand. Understood in these terms, lawfare is an agnostic concept that simply describes the use or abuse of law as a means to achieve a military goal.<sup>53</sup> It follows that lawfare can be a force for

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47. C. Dunlap, *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* (Carr Center for Human Rights, 2001).

48. *Ibid.*, 4.

49. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art 51(7), 8 June 1977, 1125 UNTS 3 (Additional Protocol I). See J.-M. Henckaerts and L. Doswald-Beck (eds), *Customary International Humanitarian Law, Volume I: Rules* (2005), 337–340.

50. Additional Protocol I art 51(8).

51. See S. Horton, ‘The Dangers of Lawfare’ (2010) 43 *Case Western Reserve Journal of International Law* 163, 170; D. Luban, ‘Carl Schmitt and the Critique of Lawfare’ (2010) 43 *Case Western Reserve Journal of International Law* 457, 458–459.

52. C. J. Dunlap, Jr, ‘Lawfare Today: A Perspective’ (2008) 3 *Yale Journal of International Affairs* 146, 146–148; C. J. Dunlap, Jr, ‘Does Lawfare Need an Apologia?’ (2010) 43 *Case Western Reserve Journal of International Law* 121, 122; C. J. Dunlap, Jr, ‘Lawfare Today... and Tomorrow’ (2011) 87 *International Law Studies* 315, 315.

53. Dunlap, ‘Does Lawfare Need an Apologia?’ (n. 52), 122.

good. For instance, it is not far-fetched to describe the establishment of the International Criminal Tribunal for the former Yugoslavia as an example of lawfare, bearing in mind that one of the aims pursued by the Security Council was to influence the behaviour of the warring parties in the absence of effective military means to do so.<sup>54</sup>

Others have built on Dunlap's work to refine the concept further. For example, Orde Kittrie defines lawfare as the use of law to create the same or similar effects as those traditionally sought from conventional military action, *provided* the party using law in this manner is motivated by a desire to weaken or destroy an adversary.<sup>55</sup> The addition of an intent requirement is designed to exclude from the definition actions that are not hostile in character.

Despite such refinements, the concept suffers from several limitations.<sup>56</sup> The instrumental use of international law is not confined to war. States regularly employ law and legal arguments to pursue their interests outside the context of active hostilities, for example as China does in the South China Seas. As traditionally understood, lawfare fails to capture the instrumentalization of law beyond armed conflict and for purposes other than strictly military gains. In fact, even during armed conflict, non-State actors such as Hamas and Hezbollah do not resort to lawfare and place civilians at risk solely or even primarily in order to achieve a direct operational advantage. Rather, the benefit they seek often lies in the information domain, where they can exploit the increased rates of civilian suffering caused by their own failure to comply with the law to delegitimize their opponent.<sup>57</sup> The traditional concept also says little about the standards against which lawfare should be assessed. For example, what criteria should be applied to prioritize different instances of lawfare and to distinguish them from ordinary legal business? If lawfare truly is a neutral concept, how should law-abiding nations know where the dividing line between the legitimate use

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54. SC Res 827, 25 May 1993, preamble. *Cf.* UN SCOR, 48th Session, 3217th meeting, UN Doc S/PV.3217, 25 May 1993, 12 (France), 19 (UK), 21 (Hungary), 22–23 (New Zealand), 24–25 (Japan), 27 (Morocco) and 32 (Pakistan). See W. M. Reisman, 'Stopping Wars and Making Peace: Reflections on the Ideology and Practice of Conflict Termination in Contemporary World Politics' (1998) 6 *Tulane Journal of International and Comparative Law* 5, 46–49. See also R. Kerr, *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics, and Diplomacy* (2004), 12–40.

55. O. F. Kittrie, *Lawfare: Law as a Weapon of War* (2016), 8.

56. See also J. Voetelink, 'Reframing Lawfare', in P. A. L. Ducheine and F. P. B. Osinga (eds), *Netherlands Annual Review of Military Studies (Winning Without Killing: The Strategic and Operational Utility of Non-Kinetic Capabilities in Crises)* (2017) 237.

57. Jewish Institute for National Security of America, Gemunder Center for Defense and Strategy, *Israel's Next Northern War: Operational and Legal Challenges* (2018), especially 28–35. See also L. R. Blank, 'Media Warfare, Propaganda, and the Law of War', in M. L. Gross and T. Meisels (eds), *Soft War: The Ethics of Unarmed Conflict* (2017) 88.

of law and its impermissible abuse lies?<sup>58</sup> In the absence of general agreement on this question, lawfare is open to the charge that it is simply a label used to discredit perfectly routine legal claims by tarnishing them with the brush of illegitimacy.<sup>59</sup> Often, the concept is clouded by national experiences. In the UK, for example, lawfare seems indelibly, but unhelpfully, associated with concerns over human rights litigation and its impact on military effectiveness.<sup>60</sup>

### *Hybrid warfare*

The notion of hybrid warfare originally emerged in the context of debates over the changing character of war and the associated question of future force structures and force modernization.<sup>61</sup> One of the earliest proponents of the term is Frank Hoffman.<sup>62</sup> With adversaries increasingly deploying an integrated mix of conventional capabilities and irregular tactics in the same battlespace, Hoffman argued that distinct modes of warfighting, acts of terrorism and criminality were converging to produce a hybrid form of war. Following Russia's annexation of Crimea, the concept gained wider popularity and entered the Western strategic lexicon. In the process, it acquired a looser meaning to refer to the combined use of military and non-military, conventional and unconventional, overt and covert means of exercising influence.<sup>63</sup> This conceptual drift has not escaped criticism. In the eyes of many commentators, a loose understanding of hybrid warfare is little more than a shorthand for geostrategic competition across multiple domains or a euphemism for Russian aggression that offers few, if any, useful insights.<sup>64</sup>

Hybrid warfare is not a legal term of art and its fluidity has made assessing its legal implications

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58. G. P. Noone, 'Lawfare or Strategic Communications?' (2010) 43 *Case Western Reserve Journal of International Law* 73, 83–85.
  59. E.g. D. Hughes, 'What Does Lawfare Mean?' (2016) 40 *Fordham International Law Journal* 1; F. Irani, "'Lawfare', US Military Discourse, and the Colonial Constitution of Law and War' (2017) 3 *European Journal of International Security* 113.
  60. Cf. T. Tugendhat and L. Croft, *The Fog of Law: An Introduction to the Legal Erosion of British Fighting Power* (Policy Exchange, 2013), 35.
  61. J. N. Mattis and F. G. Hoffman, 'Future Warfare: The Rise of Hybrid Wars' (2005) Issue 131 *Proceedings Magazine* 18. See É. Tenenbaum, 'Hybrid Warfare in the Strategic Spectrum: An Historical Assessment', in G. Lasconjarias and J. A. Larsen (eds), *NATO's Response to Hybrid Threats* (2015) 95.
  62. F. G. Hoffman, *Conflict in the 21st Century: The Rise of Hybrid Warfare* (Potomac Institute for Policy Studies, 2007); F. G. Hoffman, 'Hybrid Warfare and Challenges' (2009) 52 *Joint Force Quarterly* 34.
  63. O. Fridman, *Russian "Hybrid Warfare": Resurgence and Politicization* (2018).
  64. E.g. S. Charap, 'The Ghost of Hybrid War' (2015) 57 *Survival* 51; A. Monaghan, 'The "War" in Russia's "Hybrid Warfare"' (2015) 45 *Parameters* 65; B. Renz, 'Russia and "Hybrid Warfare"' (2016) 22 *Contemporary Politics* 283.

difficult.<sup>65</sup> However, both NATO and the EU have associated certain legal challenges with the notion.<sup>66</sup> Hybrid adversaries are said to deploy law and legal arguments in an effort to gain an operational or strategic advantage. They do so in several ways. They exploit the lack of legal interoperability and consensus among Western nations. They generate and exploit legal ambiguity. They also circumvent legal boundaries and thresholds to avoid triggering the applicability of mutual assistance commitments, such as Article 5 of the North Atlantic Treaty.<sup>67</sup> In addition, it has become practically an article of faith that the classic distinction between war and peace is fading away as a consequence of the hybridization of warfare. For example, at their Brussels summit held in July 2018, NATO leaders took note of the increasing challenges posed by States and non-State actors ‘who use hybrid activities that aim to create ambiguity and blur the lines between peace, crisis, and conflict.’<sup>68</sup>

The narrow understanding of hybrid warfare, as initially proposed by Hoffman, describes a form of operational art and is therefore closely linked to the conduct of hostilities. It shares this feature with Dunlap’s definition of lawfare. In fact, lawfare has been identified as a specific hybrid warfare technique.<sup>69</sup> The benefit of the narrow hybrid warfare perspective is that it draws attention to certain hostile tactics. These include plausible deniability, interference not reaching the level of prohibited intervention, acting through proxies, information operations and the use of force below the threshold of an armed attack. This also focuses attention on certain legal difficulties and areas of law, including the attribution of wrongful acts, the law of cyber operations, countermeasures, the rules governing the use of force and the law of armed conflict.<sup>70</sup> The hybrid warfare construct

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65. See M. E. O’Connell, ‘Myths of Hybrid Warfare’ (2015) 2 *Ethics and Armed Forces* 27; B. Wittes, *What Is Hybrid Conflict?*, Lawfare, 11 September 2015, <https://lawfareblog.com/what-hybrid-conflict>.

66. In particular, see Supreme Allied Commander, Europe and Supreme Allied Commander, Transformation, Bi-SC Input to a New NATO Capstone Concept for the Military Contribution to Countering Hybrid Threats, 25 August 2010; Headquarters, Supreme Allied Commander Transformation, Assessing Emerging Security Challenges in the Globalised Environment: The Countering Hybrid Threats (CHT) Experiment, Final Experiment Report (FER), 29 September 2011; European External Action Service, Food-for-Thought Paper ‘Countering Hybrid Threats’, Council Doc 8887/15, 13 May 2015; European Commission, Joint Framework on Countering Hybrid Threats: A European Union Response, JOIN(2016) 18 final, 6 April 2016.

67. 4 April 1949, 34 UNTS 244.

68. Brussels Summit Declaration, Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Brussels, 11–12 July 2018.

69. A. B. Muñoz Mosquera and S. D. Bachmann, ‘Lawfare in Hybrid Wars: The 21st Century Warfare’ (2016) 7 *Journal of International Humanitarian Legal Studies* 63.

70. See D. Cantwell, *Hybrid Warfare: Aggression and Coercion in the Gray Zone*, ASIL Insights, 29 November 2017, <https://www.asil.org/insights/volume/21/issue/14/hybrid-warfare-aggression-and-coercion-gray-zone>.

thus offers a concrete typology of lawfare and a catalogue of specific legal challenges to be addressed.

However, the narrow understanding of hybrid warfare runs into the same objection as the classic definition of lawfare. Adversaries utilize hybrid tactics, including lawfare, not just in the shadow of impending armed conflict or during actual hostilities, but also in situations where there is no immediate prospect of war. The attempted murder of Sergei Skripal with a chemical nerve agent in the city of Salisbury on 4 March 2018 offers an example.<sup>71</sup> This is why many commentators and organizations such as the EU prefer to use the term hybrid *threats*. According to the European Centre of Excellence for Countering Hybrid Threats, such threats involve the systematic targeting of the political, social, economic, military and other vulnerabilities of Western nations in pursuit of strategic goals.<sup>72</sup> This definition of hybrid threats may offer a fitting description of the current geopolitical condition or, as some have suggested, a fitting insight into Western existential angst.<sup>73</sup> But it suffers from the same defect as the loose understanding of hybrid warfare: its sheer breadth undermines its utility as a framework for legal analysis. The hybrid warfare concept thus oscillates between too narrow and too broad a frame of mind.

### *Gray zone conflict*

When a river enters the sea, the freshwater does not turn into seawater an instant. It tends to produce brackish water. War and peace may be polar opposites, but they too may converge in a mixed state. This realization that war and peace are continuous, rather than discrete, fields of human endeavour has given rise to the idea that they may blend into each other, producing a gray zone that is neither truly war nor truly peace.<sup>74</sup> In recent years, strategic discourse has seized upon this image, above all in the US, to develop a range of related concepts, including the notion of gray

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71. Letter dated 13 March 2018 from the Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, UN Doc S/2018/218, 13 March 2018.

72. See <https://www.hybridcoe.fi/hybrid-threats/>.

73. M. Mälksoo, 'Countering Hybrid Warfare as Ontological Security Management: The Emerging Practices of the EU and NATO' (2018) 27 *European Security* 374.

74. E.g. J. G. Ruggie, 'Wandering in the Void: Charting the UN's New Strategic Role' (1993) 72 *Foreign Affairs* 26, 28; W. Curtis, 'Maneuvering in the Gray Zone: The Gap Between Traditional Peacekeeping and War Fighting, Peacemaking, Peace-Enforcement, and Post-Conflict Peace-Building', in F. L. Mokhtari (ed.) *Peacemaking, Peacekeeping, and Coalition Warfare: The Future Role of the United Nations* (1994) 175; A. Eide, A. Rosas and T. Meron, 'Combating Lawlessness in Gray Zone Conflicts Through Minimum Humanitarian Standards' (1995) 89 *American Journal of International Law* 215, 217.

zone threat and gray zone conflict.<sup>75</sup>

A white paper published by the United States Special Forces Command defines gray zone conflicts as ‘competitive interactions among and within State and non-State actors that fall between the traditional war and peace duality’.<sup>76</sup> This is a broad concept, but as the white paper emphasizes, some level of aggression is required to shift peacetime competition into the gray zone.<sup>77</sup> A report prepared by the International Security Advisory Board of the United States State Department adopts a similar approach, arguing that the central characteristic of gray zone operations is ‘that they involve the use of instruments beyond normal international interactions, yet short of overt military force’.<sup>78</sup> Gray zone conflict may not be new or exceptional, but it is pathological, rather than normal. This represents one of the weak spots of the concept: wherein lies this pathological element that distinguishes gray zone operations from routine international rivalry? The International Security Advisory Board suggests that gray zone actors employ means that ‘go beyond the forms of political and social action and military operations with which liberal democracies are familiar, to make deliberate use of instruments of violence, terrorism, and dissembling’.<sup>79</sup> This approach is not unreasonable, but it relies heavily on national perceptions of normality.<sup>80</sup>

Whereas the notion of hybrid warfare is preoccupied with the multimodal way in which adversaries operate, the gray zone concept focuses on the competitive space within which they conduct their activities. By definition, this space is marked by ambiguity about the nature of the conflict and the legal status of the parties, which in turn generates uncertainty about the applicable law.<sup>81</sup> The Kerch Strait incident between Russia and Ukraine illustrates the point. On 25 November 2018, Russian coast guard patrol boats intercepted, fired upon and seized three Ukrainian navy vessels near the entrance of the Kerch Strait. Since Russia and Ukraine are engaged in an ongoing international armed conflict, the incident is governed not only by the general rules of international law, including the law of the sea, but also by the law of naval warfare, a point that is often overlooked.<sup>82</sup> Even though Russia could have justified both the attack and the internment of the

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75. In recognition of its origins, the present paper retains the North American spelling of these terms.

76. United States Special Forces Command, *The Gray Zone* (United States Special Forces Command, 2015), 1.

77. *Ibid.*, 3.

78. International Security Advisory Board, *Report on Gray Zone Conflict* (United States State Department, 2017), 2.

79. *Ibid.*

80. United States Special Forces Command (n. 76), 3.

81. M. J. Mazarr, *Mastering the Gray Zone: Understanding a Changing Era of Conflict* (Strategic Studies Institute and US Army War College, 2015), 66; United States Special Forces Command (n. 76), 4.

82. E.g. D. Gorenburg, *The Kerch Strait Skirmish: A Law of the Sea Perspective* (European Centre of Excellence for

Ukrainian crew members with reference to the law of war,<sup>83</sup> consistent with its efforts to deny its involvement in an armed conflict with Ukraine, it did not invoke its belligerent rights. In addition to generating legal uncertainty, grey zone conflicts also give rise to more specific legal challenges. However, since operations in the gray zone for the most part involve the same tactics and techniques as those associated with hybrid warfare,<sup>84</sup> they mostly raise identical legal questions.<sup>85</sup>

Implicit in much of the gray zone debate is an underlying concern that a gap has opened up between the traditional model of war that informs international law and the more amorphous character of contemporary warfare.<sup>86</sup> The law seems to lag behind reality. The same concern animates much of the hybrid warfare debate, as reflected in its fixation on the dividing line between war and peace.

Classic legal authorities have consistently denied that a middle ground exists between war and peace.<sup>87</sup> The reality of warfare never quite reflected this classic position. Even Clausewitz was forced to admit that the extreme and unrelenting application of violence, which he identified as the internal dynamic of war in an ideal sense, finds itself tempered in the real world by competing considerations.<sup>88</sup> Limited objectives, lack of incentives and the fear of escalation breed military stagnation, ‘half-wars’ and a descent into the use of force as a mere threat.<sup>89</sup> But legal practice has never quite lived up to the strict doctrinal distinction between war and peace either.<sup>90</sup> Formal

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Countering Hybrid Threats, 2019).

83. J. Kraska, *The Kerch Strait Incident: Law of the Sea or Law of Naval Warfare?*, EJIL:Talk, 3 December 2018, <https://www.ejiltalk.org/the-kerch-strait-incident-law-of-the-sea-or-law-of-naval-warfare/>.
84. International Security Advisory Board (n. 78), 2; V. Jackson, ‘Tactics of Strategic Competition: Gray Zones, Redlines, and Conflicts before War’ (2017) 70 *Naval War College Review* 39; J. J. Wirtz, ‘Life in the “Gray Zone”’: Observations for Contemporary Strategists’ (2017) 33 *Defense and Security Analysis* 106, 107–110.
85. See M. N. Schmitt and A. E. Wall, ‘The International Law of Unconventional Statecraft’ (2014) 5 *Harvard National Security Journal* 349; H. Nasu, ‘Japan’s 2015 Security Legislation: Challenges to Its Implementation under International Law’ (2016) 92 *International Law Studies* 248, 260–269; R. Brooks, *Rule of Law in the Gray Zone*, Modern War Institute, 2 July 2018, <https://mwi.usma.edu/rule-law-gray-zone/>.
86. E.g. M. Leed, ‘Square Pegs, Round Holes, and Gray Zone Conflicts’ (2015) 16 *Georgetown Journal of International Affairs* 133, 134–135.
87. H. Grotius, *De Jure Belli ac Pacis Libri Tres* (1625), Bk III, ch XXI, I.1. See also *Janson v Driefontein Consolidated Mines Ltd* [1902] AC 484, 497 (House of Lords).
88. C. v. Clausewitz, *Hinterlassene Werke des Generals Carl von Clausewitz über Krieg und Kriegführung*, III (1834), Bk VIII, ch 2.
89. *Ibid*, Bk VIII, ch 6.
90. G. Schwarzenberger, ‘Jus Pacis Ac Belli?: Prolegomena to a Sociology of International Law’ (1943) 37 *American Journal of International Law* 460.

declarations of war were always the exception, rather than the rule.<sup>91</sup> Since 1945, States have found ways of employing force in circumstances not foreseen by the UN Charter. In doing so, they have adapted and recalibrated the law in several respects.<sup>92</sup> Much of the gray zone debate thus fails to appreciate that in legal practice, the threshold between war and peace and their attendant regulatory frameworks is not as firm as the black letter of the law may suggest.<sup>93</sup> The legitimate use of the law and its blatant abuse are not always separated by a clear line in this field. This has implications for determining whether a particular competitive tactic or incident is pathological, and thus forms part of gray zone conflict, or not. It also means that gray zone conflicts not only generate legal ambiguity, but that legal gray zones generate conflict too.

### **Facing up to the challenges**

From a legal perspective, the three concepts explored in the preceding section—lawfare, hybrid warfare and gray zone conflict—have proved themselves to be under-inclusive in some respects and over-inclusive in others. The legal community is thus confronted with a situation where policy and strategic discourse has adopted a language that does not translate well into legal doctrine and *vice versa*. By not engaging with the prevailing discourse on its own terms, lawyers open themselves up to censure for ignoring current strategic priorities, including concerns over the erosion of the rules-based international order.<sup>94</sup> Yet by adopting those terms uncritically, they run the risk of entangling themselves in concepts that may prove to be of limited benefit for legal analysis.

Nevertheless, certain insights may be identified. At the most general level, all three concepts underscore the instrumentalization of international law for strategic ends. Had Clausewitz been a lawyer, he might have observed that law is but a continuation of politics by other means. This is not to side with those realists who deny that international law is governed by its own, distinct logic. If they were right, the validity of international rules would depend on their political utility and not

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91. J. F. Maurice, *Hostilities without Declaration of War* (1883). See also C. Greenwood, 'The Concept of War in Modern International Law' (1987) 36 *International and Comparative Law Quarterly* 283.

92. T. M. Franck, 'Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States' (1970) 64 *American Journal of International Law* 809; T. M. Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (2002).

93. See M. Hakimi, 'The Jus ad Bellum's Regulatory Form' (2018) 112 *American Journal of International Law* 151. See also W. M. Reisman, *The Quest for World Order and Human Dignity in the Twenty-First Century: Constitutive Process and Individual Commitment* (2013), 95–104.

94. E.g. Cabinet Office, *National Security Capability Review* (Cabinet Office, 2018), 6.

on legal criteria.<sup>95</sup> But then they would cease to be rules of law. Rather, it is to accept that international law is, by its very nature, politically contestable and open to instrumentalization for non-universal ends. As I have argued in greater detail elsewhere,<sup>96</sup> in the present context this instrumentalization takes on a particular form. In hybrid warfare and gray zone conflicts, adversaries rely on law and legal arguments predominantly in order to legitimize their own behaviour and maintain their own freedom of action and to delegitimize their opponents' behaviour and restrict their respective freedom of action. In addition, all three concepts draw attention to a set of tactics and techniques that adversaries tend to employ for these purposes. This combined catalogue of lawfare, hybrid and gray zone measures gives more concrete meaning to the instrumentalization of international law by enabling lawyers to identify specific legal questions, difficulties and vulnerabilities that demand their talents. However, absorbing these insights without more is insufficient.

#### *The national interest and the international rule of law*

The turn to a more antagonistic international law poses two types of challenges. By definition, the use of international law for strategic ends as part of a lawfare, hybrid or gray zone campaign affects the strategic position of the targeted State. The instrumental use of international law by adversaries thus presents a challenge, first of all, to the national interest of each State. For methodological reasons, this is an important point to make. Understanding how adversaries utilize the law requires technical legal expertise. However, the strategic significance and impact of their actions is not something that can be assessed by legal criteria alone. These are questions of political judgment— informed by legal expertise, but not decided by it. A legal claim may be perfectly tenable under the law, but that does not prevent it from being pursued with hostile intent. Moreover, whether a particular claim is legally tenable or abusive may be difficult to determine conclusively with reference to legal standards such as the principle of good faith.<sup>97</sup> Part of the answer depends on political criteria and thus, inevitably, on partisan considerations. If the exercise of political judgment in these matters cannot be avoided, it is more conducive to sound analysis, and intellectually more honest, to acknowledge this.

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95. A. Peters, 'How Not to Do Things with International Law' (2018) 32 *Ethics and International Affairs* 483, 486.

96. A. Sari, 'Hybrid Warfare, Law and the Fulda Gap', in C. M. Ford and W. S. Williams (eds), *Complex Battlespaces: The Law of Armed Conflict and the Dynamics of Modern Warfare* (2019) 161, 186–187.

97. J. Dill, 'Abuse of Law on the Twenty-First-Century Battlefield: A Typology of Lawfare', in M. L. Gross and T. Meisels (eds), *Soft War: The Ethics of Unarmed Conflict* (2017) 119, 125–128. See also D. Stephens, 'The Age of Lawfare' (2011) 87 *International Law Studies* 327.

The hostile instrumentalization of international law also poses a challenge to the international rule of law. Many of the tactics employed—such as taking advantage of legal gaps and thresholds in bad faith, evading legal accountability, advancing untenable legal arguments, circumventing legal commitments or engaging in manifest breaches of the applicable rules—are incompatible with respect for the rule of law. The cynical evasion and manipulation of the law not only deepens the structural weaknesses of the international legal order, especially if the culprits are great powers, but it also leads other actors to question the wisdom of their own continued compliance. At a certain point, the accumulation of persistent and serious transgressions may threaten to undermine the integrity of the international legal system as such. Specifically, the instrumental use of the law risks politicizing international legal processes and discourse to the point where their ability to serve as an effective medium for resolving political disputes is compromised. The near complete schism between Western and Russian international lawyers in their assessment of Russia’s annexation of Crimea—the former widely denouncing it as a grave violation of international law, the latter predominantly treating it as a lawful exercise of the right of self-determination—illustrates the danger.<sup>98</sup>

These two challenges are connected. When actors with a vested interest in the *status quo* are confronted with revisionist tactics, they face a choice. They may continue to comply with the rules that underpin the *status quo*, but at the cost of abstaining from employing the same illicit, but potentially effective, instruments used by their adversaries. Alternatively, they may attempt to beat revisionist powers at their own game and adopt their tactics, but at the expense of joining them in undermining the legal *status quo*. Law-abiding States must therefore mediate between both challenges: they cannot afford to counter lawfare, hybrid and gray zone challenges harmful to their national interests with identical means without chipping away at the international rule of law.

This dilemma between normative and non-normative counteraction manifests itself in many guises. For example, in the cyber domain, it is the UK’s position that the principle of sovereignty does not prohibit one State from interfering with the computer networks of another State where such interference falls below the level prohibited by the principle of non-intervention.<sup>99</sup> On this view, cyber interference to manipulate the electoral system of another State is prohibited, but cyber operations to steal private data are not. There is no reason to doubt that this position reflects the genuinely held view of Her Majesty’s Government about the current state of international law. However, it is also safe to assume that it is informed by a pragmatic calculation of risk and reward:

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98. A. Roberts, *Is International Law International?* (2017), 231–240.

99. J. Wright, *Cyber and International Law in the 21st Century*, 23 May 2018, <https://www.gov.uk/government/speeches/cyber-and-international-law-in-the-21st-century>.

the threat that low-level cyber interference poses to the UK and the benefit the country may derive from conducting such cyber operations against its competitors. Although the UK decided against a normative approach in this instance, its National Cyber Security Centre subsequently accused Russia of acting ‘in flagrant violation of international law’ for engaging in cyber interference of the kind the Government determined was not prohibited by international law.<sup>100</sup> In the light of the Government’s earlier position, this accusation lacks bite.<sup>101</sup> The affair demonstrates that choosing brinkmanship over normative solutions, and *vice versa*, is not cost free.

The challenges posed by the instrumentalization of international law are complex and significant. They go to the heart of the relationship between law and power in international relations. It would be naïve, therefore, to believe that they can be resolved conclusively. Managing them and lessening their adverse impacts is a more realistic objective. However, even this more modest goal requires a systematic and sustained effort. Such an effort, I suggest, should be based on two foundations.

#### *A legal resilience perspective*

The first step is to adopt a legal resilience perspective. Resilience theory derives from multiple sources. One influential strand emerged in the field of ecology in the 1970s.<sup>102</sup> Over the years, resilience thinking has spread to other disciplines, including the social sciences and, to a lesser extent, law.<sup>103</sup> Most of the resilience scholarship in the field of law is concerned with environmental law and related subjects.<sup>104</sup> So far, few attempts have been made to utilize the concept in the field of international conflict and security law. This is a missed opportunity, as adopting a legal resilience perspective promises several benefits.

Legal resilience is concerned with the resistance of legal systems to change and their capacity

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100. National Cyber Security Centre, Reckless campaign of cyber attacks by Russian military intelligence service exposed, 4 October 2018, <https://www.ncsc.gov.uk/news/reckless-campaign-cyber-attacks-russian-military-intelligence-service-exposed>.

101. J. Biller and M. Schmitt, *Un-caging the Bear? A Case Study in Cyber Opinio Juris and Unintended Consequences*, EJIL:Talk, 24 October 2018, <https://www.ejiltalk.org/un-caging-the-bear-a-case-study-in-cyber-opinio-juris-and-unintended-consequences/>.

102. C. S. Holling, ‘Resilience and Stability of Ecological Systems’ (1973) 4 *Annual Review of Ecology and Systematics* 1.

103. T.-L. Humby, ‘Law and Resilience: Mapping the Literature’ (2014) 4 *Seattle Journal of Environmental Law* 85.

104. E.g. L. H. d. L. Demange, ‘The Principle of Resilience’ (2012) 30 *Pace Environmental Law Review* 695; A. S. Garmestani and C. R. Allen (eds), *Social-Ecological Resilience and Law* (2014); M. H. Benson, ‘Reconceptualizing Environmental Challenges: Is Resilience the New Narrative?’ (2015) 21 *Journal of Environmental and Sustainability Law* 99.

to adapt in response to disturbances. In essence, the aim of legal resilience theory is to understand how legal systems cope with internal and external shocks. Legal scholarship follows other disciplines in distinguishing between two forms of resilience.<sup>105</sup> Engineering resilience refers to the capacity of a system to suffer disturbances whilst still retaining its ability to return to an earlier stable state. Picture a branch twisted by the wind: can it spring back into shape or will it break? Ecological resilience, by contrast, refers to the capacity of a system to absorb the effects of disturbances through adaptation, whilst still retaining its original function and other core characteristics. If the branch breaks, will the tree grow a new one? Both forms of resilience describe the ability of a system to retain its original functionality and identity in response to disturbance, but one focuses on static coping mechanisms (resistance and recovery) and the other on dynamic strategies (adaptation). This distinction translates well into the present context, given that the capacity of international law to endure in the face of persistent breaches and its ability to adapt to the changing international environment are key areas of concern. The literature also distinguishes between two different dimensions of legal resilience.<sup>106</sup> The first dimension pertains to the role that law plays in rendering other social systems, for instance the economy, more resilient. The second is concerned with the resilience of the law itself. This distinction resonates well with the twin challenges posed by the instrumentalization of international law. From a resilience perspective, we may ask, first, what contribution international (or domestic) law can make towards rendering societies more resilient against the threats posed by hybrid warfare and gray zone conflicts and, second, what measures are required to make the international legal order more resilient against violations and subversion.

The first benefit of adopting a legal resilience perspective, therefore, is analytical. It shines a spotlight on the capacity of international law to cope with disturbances. This focuses attention on law's vulnerabilities and coping mechanisms. It also highlights that there is a difference between using international law in pursuit of societal resilience and increasing the resilience of the international legal order as such. The second benefit is for the formulation of policy. Resilience is not an absolute virtue. Few would wish to see the undesirable features of a social system become resilient to change. However, for States that seek to safeguard their strategic position and the international rule of law against the hostile instrumentalization of international law, legal resilience is a value worth pursuing. A legal resilience perspective encourages States to make better use of

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105. E.g. J. B. Ruhl, 'General Design Principles for Resilience and Adaptive Capacity in Legal Systems—With Applications to Climate Change Adaptation Adaptation and Resiliency in Legal Systems' (2010) 89 *North Carolina Law Review* 1373, 1375–1378.

106. *Ibid*, 1382.

international law to strengthen their national resilience and to bolster the capacity of international rules, institutions and processes to withstand hostile instrumentalization by their adversaries. Legal resilience is, essentially, a *status quo* strategy. Finally, adopting a legal resilience perspective should bring different expert communities and their notions of resilience closer together by underscoring that resilience has a legal dimension and international law a resilience aspect.<sup>107</sup>

### *An operational mindset*

If the use of international law for strategic ends teaches one lesson, it is that international law is a dynamic system composed not only of rules, but also of legal actors, decisions, institutions, claims and counter-claims.<sup>108</sup> This dynamic nature of international law is often overlooked. Yet there can be little hope of successfully countering the hostile instrumentalization of international law unless the international legal order is treated as a realm of action. This calls for the adoption of an operational mindset.

First, in view of its nature as system of rules and processes, law should be formally recognized in military doctrine and strategic thinking as a distinct environment within the overall operating environment. NATO defines the operating environment as ‘a composite of the conditions, circumstances and influences that affect the employment of capabilities and bear on the decisions of the commander’.<sup>109</sup> Although the operating environment is understood to encompass all relevant physical and non-physical areas and factors, doctrine tends to focus on its political, military, economic, social, information and infrastructure (PMESII) dimensions, without specifically including law on this list.<sup>110</sup> Instead, international law is treated outside this conceptual framework in its own right.<sup>111</sup> Although this is to be welcomed to the extent that it acknowledges its importance and distinct characteristics, it nevertheless compartmentalizes legal affairs by isolating them, both conceptually and in practice, from other environments. Formally recognizing

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107. E.g. J. Shea, *Resilience: A Core Element of Collective Defence*, NATO Review, <https://www.nato.int/docu/review/2016/also-in-2016/nato-defence-cyber-resilience/en/index.htm>; T. Brinkel, ‘The Resilient Mind-Set and Deterrence’, in P. A L Ducheine and F. P. B. Osinga (eds), *Netherlands Annual Review of Military Studies (Winning Without Killing: The Strategic and Operational Utility of Non-Kinetic Capabilities in Crises)* (2017) 19. See also S. A. Beichler, *et al.*, ‘The Role played by Social-Ecological Resilience as a Method of Integration in Interdisciplinary Research’ (2014) 19 *Ecology and Society*.

108. R. Higgins, *Problems and Process: International Law and How We Use It* (1994), 2.

109. NATO, *Allied Joint Doctrine*, AJP-01, February 2017 (edn 5, ver 1).

110. E.g. NATO, *Allied Joint Doctrine for the Conduct of Operations*, AJP-3 (B), March 2011, §§ 0410–0414.

111. NATO, *Allied Joint Doctrine*, AJP-01, February 2017 (edn 5, ver 1), §§ 1.13–1.19.

law as a dimension of the overall operating environment would remedy this.

Second, international law should be treated as a specific instrument and medium through which strategic and operational objectives may be pursued. Western military doctrine adopts a holistic and effects-based approach to targeting which is meant to consider ‘all available actions and potential effects set against the operations objective’.<sup>112</sup> Despite the supposedly full-spectrum approach, law is not recognized as a source of available actions and potential effects. Instead, legal consideration usually enter the targeting process in the guise of external constraints on targeting decisions and action.<sup>113</sup> This perspective is too narrow. It fails to appreciate law’s potential to achieve operational effects and the fact that operations sometimes pursue legal effects.<sup>114</sup> Recognizing international law as an operating environment implies that it is a space in and through which effects may be achieved. Conceiving of law in these terms permits incorporating legal effects into the joint targeting process, which in turn provides a framework for undertaking legal information activities, fires and manoeuvres<sup>115</sup> and to coordinate, synchronize and integrate these with other targeting activities.

Third, putting an operational mindset into practice requires sound doctrine, effective processes and adequate resources. At the heart of these requirements lies a recalibration of the way in which legal expertise is employed. Legal experts and advisors carry out a wide range of functions that include advising, litigating, negotiating and counselling. Their mandate may even involve contributing to policy planning and development.<sup>116</sup> Whilst achieving legal effects may be implicit in most of these roles, it is seldom confirmed as an explicit responsibility. In the military context, for example, the legal advisor’s principal duty is defined as assisting the commander in exploiting operational options.<sup>117</sup> Whereas legal advisors are expected to carry out their duties proactively, their job description fails to specifically charge them with the task of manoeuvring in the legal environment to achieve legal and operational effects. Both the law and legal expertise thus remain underutilized.<sup>118</sup> To rectify this, it should be recognized that the role of legal experts is not simply

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112. NATO, *Allied Joint Doctrine for Joint Targeting*, AJP-3.9, April 2016 (edn A, ver 1), § 0117.

113. *Ibid.*, § 0119.

114. E.g. freedom of navigation operations.

115. See UK Ministry of Defence, *Understanding and Intelligence Support to Joint Operations*, JDP 2-00, August 2011 (3rd edn), section III.

116. E.g. S. Hill, ‘The Role of NATO’s Legal Adviser’, in A. Zidar and J.-P. Gauci (eds), *The Role of Legal Advisers in International Law* (2016) 213, 224.

117. UK Ministry of Defence, *Legal Support to Joint Operations*, JDP 3-46, June 2018 (3rd edn), § 5.1.

118. See also J. P. Trachtman, ‘Integrating Lawfare and Warfare’ (2016) 39 *Boston College International and Comparative Law Review* 267, 281.

to provide *legal support to operations*, but also to undertake *legal operations*.<sup>119</sup> This shift in perspective must be embedded in doctrine. It also requires robust procedures and guidelines. Inevitably, engaging in legal operations in a more deliberate fashion raises questions about the dividing line between the legitimate and illegitimate use of law. Enabling legal operations also requires closer collaboration with and support from other expert communities. In an environment increasingly saturated with legal misinformation and fake legal news, particularly close attention must be paid to the interplay between legal expertise and strategic communications.<sup>120</sup>

## Conclusion

Following the end of the Second World War, Great Britain peacefully relinquished control over vast stretches of its colonial territories and their 800 million inhabitants. Yet, as Thomas Franck noted,<sup>121</sup> it was prepared to fight a war with Argentina over the Falkland Islands, an area of approximately 4700 square miles and a population of less than 2000. The difference, Franck suggests, lies in the legal principle at play: Britain deemed the Argentine invasion a violation of its territorial sovereignty. The Falklands War illustrates both the weakness of international law and its power to motivate and justify strategic action.

International law is torn between its function as an instrument for ordering international society and its inherent vulnerability to be diverted for partisan ends. In this paper, I have argued that it is this dynamic which sustains lawfare and the various other legal tactics and techniques that characterize hybrid warfare and gray zone conflicts. From a legal perspective, the key insight to draw from these three concepts is the rampant instrumentalization of international law for strategic ends. That the international legal system is an arena of strategic competition is hardly news, but it has far-reaching implications. If the world has taken a turn towards a more antagonistic international law, as seems to be the case, then law-abiding societies must come to realize that the hostile instrumentalization of international law may substantially undermine their interests and severely corrode the international legal order. Not only that, but they must also take concrete steps to counteract these challenges. I have argued that such efforts should be based on two foundations: a legal resilience perspective and an operational mindset. Legal resilience highlights the

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119. Cf. Department of the Army, *Legal Operations*, FM 27-100, 3 September 1991.

120. Generally, see D. Patrikarakos, *War in 140 Characters: How Social Media is Reshaping Conflict in the Twenty-first Century* (2017); P. W. Singer and E. T. Brooking, *Likewar: The Weaponization of Social Media* (2018). P. W. Singer and E. T. Brooking, *Likewar: The Weaponization of Social Media* (2018).

121. T. M. Franck, 'Dulce et Decorum Est: The Strategic Role of Legal Principles in the Falklands War' (1983) 77 *American Journal of International Law* 109.

contribution that international law can make to render societies more resilient against hybrid and gray zone threats *and* that the international rule of law itself must be strengthened to withstand the kind of subversion associated with these concepts. The legal resilience perspective thus offers diverse stakeholders a common framework for analysis and a shared set of objectives to guide them in countering the legal challenges arising in the current strategic environment. In addition, adopting an operational mindset provides them with an opportunity to recalibrate the way they use legal expertise. By treating law as an operating environment, they may develop more adequate capabilities to engage in legal operations and manoeuvre more deliberately through the legal space.