THE CONCEPT OF LAWFARE: APPROACH TO USAGE EXAMPLES[1]

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Abstract: The article addresses various definitions of lawfare, as well as the way in which they are integrated into conflict models such as hybrid war or gray zone.

Key Words: Lawfare, legal warfare, hybrid war, Grey Zone, Irrestricted war.

1.- Lawfare, hybrid war and unrestricted war

The neologism lawfare- coming from the fusion of the English words law and warfare (way of making war)[2]- was used for the first

[1] The publication of this paper has been possible thanks to the funding of the Subdirección General de Política de Defensa, of Ministry of Defence of Spain, with the Project *Guerra híbrida y lawfare: la dimensión jurídica de las nuevas concepciones del conflicto*.

[2] LEÓN CASTRO, E., "La encrucijada del lawfare: entre la judicialización y mediatización de la política", in *Nullius: Revista de pensamiento crítico en el ámbito del Derecho*, nº 1, 2020, p. 86.

time by Carlson and Yeomans in 1975[3], but the beginning of its conceptual development has been on the account of General Charles Dunlap, who forged its use in reference to the use of Law as a weapon[4], and, in a more specific sense, as a weapon to be used in asymmetric conflicts[5], affecting three different normative fields: the right to war (*ius ad bellum*, which determines when it is legitimate to use force within the international order), the law of war (*ius in bello*, which regulates the legitimate conduct of the parties to a war) and the law of international treaties[6].

However, the above definitions have a problem in not differentiating between legitimate use of the right and its manipulation or malicious use. In application of such formulations, any use of a legal standard by a power would be framed within the spectrum of *lawfare*[7].

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[3] In CARLSON, J., and YEOMANS, N., "Whither Goeth the Law - Humanity or Barbarity", in SMITH, M., and CROSSLEY, D. (eds.) *The Way Out. Radical Alternatives in Australia,* Melbourne, 1975. That's what BARTMAN, Ch. thinks. S., *Lawfare: Use of the Definition of Aggressive War by the Soviet and Russian Federation Governments*. Cambridge, 2010, p. 1.

[4] VOYGER, M., "Russian Lawfare-Russia's Weaponisation of International and Domestic Law: Implications For The Region And Policy Recommendations", in *Journal of Baltic Security*, nº 4, 2018, p. 35; MUÑOZ MOSQUERA, A. B., "Lawfare in Hybrid Wars: The 21st Century Warfare", in *Journal of International Humanitarian Legal Studies*, nº 7, 2016, p. 63. Dunlap addressed the issue in length at DUNLAP, Ch. J., "Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts", in VV. AA., *Humanitarian Challenges in Military Intervention Conference*, Harvard, 2001; and DUNLAP, Ch. J., "Lawfare today: A Perspective", in *Yale Journal of International Affaires,* nº 3, 2008.

[5] DUNLAP, Ch. J., "Lawfare 101: A Primer", in *Military Review,* nº, 17, 2017, pp. 17 and siguientes; BARTMAN, *Lawfare: Use of the Definition of Aggressive War by the Soviet and Russian Federation Governments*, p. 2.

[6] MUÑOZ MOSQUERA and MUÑOZ, "Lawfare in Hybrid Wars: The 21st Century Warfare", p. 65.

[7] Those who consider that any use of law for geopolitical purposes is lawfare start from the idea that "international law is only a ploy; states only create and

Therefore, the definition offered by Bartman seems more adjusted, pointing out as lawfare only "the manipulation or exploitation of the international legal system to achieve political and military objectives", adding that the mere use of standards for the purpose of which they were established cannot be considered *lawfare*[8]. Hence, this definition would confine the phenomenon to those occasions in which the actor made use of the regulation in a way that could be considered apart from its original purpose (manipulation) or taking advantage of its inaccuracies, legal gaps or any other technical circumstances beyond good faith (exploitation), excluding uses that may be considered legitimate, such as the U.S. claims against Iran for the violation of diplomatic law during the hostage crisis or Nicaragua's claims against US interference in its civil war, which Washington justified on the basis of the principle of collective security and which the International Court of Justice declared inapplicable to the case[9].

The term *lawfare* has sometimes been used as a negative connotation, as a means of denigrating and discrediting legal actions against the interests of the addressee of the action[10]. Thus, for example, Israel has called *lawfare*, in this pejorative sense, attempts to identify responsibility for possible crimes committed by the Israeli Armed

comply with international norms as part of their competition for power", so that "International law is the law of the jungle" (ENGLE, E., "Lawfare, Wikileaks, and the Rule of Law", in Humboldt Forum Recht, nº 12, 2012, p. 190). For example, Lisa Hajjar mentions as examples of lawfare the establishment of courts to prosecute crimes against humanity in the Balkans and Rwanda or the creation of the International Court of Justice (HAJJAR, L., Lawfare and Armed Conflict: *Comparing Israeli and US Targeted Killing Policies and Challenges Against Them*, Beirut, 2013, p. 5).

[8] BARTMAN, *Lawfare: Use of the Definition of Aggressive War by the Soviet and Russian Federation Governments*, pp. 1 and 5.

[9] BARTMAN, *Lawfare: Use of the Definition of Aggressive War by the Soviet and Russian Federation Governments*, p. 6.

[10] SCHARF, M., y ANDERSEN, E., "Is Lawfare Worth Defining? Report of the Cleveland Experts Meeting", in *Case Western Reserve Journal of International Law*, nº 43, 2011, p. 12.

Forces in the context of the ongoing armed conflict with Hamas and other Palestinian organizations[11].

In contrast to this clearly critical view, some authors discriminate morally in the use of the law as a weapon of war, speaking of *lawfare* hadesiano -by Hades, lord of hell in Greek mythology- when it aspires to alter the paradigms of law enforcement to achieve the objectives of the actor in a conflict, and use "zeusiano" -by Zeus, father of the gods- if it uses *lawfare* to consolidate the application of the law against those who try to undermine it[12]. With this, a current of thought is established that does not conceive the utilitarian use of law to achieve the geopolitical objectives of a State as something in itself reprehensible, attributing to the international community the responsibility that the norms and their use serve the purposes of justice, protection and equity and, at the same time, not be manipulated for purposes other than those for which they were created[13].

Historiography has distinguished three main forms of *lawfare*. The first would be the *lawfare* of litigation, in which claims, claims, requests for arbitration and, in general, all types of judicial actions likely to generate a litigation before a court, a judge or an arbitrator in theory impartial. The second is known in English as *lawfare obedience explotation*, a term that could be translated, *lato sensu*, as *lawfare* of exploitation of submission to the law, since they are actions through which the actor intends to make a profit by exploiting the willingness of the counterparty to submit to the legislation in force[14]. One example could be the usual practice of the Afghan Taliban to locate their

[11] HAJJAR, *Lawfare and Armed Conflict: Comparing Israeli and US Targeted Killing Policies and Challenges Against Them*, p. 6

[12] MUÑOZ MOSQUERA and MUÑOZ, "Lawfare in Hybrid Wars: The 21st Century Warfare", p. 73.

[13] FISHER, K. J., and STEFAN, C. G., "The Ethics of International Criminal 'Lawfare", en *International Criminal Law Review*, nº 16, 2016, pp. 2-3.

[14] BRUNER, T., and FAIX, M., "The attribution problem as a tool of lawfare", in *Obrana a Strategie*, nº 1, 2018, p. 84.

positions as close as possible to civilian sites, aware that the rules governing NATO's actions in time of war limited the alliance's military options by the risk of causing harm to the civilian population[15]. The third form would be the *lawfare* of ambiguity, in which the actor tries to take advantage of the lack of clarity of the law on a specific aspect or use a legal vacuum in its favor[16].

The *lawfare* has taken special relevance from the hand of the concept of hybrid war, a term first used in 2002 referring to Chechen strategies against the Russian invasion[17], and that can be defined as the war in which its actors use a combination of conventional and unconventional war actions, including the use of terrorism, insurgency, guerrilla warfare, organized crime, etc.[18]. Herman, the author of reference in the initial conception of hybrid warfare, added a second defining element to the combined use of conventional and unconventional forms of warfare: the direction and coordination of both conventional and non-international operations rests with a joint command structure, which combines its material and psychological effects to achieve its strategic objectives in the conflict[19]. Vivid

[15] MUÑOZ MOSQUERA and MUÑOZ, "Lawfare in Hybrid Wars: The 21st Century Warfare", p. 76. International observers and numerous sources on the ground reported that Israel maximized precautions aimed at limiting harm to civilians during these clashes, including radio and television messages and thousands of individual phone calls warning residents of the attacks in time for them to evacuate the vicinity of the targets (p. 77)

[16] BRUNER, T., and FAIX, M., "The attribution problem as a tool of lawfare", p. 85.

[17] COLOM PIELLA, G., "Vigencia y limitaciones de la guerra híbrida", in *Revista Científica General José María Córdova*, nº 10, 2012, p. 79.

[18] MUÑOZ MOSQUERA and MUÑOZ, "Lawfare in Hybrid Wars: The 21st Century Warfare", pp. 64 and 66.

[19] HOFFMAN, F.G., *Conflict in the 21st Century: The Rise of Hybrid Wars*, Washington, 2007, p. 8. Russia most often uses the term "non-linear war" to define its own concept of hybrid war (POMERANTSEV, P., "How Putin is Reinventing Warfare', in Foreign Policy, May 5th, 2014, URL:

examples of such conflicts in the first two decades of 2015 include the actions of Hezbollah in the 2006 war against Israel[20], the conflict in Crimea and the Donbas in 2015 or the actions of the Islamic State from 2011 onwards[21].

In this more strictly military context, *lawfare* could be defined as the use of Law rather than military means to achieve operational objective[22], in which case, as Kittrie points out "the actor uses the law to create an effect equal to or similar to that sought by conventional kinetic military actions[23], including affecting the capabilities and decision-making process of the target armed forces"[24]. In this sense, *lawfare* would be one of the central elements of the hybrid war[25], to which specialists such as Voyger attach critical importance[26].

https://foreignpolicy.com/2014/05/05/how-putin-is-reinventing-warfare/, accessed May 4th, 2022).

[20] Some authors consider this conflict to be the first major practical manifestation of hybrid warfare after its theoretical formulation (COLOM PIELLA, "Validity and limitations of hybrid warfare", p. 80).

[21] MUÑOZ MOSQUERA and MUÑOZ, "Lawfare in Hybrid Wars: The 21st Century Warfare", p. 66.

[22] DUNLAP, "Lawfare today: A Perspective", p. 146.

[23] In military terminology, a kinetic action is one that causes a physical impact on the target, such as a shot, a bombardment, etc.

[24] KITTRIE, O., *Lawfare: Law as a Weapon of War,* Oxford, 2015, p. 8.

[25] MUÑOZ MOSQUERA and MUÑOZ, "Lawfare in Hybrid Wars: The 21st Century Warfare", p. 86.

[26] VOYGER, M., "Russian Lawfare-Russia's Weaponisation of International and Domestic Law: Implications For The Region And Policy Recommendations", p. 35. Commaroff has defined lawfare in a different context, that of colonial domination, indicating that it would be "the effort to conquer and control indigenous peoples through the coercive use of legal means" (LEÓN CASTRO, "The crossroads of lawfare: between the judicialization and mediatization of politics", p. 88). In Latin America, it has been common to use the term to refer to the use of regulations to try to limit the capacity of action of a political opponent (ROMANO, S. M., "The lawfare as research agenda", in Nullius: *Revista de pensamiento crítico en el ámbito*

Chinese colonels Xiangxui and Lian, in their referential approach to the nature of war at the dawn of the 21st century, wrote in 1999, surpassed the notion of hybrid war by speaking of unrestricted war, understanding that the war conflicts of the 21st century would go beyond the strictly military framework to enter into the political, the economic, the propagandistic, and, in general, in any non-military field likely to influence the achievement of the objectives set out in the conflict[27]. Although they do not use the term *lawfare* in their work, the instrumental use of law for geopolitical purposes is encompassed within the idea of unrestricted war, where, in order to achieve its objectives, a power can both exploit the existing rules and break them if necessary[28], stating that the use of law can produce consequences as high impact as resorting to force[29]. Thus, the People's Republic of China, in its long-term strategies, has included *lawfare* as a third pillar, referred to as *falu zhanzheng*[30]-, together with actions on public opinion and in the media,

del Derecho, nº 2, 2021, p. 2). Again, this is a phenomenon that is not limited to a single geographical space, as evidenced by the development of a whole normative apparatus by the authoritarian governments of Central Asia aimed at preventing the activity of various NGOs and their possible support to the opposition demanding democratic reforms (ROUSSEAU, K., "International Law and Military Strategy: Changes in the Strategic Operating Environment", in *Journal of National Security Law&Policy*, nº 9, 2017, p. 7).

[27] LIANG, Q., y XIANGSUI, W., *Unrestricted Warfare*, Pekín, 1999. On the relationship between war and other aspects of the State, from a iushistórica perspective, see FERNÁNDEZ RODRÍGUEZ, M., y MARTÍNEZ PEÑAS, L., *La guerra y el nacimiento del Estado Moderno*, Valladolid, 2014; FERNÁNDEZ RODRÍGUEZ, M., "Guerra y cambios institucionales en el contexto europeo del reinado de los Reyes Católicos" in *Revista de la Inquisición, Intolerancia y Derechos Humanos,* nº 18, 2014; by the same author "Guerra, Ejército y construcción del Estado Moderno: el caso francés frente al Hispánico" in colaboration with Leandro Martínez in *Glossae. European Journal of Legal History*, nº 10, 2013.

[28] LIANG, Q., and XIANGSUI, W., *Unrestricted Warfare*, Pekín, 212.

[29] ROMANO, "El lawfare como agenda de investigación", p. 2.

[30] ROUSSEAU, "International Law and Military Strategy: Changes in the Strategic Operating Environment", p. 15.

of its line of action, exceeding strictly military limits in case of conflict[31]. Thus, a triad is formed, oriented to create an impact on the opponent through the manipulation of the story in favor of one's own objectives, being for it the *lawfare* "a weapon of massive disinformation, typical of the peculiarities of the era that we live"[32].

2.- Examples of the exploitation of the law: Israel and GWAT

2.1 Israel

Throughout its troubled history in the twentieth and twenty-first centuries, the State of Israel has been both an actor and a receiver of the practice of *lawfare*. As early as 1967, Israel resorted to legal technicality to free its armed forces in the newly occupied areas of Gaza and the West Bank. Initially, Tel Aviv recognized that the Palestinian population residing in both occupied territories was under the protection of the Fourth Geneva Convention, which gave them the status of protected persons. However, in July of that same year, barely a month after the occupation, Israel announced that the status of protected persons did not apply to Palestinians in Gaza and the West Bank, since the Convention provided for nationals of the original holder of the occupied territory, a condition which was not possessed by the Palestinians, since most of them had not received Egyptian citizenship, in the case of Gaza, or Jordanian citizenship, in the case of the West Bank. The implications of this decision have been broad and extend to the present, legalizing, for example, the use of armoured vehicles and helicopter gunships in the repression of riots in the occupied territories,

[31] LONARDO, L., "EU Law Against Hybrid Threats: A First Assessment", in *European Papers*, nº 6, 2021, p. 1076.
[32] DINSTEIN, Y., "Concluding Remarks: LOAC and Attempts to Abuse or Subvert it*",* in *Interational Law Studies*, nº 47, 2011, p. 484.

something that would have been illegal under the Fourth Geneva Convention, which excludes its use against protected populations[33].

Another example of the legal battle between Israelis and Palestinians took place on January 22th, 2009, when the Palestinian National Authority called on the International Criminal Court in The Hague to investigate the alleged crimes against humanity committed by the Israeli army in the Occupied Territories. In view of the Israeli allegations, and in strict compliance with the wording of the Rome Statute, the court rejected the request, since only States recognized as such by the United Nations have the power to make such requests to the Tribunal. When, in 2012, the United Nations Assembly voted to accept Palestine as a non-member observer State, part of what was at stake was the possibility of a new Palestinian claim succeeding at the Hague Tribunal. Despite opposition from Israel, the United States and Canada[34], among other nations, the vote was in favor of accepting Palestine. This meant that on December 31th, 2014 the International Criminal Court accepted the request of the Palestinian National Authority and declared itself competent to investigate any crime committed in Gaza, the West Bank and East Jerusalem as of June 13th, 2014, date on which a bloody Israeli offensive on Gaza had begun. Since then, investigations by Tribunal staff have been hampered by both Israel and the United States[35].

[33] HAJJAR, *Lawfare and Armed Conflict: Comparing Israeli and US Targeted Killing Policies and Challenges Against Them*, 8-9.

[34] These other nations were Palau, Micronesia, Czech Republic, Panama, Nauru and the Marshall Islands.

[35] FISHER y STEFAN, "The Ethics of International Criminal 'Lawfare", pp. 16-17.

In the same vein, in recent years Hamas has repeatedly called on the civilian population of the occupied territories to act as human shields on the premises of the organization[36], with the intention of avoiding Israeli attacks in the face of the risk of heavy civilian casualties. The intentional endangerment of civilians is not only contrary to the international order and all the conventions on the law of war, but, as carried out by Hamas, violated the principle of reciprocity, since, while demanding that Israel refrain from firing on targets protected by civilians, the Palestinian organization indiscriminately fired rockets at Israeli cities[37].

Israel has adapted its strategies taking into consideration the use of *lawfare*. Following the Gladstone report, which accused Israel and Hamas of committing crimes against civilians in 2008, Israel developed a whole battery of actions designed to limit the number of civilian casualties among the population of the Occupied Territories and thus reduce the extent to which Hamas could use the law to harm Israel. The measures taken included making telephone warning calls -which were recorded for the record- to households located near targets that were to be attacked. Another example of Israeli developments in this area is the paradigm shift in action against flotillas trying to reach Gaza in violation of the Israeli blockade: in 2010, Israel used force, shooting at ships and killing nine people, causing international scandal. In 2011, faced with a similar action, Tel Aviv threatened the companies of the

[36] ROUSSEAU, K., "International Law and Military Strategy: Changes in the Strategic Operating Environment", in *Journal of National Security Law&Policy*, nº 9, 2017, p. 9

[37] MUÑOZ MOSQUERA and MUÑOZ, "Lawfare in Hybrid Wars: The 21st Century Warfare", p. 76. The international investigation, through the Goldstone Report, into the Israeli offensive in Gaza in 2008, which killed 1,300 Palestinians, concluded that both Hamas and the State of Israel had violated international law, by indiscriminately opening fire on civilians (ROUSSEAU, "International Law and Military Strategy: Changes in the Strategic Operating Environment", p. 10).

ships to sue them in various courts, after which all the boats turned around before reaching Israeli waters[38].

2.2 GWAT

On the other hand, the so-called Global War on Terrorism (GWAT) became a fertile ground for the use of *lawfare*, renewing the validity of the ideas of the so-called criminal law of the enemy, legal construction of German origin according to which those who are manifest enemies cannot be applied the same guarantees and freedoms as other citizens, but a restricted version of them[39].

One of its most public manifestations, the Guantanamo detention center, is based entirely on the manipulation of legal norms for their own benefit: the base is not a national territory of the United States, but a Cuban territory ceded to the United States, which may unilaterally renew this transfer each time the deadline expires. This means that, according to the theoretical interpretation made by Washington, and since it is not American territory, the rights and freedoms that American laws guarantee in its homeland are not required in Guantanamo, although in 2004 the Supreme Court of the United States recognized - in its judgment in the Hamdan v Rumsfeld case- that the minimum precepts established by Article 3 of the Geneva Convention did apply to them. Paradoxically, on numerous occasions those who have resorted

[38] ROUSSEAU, "International Law and Military Strategy: Changes in the Strategic Operating Environment", p. 16.

[39] ROMANO, "El lawfare como agenda de investigación", p. 5. FERNANDEZ RODRIGUEZ, M., "The terrorist threat in the European Union: a common legislative reaction" in *Revista Aequitas*, nº 2, 2012, by the same author "La presión legislativa sobre derechos y libertades como respuesta al terrorismo: las leyes británicas", in VV. AA., *Actas IV Jornadas de Estudios de Seguridad,* Madrid, 2012; and "The antiterrorism legislation in the 1970ths: Italian and German laws", in *International Journal of Legal History and Institutions,* nº 1, 2017.

to the courts to try to put an end to Guantanamo have been accused of lawfare by the United States authorities[40].

The aforementioned legal peculiarity has allowed the operation of a detention center in which the rights and freedoms that the Constitution and the laws of the United States guarantee to all persons in U.S. territory have not been applicable to the inmates, and also explains the difficulties that the administrations that succeeded the Bush Jr. administration, which created the center, have had in closing it. The Latin adage of Terence reminds us that it is a bad thing to hold a wolf by the ears, for one can neither continue to hold him nor release him; a similar legal challenge is posed by the situation of alegality of the Guantanamo detainees: it was impossible to put them on trial in a criminal court, since the obvious violation of their rights would immediately lead to the nullity of the whole process[41], and it was also impossible, for security reasons, to release them without further ado. In the end, an *ad hoc* solution was chosen, creating a special military tribunal to try the Guantanamo detainees, in application of the Special Powers Act that was passed in 2006[42].

[40] ROMANO, "El lawfare como agenda de investigación", p. 4.

[41] Only one Guantanamo detainee has ever been tried by a U.S. criminal court, and the result was that the court found him not guilty of 284 of the 285 offenses with which he had been charged, including among the charges from which he was exonerated the most serious of the charges, that of terrorism. After this experience, the authorities de facto renounced any further criminal prosecutions against the detainees at the base.

[42] On the use of special jurisdictions, see PRADO RUBIO, E., FERNÁNDEZ RODRÍGUEZ, M., and MARTÍNEZ PEÑAS, L., *Análisis de jurisdicciones especiales*, Valladolid, 2017; by the same authors, *Especialidad y excepcionalidad como recursos jurídicos*, Valladolid, 2017; MARTINEZ PEÑAS, L., and FERNÁNDEZ RODRÍGUEZ, M., *Reflexiones sobre jurisdicciones especiales*, Valladolid, 2016; and FERNÁNDEZ RODRÍGUEZ, M., *Estudios sobre jurisdicciones especiales*, Valladolid, 2015.

Another case of lawfare linked to the GWAT was the creation of the status of "enemy combatant", a legal construct applied to terrorist suspects declared by Bush Jr. on November 13th, 2001, with the ultimate aim of removing the actions against them from any hint of guarantees, since their legal status was placed in a sort of limbo in which neither the civilian criminal laws, which apply to criminals, nor the International Law of Conflict, which protects soldiers, were applicable to them. Enemy combatants were, by virtue of this notion, neither criminals nor soldiers and, therefore, their legal protection was absolute, since, with the express disagreement of the State Department, the U.S. Department of Justice affirmed that the successive Geneva Conventions did not apply to terrorist suspects[43].

Going even further, without leaving the framework of the Global War on Terrorism, was the presidential authorization granted to the CIA in September 2001 to conduct lethal operations against terrorists. These were the precedent for the intensive use of drones to kill jihadist militants, a practice that began in Afghanistan in February 2002 and whose effectiveness has been decisive in the destruction of many terrorist networks in countries such as Afghanistan, Pakistan, Yemen or Somalia, but whose legality -or at least legitimacy- has raised many doubts. The beginning of this policy, and the multiplication of its use during the Obama administration, was based on a legal norm, the Authorization for the Use of Military Force, approved after 9/11 and which, in line with the celebrated presidential declaration that the United States was at war with terrorism, authorized the use of all the nation's military resources to fight it wherever possible, eliminating any hint of territoriality in the application of the law and even of respect for the sovereignty of other nations[44].

[43] HAJJAR, *Lawfare and Armed Conflict: Comparing Israeli and US Targeted Killing Policies and Challenges Against Them*, p. 10.
[44] HAJJAR, *Lawfare and Armed Conflict: Comparing Israeli and US Targeted Killing Policies and Challenges Against Them*, p. 14.

The AUMF was the ideal instrument for *lawfare*, since, although it had been conceived and publicized as an anti-terrorist rule, its wording allowed the application of its provisions against anyone who could be considered an enemy of U.S. interests, terrorist or not. This transversality in the application of laws that had been publicized as anti-terrorist was not a phenomenon exclusive to U.S. legislation, but was also present in other states. Thus, for example, in the context of the 2008 Icelandic financial crisis, the United Kingdom did not hesitate to apply to Icelandic banks the anti-terrorist legislation that allowed it to intervene in those banking institutions that, through their activities, collaborated in causing harm to the nation.

3.- The Russian tradition of instrumentalization of law

Few countries have made the use of law an instrument of their international policy as skillfully and frequently as Russia, a state undoubtedly at the forefront of the international community in this area, which Russian thinkers such as Vladislav Surkov refer to as "non-linear warfare"[45]. Neither Russia now nor the USSR before have been the only powers to use it[46], but they have been pioneers in the matter and have resorted to *lawfare* most frequently and effectively[47].

[45] POMERANTSEV, P., "How Putin Is Reinventing Warfare. Though some deride Russia for backward thinking, Putin's strategy in Ukraine betrays a nuanced understanding of 21st century geopolitics", in *Foreign Policy*, 5 de mayo de 2014, URL: https://foreignpolicy.com/2014/05/05/how-putin-is-reinventing-warfare/, accessed May 16, 2022, unpaginated..

[46] To cite just one example, Silvina Romano considers that the impulse given by the United States to the fight against corruption in Central America and the Caribbean, channeling to this effort a large amount of funding through USAID is a clear case of lawfare, since its main purpose is not to eradicate corruption in these nations, but to serve the geostrategic interests of the United States (ROMANO, S. M., "Lawfare: de la guerra contra la política a la antipolítica", en *Sul Global*, nº 3, 2022, p. 119).

[47] BARTMAN, *Lawfare: Use of the Definition of Aggressive War by the Soviet and Russian Federation Governments*, p. 4.

Already in the 19th century, Russian interventions in the Balkans were repeatedly justified under the 1774 treaty with the Ottoman Empire, which gave Moscow the role of protector of all Orthodox living under the Sultan's sovereignty[48]. This treaty even served as a pretext to trigger the operations that led to the outbreak of the Crimean War, almost eighty years after its signing, in what was the largest conflict in Europe between Waterloo and World War I. It should be remembered that the *casus belli* of that conflict were the disputes between the Orthodox monks and the Catholic religious regarding the use to be made of the Holy Sepulchre of Jerusalem during Christmas. Undoubtedly, that this dispute between religious triggered the Russian invasion of the Ottoman territories in Eastern Europe, invoking for this the clauses signed in Kuchuk-Kainarji in 1774, is a notable example of instrumentalization of the law[49].

The Soviet Union also implemented the exploitation of the most vulnerable aspects and normative gaps as an instrument to achieve its strategic objectives[50], including by taking advantage of treaty contexts that it would then manifestly violate. Thus, in 1932 the Soviet Union signed non-aggression treaties with Poland, Estonia, Latvia and Lithuania, to which must be added the Treaty of Tartu with Finland, signed in 1920. These agreements restricted the military capabilities of

[48] VOYGER, M., "Russian Lawfare-Russia's Weaponisation of International and Domestic Law: Implications For The Region And Policy Recommendations", p. 36.

[49] With this agreement, in addition to its recognition as a protector of the Sultan's Orthodox subjects, Russia gained partial access to the Black Sea coast, one of its historic ambitions, after having gained access to the Baltic with the Treaty of Nistadt of 1721. In 1792, with the Treaty of Jassy, Russia would gain total dominion of the northern shore of the Black Sea (MARTÍNEZ PEÑAS, L., Sic transit III, Valladolid, 2021, p. 82.

[50] BARTMAN, Ch. S., *Lawfare: Use of the Definition of Aggressive War by the Soviet and Russian Federation " Governments*. Cambridge, 2010, p. 1.

the co-signatories and created a sense of false security in them[51], facilitating the subsequent Soviet aggression, which violated each and every such non-aggression treaty, successively invading the five nations[52].

One of the most common Soviet uses of *lawfare* was to gain time so that the State could prepare itself to face the strategic challenges before it. This was the basis of the diplomatic relationship between Germans and Soviets in the inter-war period and was the main objective of all the agreements that Moscow signed with Berlin, from Brest-Litovsk -which brought out Russia, which had not yet changed its name to that of the USSR, from World War I to the German-Soviet Non-Aggression Pact of August 1939, signed days before the beginning of the Nazi invasion of Poland. Behind them all was the Soviet mentality, the Stalinist doctrine of the state of siege: the idea that the Soviet Union was a kind of fortress besieged by its enemies, against whom it was doomed to fight for its survival, It was therefore necessary to gain time in order to improve the preparation of the Soviet Union for the outbreak of the conflict[53].

After the fall of the USSR and the rebirth of Russia, one element that cannot be forgotten is that, before a user of lawfare, Russia sees itself as a victim of the pernicious use of law by the country's strategic adversaries -NATO in general and the United States in particular- as General Gerasimov's seminal contribution to the question made abundantly clear. From the perspective of the Russian strategists, NATO has used a whole legal argument to instigate and support the

[51] BARTMAN, *Lawfare: Use of the Definition of Aggressive War by the Soviet and Russian Federation Governments*, p. 5.

[52] Some contemporaries of those agreements warned that the ultimate goal pursued by the Soviets with their signature was not to guarantee peace among the signatories, but to move towards control and domination of these using legal mechanisms for them. This was stated, for example, by the Central and Eastern European specialist Malbone W. Graham as early as 1929.

[53] MARTÍNEZ PEÑAS, *Sic Transit III*, p. 82.

"color revolutions", a series of essentially pro-European and pro-democratic movements that took place in various former Soviet republics, with the aim of destabilising Russia and its strategic environment[54]. Voyger considers that this perception, rather than responding to a factual reality, corresponds to what he has called Chronos Syndrome[55]: the fear of the political elites of a power with a history of revolutions and violent changes to be a victim of one of them, that leads to reactions based on a preventive use of force[56].

Thus, in the 21st century, Russia continued its policy of exploiting the legal resources available to it. A case of great interest is the Arctic, where, after signing the Law of the Sea Convention in 1996, Russia made a debatable interpretation of Article 76, paragraph 8, of the Convention to claim, on November 20th, 2001, an extension of its Exclusive Economic Zone from 200 nautical miles to 350, based on the Lomonosov Ridge, a submarine ridge that runs along much of the Arctic seabed[57], and which Moscow interprets as part of the Russian continental shelf[58].

The United Nations, in 2002, was unable to settle the issue, avoiding pronouncing itself in one direction or the other, so that the debate -and even the scientific confrontation- on the geological nature

[54] VOYGER, M., "Russian Lawfare-Russia's Weaponisation of International and Domestic Law: Implications For The Region And Policy Recommendations", p. 37.

[55] In Greek mythology, Cronus was the father of the gods and, very soon, in the face of the rising power of his progeny, he feared that this would overtake him, so he tried to devour them.

[56] VOYGER, M., "Russian Lawfare-Russia's Weaponisation of International and Domestic Law: Implications For The Region And Policy Recommendations", p. 37.

[57] The ridge crosses the Arctic in its central part, between the New Siberian archipelago and the Canadian island of Ellesemere.

[58] REQUEJO CRUAÑAS, O., *El Ártico, nuevo mar de oportunidades. Análisis medioambiental y socieconómico de la ruta del Ártico*. Barcelona, 2020, p. 44.

and chemical composition of the Lomonosov Ridge has taken on the appearance of a geopolitical rather than a scientific struggle: acceding to the Russian claim would mean increasing by 1. 2 million square kilometers -almost two and a half times the size of Spain- the Russian Exclusive Economic Zone in the Arctic[59], which would include not only the North Pole, but also hydrocarbon reserves estimated at 5 billion tons[60]. The situation is tempting other countries, such as Denmark, which has funded projects in this regard, trying to prove that the ridge is not an extension of Eurasia, but of Greenland, which could lead to the Danish kingdom making its own claims in this regard[61]. In 2007, Russia reiterated its claim at the United Nations, but the UN requested Moscow to provide scientific evidence that the Lomonosov Ridge and the other seabed features Russia mentioned were indeed an extension of the Russian mainland[62].

The Russian claims and the opposition of the other nations with coasts in the Arctic to them have deteriorated the climate of mutual cooperation which, up to that time, had prevailed in matters concerning the extreme north of the world[63], given that there are many who consider

[59] VOYGER, M., "Russian Lawfare-Russia's Weaponisation of International and Domestic Law: Implications For The Region And Policy Recommendations", p. 41. This would be in addition to the five million square kilometers of Arctic territory already under Russian sovereignty (PAUL, M., and SWISTECK, G., "Russia in the Arctic: Development Plans, Military Potential, and Conflict Prevention", in *SWP Research Paper*, nº 3, 2022, p. 7).

[60] MORENO SÁNCHEZ, A. K., *Intereses geopolíticos de Rusia en el Ártico*. Puebla, 2016, p. 61.

[61] BBC NEWS, October 5th, 2004, URL: http://news.bbc.co.uk/2/hi/europe/3716178.stm, accessed May 10th, 2022.

[62] MORENO SÁNCHEZ, A. K., *Intereses geopolíticos de Rusia en el Ártico*, p. 61.

[63]Territorial disputes in the Arctic have existed since the 1920s, when the Soviet Union and Canada disputed sovereignty over Wrangler Island. However, the climate of cooperation and non-confrontation had been above those disputes. This spirit had been shown very clearly in the dispute over the boundaries between Norway and the USSR in the Barents Sea, which had

that they are based on a bad faith exploitation of international legality[64], and provoked a redefinition of military attitudes in the area, including the creation by Russia of a specific military district for the Arctic in 2021[65]. The Pandora's box of Arctic territorial claims appears to have been opened, so Canada submitted its own in 2013, claiming 1.2 square kilometres, which would also include the North Pole, while Denmark did the same in 2014, requesting an extension of its Exclusive Economic Zone of more than 900.00 square kilometers[66]. A curious case is that of the United States, which also claims an expansion of its Arctic area, but which cannot submit such a claim to the United Nations because it has not signed the Convention on the Law of the Sea[67].

In 2008, the use of law as a geopolitical instrument by Russia was extended with the formulation of the so-called Medvedev Doctrine in 2008, following the conflict with Georgia in South Ossetia[68], and

arisen in the mid-1970s, and in which, without resolving the substance of the question, The two powers agreed to a sort of mutually administered maritime grey zone pending a better time to resolve the dispute (CIASULLO, J., *Winning the Battle but Losing the War: Why the Lomonosov Ridge and Svalbard Continental Shelf Disputes Will Remain Peaceful*. Oslo, 2021, p. 3).

[64] LONARDO, L., "EU Law Against Hybrid Threats: A First Assessment", p. 1091.

[65] PAUL y SWISTECK, "Russia in the Arctic: Development Plans, Military Potential, and Conflict Prevention", p. 11.

[66] CIASULLO, *Winning the Battle but Losing the War: Why the Lomonosov Ridge and Svalbard Continental Shelf Disputes Will Remain , 10 Peaceful*.

[67] MORENO SÁNCHEZ, A. K., *Intereses geopolíticos de Rusia en el 62 Ártico*.

[68] It should be remembered that Medvedev's training is of a jurist, just like Putin's, which has led him to affirm, with regard to the Russian use of lawfare as a weapon at the service of the geopolitics of the Kremlin, that "for who is a hammer, everything looks like a nail" (VOYGER, "Russian Lawfare-Russia's Weaponisation of International and Domestic Law: Implications For The Region And Policy Recommendations", p. 39). On the change that the new approach brought about in Russian approaches, see MORALES, J., "Russia's

which consists in granting the right of intervention of Russia for the protection of its citizens wherever they are. This idea was expanded with the notion of Russkiy Mir -that is, the Russian world-, made public by Vladimir Putin in 2014, by means of which he arrogated the right of intervention in a geographical space that ignored state borders to encompass all those territories, from Moldova to Central Asia, inhabited by peoples who had historical ties with Russia, in order to ensure their protection, including through the deployment of military forces, if necessary[69].

Continuing with the instrumentalization of the law, since 2011 Russia has taken advantage of the technicalities of its agreements with the OSCE regarding military maneuvers, aimed at promoting transparency in military activities as a way to reduce and avoid tensions on European territory, circumventing the substantive compliance with the same. Thus, since the agreement requires that maneuvers involving the deployment of more than 13,000 men include inviting foreign observers, Russia has limited these to no more than 12,700 men, thus avoiding an international presence at the maneuvers. Likewise, it has made an abusive -and surely fallacious- use of the exception that allows not notifying in advance to the other signatories the military maneuvers in which the participating troops themselves have not been notified in advance, so that the international community has seen how military exercises involving tens of thousands of men of the Russian army had been, according to the official Russian position, ordered without prior notice in the same morning they started, thus avoiding the obligation of prior notice to the rest of the powers[70].

New National Security Strategy: Towards a 'Medvedev Doctrine'?", in *ARI*, nº 135, 2009.

[69] VOYGER, M., "Russian Lawfare-Russia's Weaponisation of International and Domestic Law: Implications For The Region And Policy Recommendations", p. 38.

[70] VOYGER, M., "Russian Lawfare-Russia's Weaponisation of International and Domestic Law: Implications For The Region And Policy Recommendations", p. 39.

The term *lawfare* does not appear specifically, but it is contained in post-2014 Russian doctrine, which for the first time explicitly includes the use of legal tools and other non-warfare instruments in conflict contexts to achieve the Federation's objectives. Within the Russian concept of hybrid warfare, the primary function of *lawfare* is to provide Moscow's actions with a semblance of legality and justification in the eyes of both the international community and public opinion at home and abroad. The paradigmatic case of this type of use is the conflict with Ukraine.

When the Budapest Memorandum was signed in 1994, Ukraine handed over its nuclear arsenal to Russia in exchange for Russia's commitment to respect Ukraine's territorial integrity and to renounce the use of force, or the threat thereof, against this territorial integrity and against Ukraine's independence itself. However, When Russia annexed Crimea and intervened in the Lugansk and Donetsk, throughout 2014 and 2015[71], in what Surkov defined as "the first non-linear war"[72], its foreign minister Sergei Lavrov stated in March 2015 that Russia had scrupulously complied with what was established in Budapest, since the annexation of Crimea had not been carried out through the use of force, but in peaceful application of the principle of self-determination by the population and, with regard to the secessionist

[71]The tsars first claimed that the peninsula was part of their dominions in a manifesto of Catherine the Great issued on April 19, 1784; some authors consider this an act of what we nowadays call hybrid warfare, and more specifically of lawfare, since Catherine stated that her sovereignty over Crimea was obtained by accepting the request of the local population, offering a source of legitimacy very different from that of mere imperial annexation, closer to the reality of the facts (VOYGER, "Russian Lawfare-Russia's Weaponisation of International and Domestic Law: Implications For The Region And Policy Recommendations", p. 37).

[72]POMERANTSEV, P., "How Putin Is Reinventing Warfare. Though some deride Russia for backward thinking, Putin's strategy in Ukraine betrays a nuanced understanding of 21st century geopolitics", in 5 de mayo de 2014.

regions of Eastern Ukraine[73], the document did not oblige Russia - in Lavrov's interpretation - to accept that the Ukrainians would forcibly retain those regions where the population had expressed its will to secede from the Kiev government[74].

This interpretation of the Budapest agreement has been considered an abuse of law, a practice consisting of interpreting a legal document according to one's own interests in specific circumstances, taking this interpretation beyond what is legally reasonable[75], and betraying the principle of good faith that the International Court of Justice expressly established in 1996 through its ruling in the Oil Platform Case between Iran and the United States[76], a good faith that must be maintained not only with respect to the text, but also with respect to the spirit of the agreement[77]. Thus, the alleged secessionist will of the Donbas population did not eliminate the Russian obligations to respect the inviolability of borders guaranteed by Russia through the Budapest text and which, in any case, was already generally guaranteed by the 1975 Helsinki Convention, to which the USSR was a signatory[78].

[73] BRUNER y FAIX, "The attribution problem as a tool of lawfare", p. 90.
[74]Cited in MUÑOZ MOSQUERA y MUÑOZ, "Lawfare in Hybrid Wars: The 21st Century Warfare", p. 80.
[75] On this issue, see BYERS, M., "Abuse of Rights: An Old Principle, A New Age", en *McGill Law Journal,* nº 47, 2002, pp. 397–404.
[76] MUÑOZ MOSQUERA and MUÑOZ, "Lawfare in Hybrid Wars: The 21st Century Warfare", p. 83.
[77] THIRLWAY, H., "The Law and Procedure of the International Court of Justice, 1960-1989, Part One", en British Yearbook of International Law nº 60, 1989, p. 25.
[78] VOYGER, M., "Russian Lawfare-Russia's Weaponisation of International and Domestic Law: Implications For The Region And Policy Recommendations", p. 38.

Another argument used by Russia in 2015 consisted in considering that its intervention in eastern Ukraine was covered by International Humanitarian Law[79], having taken place to protect the Russian-speaking community, which Moscow considered threatened by the Kiev government, as expressly stated by Vladimir Putin[80]. This argument has also been rejected by most of the international community, since its application would have required the intervention to have prevented an immediate and unavoidable humanitarian catastrophe by other means, with no legal room or margin for a largely covert action such as that carried out by Russia[81].

The Russian argument based on the notion of humanitarian intervention highlights one of the major problems facing international law at the present time: the collision between the growing development of international humanitarian law, which supports international interventions based on humanitarian grounds, with the principle of sovereignty and the right of non-interference which, in principle, every State possesses and which form the basis of the international system as it was reconfigured in 1648 with the Peace of Westphalia. The replacement of State sovereignty by humanitarianism as the primordial

[79] With identical legal argumentation Russia has sustained its intervention in the Syrian war in support of President Al Assad, a historical ally of Moscow (VOYGER, "Russian Lawfare-Russia's Weaponisation of International and Domestic Law: Implications For The Region And Policy Recommendations", p. 37).

[80] MUÑOZ MOSQUERA and MUÑOZ, "Lawfare in Hybrid Wars: The 21st Century Warfare", p. 84.

[81] PASCU, I., y BUCKLEY, E., "Nato's Article 5 and Russian Hybrid Warfare", in *Atlantic Council,* May 17th, 2015 (URL: https:// http://www.atlanticcouncil.org/blogs/natosource/nato-s-article-5-and-russian-hybrid-warfare), acessed May 4th, 2015. Premonitory, the authors claimed in their article that NATO should pursue a policy of public diplomacy that would not allow Russia to present itself as a peacemaker in a conflict in which, in the authors' view, it was the aggressor according to any objective legal perspective.

principle of the international order[82] augurs an increase in interventions in which this humanitarianism will be used not only as a moral justification, but also as a legal justification. This is tragically corroborated by the rhetoric of Vladimir Putin's government justifying the 2022 invasion of Ukraine on the grounds that it took place to prevent genocide.

Both in Crimea - where they were deployed in the first hours after the secession was proclaimed and seized key locations[83]- and in the 2015 war in eastern Ukraine, Russia resorted to the so-called "little green men", fighters wearing field uniforms without national insignia, which made it impossible to prove that their operations were attributable to the action of a state, in this case Russia[84]. This exploited the so-called problem of attribution, a legal issue that implies that the actions of individuals cannot be automatically attributed to the will of the State of which they are nationals[85], an idea that means that the actions of a Spaniard, for example, are not acts of Spain as a State.

In this way, Russia was able to deploy ground forces on the ground without having to face the international responsibility that such an act should have entailed. To ensure this, Moscow made sure that none of the requirements on the basis of which an individual's act can be considered an act of the State of which he or she is a national is demonstrable:

[82] ROUSSEAU, K., "International Law and Military Strategy: Changes in the Strategic Operating Environment", in *Journal of National Security Law&Policy*, nº 9, 2017, p. 1.
[83] BRUNER y FAIX, "The attribution problem as a tool of lawfare", p. 91.
[84] MUÑOZ MOSQUERA and MUÑOZ, "Lawfare in Hybrid Wars: The 21st Century Warfare", p. 69.
[85] BRUNER, T., and FAIX, M., "The attribution problem as a tool of lawfare", in *Obrana a Strategie*, nº 1, 2018, p. 80. This form of lawfare would fall under the ambiguity exploitation model.

- That the individual is part of an organ of the State and acts in his capacity as such, even when his actions exceed the instructions he has received from the State.

- That the individual exercises some type of authority linked to the State, either officially or temporarily in the absence of a formal appointment, or even in the absence of institutionalized government itself.

- That the actions carried out by the individual have been ordered, directed or controlled by the State of which he is a national. In this sense, mere material or financial support is not sufficient to attribute the actions of individuals to the State of which they are nationals, something that was established in the ruling that declared U.S. interference in the Nicaraguan civil war illegal in the 1980s.

- That the actions of the individual are directed towards the creation of a new State, in which case the responsibility for them is attributed to the new State[86].

- That the State of which the individual is a national recognizes the actions and conduct of the individual as its own[87].

Bearing in mind that the burden of proof is on the applicant State, in this case it was for Ukraine to prove that the actions of those individuals had been ordered and directed by Russia or that they were members of its armed forces or intelligence services, these facts almost impossible to prove beyond any reasonable doubt without the collaboration -logically non-existent- of Russia itself. Thus, despite the

[86] This, in no case, could be the case of the "little green men", since, although they could with their actions aspire to constitute a new State in the Donbas, they did not aspire to be citizens of it.
[87] BRUNER y FAIX, "The attribution problem as a tool of lawfare", p. 85.

de facto certainty about the Russian action in Crimea and the Donbas in 2014-15, the use of the attribution problem prevented Moscow from submitting to any kind of legal response for it.

As a summary, Mark Voyger has analyzed how Russia has used lawfare to try to make it an efficient tool for achieving its strategic objectives, through actions such as:

- The amendment of Russian law itself to legitimize and legalize the annexation of foreign territories under referendums carried out by the local population, a rule approved in March 2014.

- Amending in April 2014 the citizenship laws to grant Russian citizenship on the basis of being a native of former Soviet republics or even territories that were once part of the tsarist empire[88].

- Granting Russian passports to nationals of secessionist regions of neighbouring States, such as Abakhas and South Ossetians, in the case of Georgia, and Crimeans in the case of Ukraine, then claiming the presence of Russian citizens as justification for interventions in those territories, a phenomenon that has been called "passportization"[89].

[88] On the legal origins of the idea of citizenship see PRADO RUBIO, E., Hijos de la patria: *la construcción de las nociones jurídicas de ciudadanía y nacionalidad*, Madrid, 2022.

[89] VOYGER, M., "Russian Lawfare-Russia's Weaponisation of International and Domestic Law: Implications For The Region And Policy Recommendations", p. 39. Passport policy has not always served the interests of the powers, but has sometimes been used for humanitarian purposes, as PRADO RUBIO shows. E., "La regulación del estatuto jurídico de los expatriados receptores de un pasaporte Nansen (1922-1928)", in SAN MIGUEL, E., *Integración, Derechos Humanos y ciudadanía global*, published by Aranzadi en 2021. On related topics, the same author has two works in

- Use of the UN Security Council to legitimise the deployment of Russian forces on the ground in regions of conflict, with the justification of opening humanitarian corridors.

- Use of Russian courts to carry out legal farces, such as those in which Russian officers have been sentenced in absentia for alleged crimes against Russian citizens in the secessionist regions.

- Malicious use of the term "peacekeeping" to justify, under international humanitarian law, the dispatch of Russian forces to prevent alleged catastrophes and crimes against humanity[90].

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[90] VOYGER, M., "Russia's Use of 'Legal' as an Element of its Comprehensive Warfare Strategy", in *Land Power Magazine,* nº 1, 2015, p. 20.

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