Counter-Lawfare: Effective INDOPACOM Strategy to Counter Chinese Maritime Expansionism in the South China Sea

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14. ABSTRACT

The current U.S. strategy in the South China Sea is not effectively countering China's gray space operations and will continue to have decreasing efficiency as China expands its maritime domain through gradual, below the use of force tactics. So why is China so successful in its subtle yet aggressive accumulation of territory in the South China Sea (SCS) and what can U.S. Indo-Pacific Command (INDOPACOM) do to address this threat in the future? China's successful maritime expansion in the South China Sea can be partly attributed to its use of lawfare and INDOPACOM should implement a counter-lawfare strategy that: reinforces the State Department's efforts to resolve territorial jurisdiction in the SCS, stand up a combined joint task force in the SCS to preserve operability, and broaden the current Freedom of Navigation Operations (FONOPs) program to include a more holistic approach.

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The current U.S. strategy in the South China Sea is not effectively countering China's gray space operations and will continue to have decreasing efficiency as China expands its maritime domain through gradual, below the use of force tactics. So why is China so successful in its subtle yet aggressive accumulation of territory in the South China Sea (SCS) and what can U.S. Indo-Pacific Command (INDOPACOM) do to address this threat in the future? China's successful maritime expansion in the South China Sea can be partly attributed to its use of lawfare and INDOPACOM should implement a counter-lawfare strategy that: reinforces the State Department's efforts to resolve territorial jurisdiction in the SCS, stand up a combined joint task force in the SCS to preserve operability, and broaden the current Freedom of Navigation Operations (FONOPs) program to include a more holistic approach.

I. Introduction

What is Lawfare?

Lawfare is the misuse or abuse of law in order to realize a military objective.[1] Examples of lawfare can be attributed back to the 1600s, but it is Major General Charles Dunlap who is credited with coining the term "lawfare" in 2001.[2] General Dunlap defined lawfare as the use of law to achieve a military objective.[3] When General Dunlap used the new term lawfare, he explained that it was meant to be ideologically neutral, meaning lawfare could be used for legitimate and illegitimate purposes.[4] The exact definition and scope of lawfare remains debated with some scholars attributing a broad range of activities to lawfare.[5] Lawfare has been applied

[1] Colonel Charles Dunlap, Jr., USAF, "Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts" *Kennedy School of Government*, Humanitarian Challenges in Military Intervention Conference (November 29, 2001), p. 4.
[2] Scott Ingram, *Replacing the "Sword of War" with the "Scales of Justice": Henfield's Case and the Origins of Lawfare in the United States*, Nat'l Security L. & Pol'y 483, 488 (2018).
[3] *Id.* at 486.
[4] David Hughes, *What Does Lawfare Mean?*, 40 Fordham Int'l L.J. 1, 3 (2016).
[5] Ingram, *supra* note 2, at 486.

to domestic US legal practices, transnational legal incidents, and public international law, specifically in both international and non-international armed conflicts.[6]

Lawfare has been attributed to as far back as the 1600s when the Dutch created laws to excuse the seizure of Portuguese ships preventing Dutch utilization of Atlantic Ocean trade routes.[7] In the US, one of the first examples of lawfare in the new constitution-system of government was the case of *United States v. Gideon Henfield* in 1793.[8]

In *US v. Henfield*, Gideon Henfield was accused of violating the Neutrality Proclamation of 1793 where the President instructed to "cause prosecutions to be instituted against all persons, who shall, within the cognizance of the courts of the United States, violate the Law of Nations…."[9] Following the proclamation, Henfield was arrested for serving as a prize captain on a French privateering ship used for capturing British vessels. This put the United States in a precarious situation because Henfield's actions could be understood under international law at the time as an act of war by the United States against Great Britain.[10]

The young Washington administration used the law to confront this situation. The United States District Attorney prosecuted Henfield for violation of the neutrality act and the administration referred Great Britain to Henfield's action as a legal matter not a declaration of war.[11] Washington therefore used the law to satisfy its primary foreign policy and military objective of the time: avoid war with Great Britain and/or France and preserve its neutrality.[12]

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[6] Raul Pedrozo and Daria Wollschlaeger, *Part VII: The Changing Character of Tactics: Lawfare in Asymmetrical Conflicts*, Naval War College International Law Studies, The Age of Lawfare (2014).
[7] Ingram, *supra* note 1, at 488.
[8] *Id.* at 483.
[9] *Id*. at 491-92.
[10] *Id*. at 494.
[11] *Id*. at 493.
[12] *Id*. at 503.

In 2010 a symposium by Case Western Reserve's School of Law attempted to examine the different modern understandings of Lawfare. Scholars' definition of lawfare fell into three main categories: "the use and abuse of international law to threaten state interests"; "rhetorical device intended to discredit parties who attempt to engage with international law as a means to ensure accountability and compliance"; and "lawfare as a weapon, the legitimacy of which is defined by its user's intentions".[13] At least two of these categories have departed from General Dunlap's ideologically neutral approach to lawfare.

To understand why the concept of lawfare has drifted, it is important to look at the context of the 2000s, especially the Bush Administration and the wars in Iraq and Afghanistan. The two main drivers of the change in perception of lawfare in the Bush Administration was the perception that actors (NGOs, domestic political groups, and the international community) were using the international legal system to expose US action that violated principles of international law and the use of asymmetrical tactics, "to disrupt the operational capabilities of, and gain a tactical advantage against, a State committed to upholding the precepts of international law."[14] Understanding how these two factors have affected the perception of lawfare in the US is critical to reexamining the US position on lawfare and ensuring all relevant national security tools are available for the rest of the 21st century.

In 2003, the Council on Foreign Relations reported that "during the recent conflict with Iraq, allied forces were the target of a persistent lawfare campaign. Even before the conflict began, international activists used legal means to try to declare military action illegitimate."[15] This idea gain popularity in the Bush administration and even in 2005 made it into the National

[13] Hughes, *supra* note 4, at 4-5.
[14] *Id*. at 11.
[15] *Id.* at 7 (quoting *Lawfare, the Latest in Asymmetries—Part Two,* Council on Foreign Rel. *(May 22, 2003)).*

Defense Strategy, stating "our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international for a, judicial processes, and terrorism."[16]

The Bush administration also felt the threat of lawfare personally. Secretary of Defense Donald Rumsfeld said he expected to be "at the top of the target list" according to Jack Goldsmith.[17] Secretary Rumsfeld worry materialized in the spring of 2003 when a group of Iraqis brought universal jurisdiction criminal complaints against him and General Franks in a Belgian court.[18]

Domestic actors were also the targets of the Bush administration's label of "lawfare." The administration also targeted lawyers representing detainees in Guantanamo Bay.[19] In January 2007, the Deputy Assistant Secretary of Defense for Detainee Affairs told Federal News Radio in Washington, D.C. that a FOIA request was being processed to disclose the names of the lawyers representing GITMO detainees. Simpson added, "I think, quite honestly, when corporate CEOs see that those firms are representing the very terrorists who hit their bottom line back in 2001, those CEOs are going to make those law firms choose between representing terrorists or representing reputable firms…."[20] The administration also attempted to interfere with attorney-client representations at GITMO by seizing notes and telling detainees that their attorneys were "Jews" or "homosexual".[21]

The Bush administration used lawfare as a term to attack the very idea of international law. The term lawfare, "served as a descriptive denunciation of the perceived rise and prohibitive

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[16] David Frakt, *Lawfare and Counterlawfare: The Demoralization of the Gitmo Bar and Other Legal Strategies in the War on Terror*, 43 Case W. Res. J. Int'l L. 335, 345 (2010) (quoting U.S. Dep't of Def., National Defense Strategy of the United States of America 5 (2005)).
[17] *Id*. at 398.
[18] *Id*.
[19] Scott Horton, *Is "Lawfare" a Useful Term?: The Dangers of Lawfare*, 43 Case W. Res. J. Int'l L. 163, 171 (2010).
[20] *Id*. at 171-72.
[21] *Id*. at 172.

influence of international law within conflict situations…. the term would retain a pejorative association."[22] This negative perception of lawfare is dangerous and could limit national security capabilities necessary for prevailing in the rest of the 21st century.

Lawfare in the Era of Great Power Competition

The 2018 National Defense Strategy highlights that, "inter-state strategic competition, not terrorism, is now the primary concern in U.S. national security."[23] The strategy also highlights that this competition is not reserved for the battlefield but exists across a spectrum of conflicts: peacetime, wartime, economic, diplomatic, social, and technological.[24] Contending in a full spectrum competition falls the understanding of lawfare the US has experienced in the early 2000s. While Russia and China might not respect international law as much as the US, they are still state-actors and attempt to operate within the international order as opposed to the non-international armed conflict we have been fighting against al-Qaeda and ISIS.

In 2003, the Chinese Communist Party Central Committee (CCP) and the Central Military Committee (CMC) endorse the "three warfares" concept.[25] These three warfares are: psychological warfare, media warfare, and legal warfare. China recognizes lawfare as a capability of its national security and employs it to use "international and domestic law…to hamstring an adversary's operational freedom…build international support and manage possible political repercussions of China's military actions."[26]

China is using lawfare in the South China Sea to prosecute its "simultaneously audacious and subtle" effort to erode the international legal norms that the U.S. has worked to establishing

[22] Hughes, *supra* note 4, at 10.
[23] U.S. Dep't of Def., *Summary of the 2018 National Defense Strategy of the United States of America*, 1 (2018).
[24] *Id*. at 2-3.
[25] Robert Kline, *The Pen and the Sword: The People's Republic of China's Effort to Redefine the Exclusive Economic Zone through Maritime Lawfare and Military Enforcement*, 216 Mil. L. Rev. 122, 134 (2013).
[26] *Id*. (quoting U.S. Dep't of Def., *Annual Report to Congress: Military and Security Developments involving the People's Republic of China* 26 (2011)).

in the modern era.[27] Broadly, China's "salami-slicing" or grey zone operations represent lawfare because China is using individual actions, which in themselves do not rise to the level of an act of war or armed attack, to avoid direct action or confrontation with nations who are abiding by U.N. obligations to refrain from using force without an armed attack.[28] This lawfare strategy of gradually changing the status quo, erodes international norms and law without triggering an event that the U.S. could use to rally public or international support for an increase of pressure or the use of direct military force.[29]

Specifically, China is using lawfare to erode international norms and decrease U.S. ability to achieve its national objectives by keeping SCS nations divided over their competing territorial sovereignty claims, increasing the dangerousness of operating in the SCS to prevent countries from effectively using freedoms of navigation, and refusing to make maritime claims which obstruct the current U.S. excessive maritime claims strategy (i.e. Freedom of Navigation Program).[30] INDOPACOM should develop a counter-lawfare strategy to counter each of these lawfare tactics.

INDOPACOM should counter Chinese use of competing territorial sovereignty claims, and therefore dividing ASEAN partners, by working with the Department of State to broker an ASEAN agreement to determine territorial sovereignty in the SCS. INDOPACOM can counter Chinese strategy to increase the danger of operating in the SCS, and therefore limiting nation

[27] Hal Brands and Zack Cooper, "Getting Serious About Strategy in the South China Sea" *Naval War College Review,* Vol. 71, No. 1 (Winter, 2018), pp. 1-2.
[28] Congressional Research Service, "U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress" October 13, 2020, pp. 9-10
[29] Brands and Cooper, pp. 1-2.
[30] Congressional Research Service, pp. 8-9. Furthermore, freedom of navigation (in all lower cases) will refer to the customary international law or body of law found in the U.N. Convention on the Law of the Sea for the prescribed rights of states to travel in certain classifications of water, while Freedom of Navigation (with capital letters) refers to the U.S. joint DoD/State Department Freedom of Navigation Program and Freedom of Navigation Operations (FONOPs).

states' ability to exercise freedom of navigation, by standing up a combined joint task force so nations can operate in the SCS with a multinational support structure. Finally, INDOPACOM can counter China's lawfare strategy to not declare certain maritime claims and creating counter-narratives following FONOPs, and therefore limiting the effectiveness of the Freedom of Navigation Program, by broadening the current focus on executing episodic FONOPs into a holistic strategy to instead consistently operate under international law.

II. Competing Territorial Sovereignty Claims in the SCS

China is not the only State to issue territorial sovereignty claims in the SCS. Territorial disputes exist between China, Vietnam, the Philippines, Malaysia, Taiwan, Japan, and Brunei.[31] These territorial sovereignty claims have a direct relationship to claimed maritime boundaries in the SCS which then impact where countries can operate high seas freedoms. The U.S. has refused to take a position on competing claims to sovereignty but continue to reinforce that these disputes should be resolved peacefully and in a manner consistent with international law.

The U.S. inability to settle disputed territorial claims benefits China. China continues to lay claim to disputed land features in the South China Sea. Without a clear international legal resolution to contested territorial claims, the U.S. cannot utilize instruments of national power to enforce high seas freedoms and international norms. The U.S. should pursue a whole-of-government effort to reach an agreement with SCS nations on contested territorial sovereignty claims.

INDOPACOM can ensure a successful whole of government effort to pursue a diplomatic agreement among ASEAN nations in the SCS. After coordinating with the U.S. Department of State, INDOPACOM should work with partner nations and provide technical

[31] Congressional Research Service, p. 40.

assistance, theater security cooperation, and logistical support. Providing this support will help the U.S. broker an agreement among ASEAN nations to settle disputed territorial claims. Once the territorial claims are settled, then the U.S. can use national instruments of power to enforce the agreement as settled international law. Particularly, INDOPACOM would support the agreement by operating in accordance with settled territorial claims instead of avoiding these disputed claims. Chinese expansionism would then be violating international law and the U.S. or U.N. could utilize INDOPACOM assets to enforce or uphold the agreement.

The U.S. current position is for all countries to diplomatically settle territorial disputes, however the U.S. needs to be more assertive and proactive in assisting ASEAN nations create a treaty to settle contested claims. Also, it is unclear even if ASEAN nations agree to settle contested claims among themselves, how China will react. China might continue to refuse any international tribunal from hearing the case and therefore limiting the effectiveness of the ASEAN agreement. While this ASEAN agreement would not be as effective without settling Chinese claims, it would give the U.S. a foot hole of international law to start pressuring Chinese expansionism.

III. Increase Danger of Exercising High Seas Freedoms in the SCS

China is currently pursuing a strategy that aims to intimidate neighbors and other maritime nations from safely operating in the SCS.[32] These operations include use of the PLA and Chinese Coast Guard along with its maritime militia. These forces are known to swarm around other ships and effectively blockading disputed areas. These actions typically do not rise to the level of an armed attack but it increases the dangerousness of operating in the SCS.

[32] Congressional Research Service, pp. 8-9.

If neighbor and U.S. maritime allies are deterred from operating in the SCS then it leaves the area open for Chinese expansionism and limits U.S. allied forces. Furthermore, China can use the lack of neighbor or maritime power activity in the SCS to support its legal claim to historic or exclusive possession of the SCS defined by the nine-dash line. If China pressures other countries from staying away from disputed areas in the SCS, then that could be viewed as state action which could lead to the formulation of customary international law. This would give China a legal argument to jurisdictional claims of those disputed areas.

While the U.S. continues to conduct Freedom of Navigation Operations, along with some allied forces, these FONOPs have significant limitations (explained further in the next section). Also, without broad international action to counter Chinese claims in the SCS, then China could still use its legal argument that it has the historic and exclusive right to these areas. The U.S. and INDOPACOM cannot be the only forces in the area countering Chinese jurisdictional and excessive maritime claims.

To counter this Chinese strategy to deter neighbors and international maritime powers from operating in the SCS, INDOPACOM should stand up a combined joint maritime task force.[33] This combined joint maritime task force would focus on operating in the SCS. The CJMTF-SCS would then allow SCS nations and partner nations to operate in the SCS with the knowledge that they are supported by a multinational force. The CJMTF-SCS could also ensure consistent policy of maritime claims which would ensure other nations are not inadvertently acquiescing to unfounded Chinese claims which if acquiesced could lead to the development of pro-Chinese customary international law.

[33] Matthew Dalton, "Confronting China: Why America Needs a Maritime Strategy for Disputed Waters" *The National Interest.* January 7, 2020. https://nationalinterest.org/feature/confronting-china-why-america-needs-maritime-strategy-disputed-waters-111726.

The risk to this strategy would be that it might force China to meet this new CJMTF-SCS with a build up of its own. However, it looks like China is building up naval forces in the SCS already and the benefit would therefore outweigh the risk.

IV. Rethinking FONOPs in the SCS

Freedom of Navigation Operations (FONOPs) are the U.S. Navy's response to a costal state's excessive maritime claim.[34] Importantly, FONOPs are reactive operations that rise to counter a specific maritime claim made by a coastal state that the U.S. determines to be outside the law of the sea. Typically, FONOPs are coordinated at the strategic or operational level of war and typically are products of intense interagency collaboration and high level diplomatic and political consideration.[35] The purpose of FONOPs are to challenge a nation's excessive maritime claim to ensure that those excessive claims are not accepted, therefore preventing those claims from being subsumed into customary international law.[36]

FONOPs have inherent limitations: they are reactive, they can only challenge expressly stated maritime claims, the program limits the chances for ships to counter excessive claims by requiring all challenges to be conducted through the FON Program, and their narrow, episodic manner can lead to a counter-narrative by the challenged nation.[37] China has exploited these

[34] Peter A. Dutton, "Forget the FONOPs- Just Fly, Sail, and Operate Wherever International Law Allows" *Lawfare*. June 10, 2017. https://www.lawfareblog.com/forget-fonops-%E2%80%94-just-fly-sail-and-operate-wherever-international-law-allows.

[35] It is not uncommon for ships to be ordered to steer clear of any excessive maritime claim to not inadvertently challenge that claim and therefore conduct an unauthorized FONOP.

[36] Matthew Dalton, "Confronting China: Why America Needs a Maritime Strategy for Disputed Waters" *The National Interest.* January 7, 2020. https://nationalinterest.org/feature/confronting-china-why-america-needs-maritime-strategy-disputed-waters-111726.

[37] Furthermore, conducting a FONOP might support a challenged nation's contested sovereignty dispute. Suppose China has an excessive maritime claim (requiring notification prior to conducting innocent passage) flowing from a SCS feature that has contested sovereignty (China and Vietnam both claim jurisdiction). It is difficult to conduct a FONOP against the excessive maritime claim without recognizing sovereignty. If a U.S warship conduct innocent passage through the claimed territorial sea of the feature, then claims it was a FONOP to counter China's unlawful notice requirement, that FONOP could be used as evidence that the U.S. recognizes that China has authority over those territorial seas (even if it abused that authority by requiring an excessive requirement).

limitations by not declaring maritime claims and by developing counter-narratives to U.S. led FONOPs.[38] China has learned that by not declaring claimed baselines in certain SCS contested features, then the U.S. cannot effectively lead a FONOP because no claim exists to dispute. Chinese forces are then free to just occupy the area and effectively deny use of freedom of navigation. Secondly, China has developed a counter-narrative to diminish the effectiveness of U.S. FONOPs. Typical FONOPs counter specific excessive maritime claims for only as long necessary to get the challenge on record, and then the U.S. warship ceases the contested behavior or steers away from the contested area and continues to travel in accordance with a non-disputed travel mode or path. China has begun to follow U.S. ships during these FONOPs and then challenges the U.S. warship when they begin the contested behavior or enter the contested area. Following the challenge, and the inevitable U.S. warship's planned end of the FONOP, China tells the international community that the U.S. "fled" the area after being challenged. By using this counter narrative strategy, China is preserving the legal argument that the U.S. was acquiescing to Chinese control and therefore supporting the unlawful Chinese claim.

In order to counter these lawfare strategies, INDOPACOM should utilize the Combined Joint Maritime Task Force (proposed above), to build upon the FONOP program and consistently sail pursuant to freedoms of navigation.[39] This counter lawfare strategy would supplement reactive FONOPs with routine sailings in disputed areas that might not have per se excessive maritime claims, but display Chinese aggression and expansionism. This routine practice would make it clearer that the U.S. and its partners in the CJMTF-SCS can counter

[38] James Holmes, "Are Freedom of Navigation Operations in East Asia Enough?" *The National Interest*. February 23, 2019. https://nationalinterest.org/feature/are-freedom-navigation-operations-east-asia-enough-45257.
[39] Peter A. Dutton, "Forget the FONOPs- Just Fly, Sail, and Operate Wherever International Law Allows" *Lawfare*. June 10, 2017. https://www.lawfareblog.com/forget-fonops-%E2%80%94-just-fly-sail-and-operate-wherever-international-law-allows.

China's expansionism without waiting to narrowly, reactively, challenge an existing excessive maritime claim.

V. Conclusion

China is using lawfare in the South China Sea to undermine the rules based international order and jeopardize a Free and Open Indo-Pacific. China is using disputed territorial sovereignty claims by SCS nations to muddy the international legal landscape and deny the U.S. an international legal consensus to enforce. China is also increasing the danger of operating in the SCS to deter neighbors and other maritime powers from exercising freedom of navigation in the area to bolster China's claims to a historic exclusive right to the SCS. Finally, China is not declaring excessive maritime claims, contesting territorial sovereignty, and developing a counter-narrative to limit the effectiveness of FONOPs. To counter these uses of lawfare, INDOPACOM should provide support to the U.S. State Department to help ASEAN countries reach an agreement on competing territorial disputes, stand up a combined joint maritime task force to mitigate increasing danger of operating in the SCS, and supplement the existing FONOP program by routinely sailing in contested waters pursuant to freedom of navigation. These counter-lawfare strategies will help INDOPACOM fight Chinese maritime expansionism and gray-space operations and meet future U.S. national interests in the SCS.